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READINGS IN POLITICAL SCIENCE

SELECTED AND EDITED

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PREFACE

This collection of " Readings in Political Science " is designed to accompany the editor's " Introduction to Political Science," and the choice and arrangement of material have been influenced by the plan of that volume. At the same time it may be used to accompany other manuals that cover the general field of political science, or it may be read with profit by all who desire an introduction to the body of literature that deals with the origin, development, organization, and activities of the state.

All teachers realize the necessity of having their students read more than is contained in the textbook, and valuable selections of material to direct such reading have recently appeared for the students of history, economics, sociology, and American government. As yet, however, no book of readings for the general subject of political science has been attempted, and the editor claims the indulgence due to one who ventures into an untried field.

In a number of cases contemporary accounts or official documents have been quoted, but no effort has been made to secure material from obscure or out-of-the-way sources. On the contrary, extracts have been taken, whenever possible, from recognized modern authorities — from books the majority of which will be found in every well-appointed college library. In this way it is hoped that students will be led to read further, using this volume as a framework around which their reading may be organized. Besides, the selections in this book may serve as a basis for classroom discussion, the case system of instruction being particularly applicable to political science.

The editor wishes to acknowledge his indebtedness to the authors whose works have been drawn upon for material in this volume, and to extend his thanks to the various publishers for their gracious permission to reprint this material. Invaluable assistance in the preparation of the manuscript has been given by the editor's wife.

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READINGS IN POLITICAL SCIENCE

INTRODUCTION

CHAPTER I

NATURE AND SCOPE OF POLITICAL SCIENCE

I. Scope of Political Science

1. The work of the American Political Science Association. Since the systematic study of political science is comparatively recent, it is necessary to indicate clearly the general nature of its field. At the first public meeting of the American Political Science Association, held at Chicago, Illinois, December 28–30, 1904, the presidential address, delivered by Professor Frank J. Goodnow, outlined the objects and purposes of the association and indicated the scope of Political Science.

Political Science is that science which treats of the organization known as the State. It is at the same time, so to speak, a science of statics and a science of dynamics. It has to do with the State at rest and with the State in action. Inasmuch, however, as it is the State in action which causes the phenomena of the greatest practical concern to the individual, what will hereafter be said will be said from the point of view of the dynamics of Political Science. The State, as an object of scientific study, will be considered from the point of view of the various operations necessary to the realization of the State will.

In order that the State will may be realized in any concrete instance, it is necessary, first, that there be organs for the formulation of the State

will; second, that that will be expressed; and, third, that the will, once expressed, shall be executed. Our subject naturally divides itself, therefore, into three pretty distinct parts, viz.:

1st, The expression of the State will;

2d, The content of the State will as expressed, and

3d, The execution of the State will.

In the first place, the State will must be expressed. In order that it shall be expressed, it is necessary that organs shall be established which are capable of action. The problems involved in determining what these organs shall be and how they shall act are of two kinds. They are, in the first place, theoretical or speculative in character, and they are, in the second place, legal or expressive of existing conditions. The theoretical problems have been mentioned first. For, however contemptuous may be one's belief in the practical value of the study of political theory, it is none the less true that every governmental system is based on some more or less well-defined political theory whose influence is often felt in minute details of governmental organization. The problems connected with the organization of the authorities which are to express the State will have to do naturally with the special disciplines to which the names of political theory and constitutional law have been attached. . . .

But the problems of political theory, so far as that confines itself to the organization of the State and constitutional law do not, by any means, embrace all the problems arising in connection with the first branch of our subject. For the expression of the will of the State is in some cases directly facilitated by methods of procedure and by organizations which are not commonly regarded as parts of the political system. There are in all governmental systems extralegal customs and extralegal organizations whose influence must be considered if we are to obtain an idea of the actual political system of a country. . . . Our political science has, therefore, to do, not only with the theoretical and legal problems of State organization, but also with the somewhat more practical and concrete problems of party organization, and nomination methods, whether these matters are regulated by law or not.

One of the peculiar developments of American political practice has been the attempt to separate both in organization and action the sovereign State from the government. The organization of the sovereign State we find provided for in constitutional conventions and plebiscites; its will is recorded in written constitutions and constitutional amendments. Important problems, both of a political and legal character, present themselves in connection with these subjects. . . .

I have said that constitutional conventions and written constitutions are peculiar to American development. While this is true, it is also

true that some European states have manifested a tendency somewhat akin to that to be noticed in the United States; while in America, not content with giving the sovereign people its opportunity to express its will on matters of fundamental importance, we have called upon it to act on many less important matters. We find here, as well as elsewhere, many instances of the referendum and initiative, both in state and local affairs. These are subjects which should receive attention at our hands. . . .

So far we have considered the questions of who shall express the State will and how shall that will be expressed. The second branch of the subject which demands attention is the content of the State will.

The content of the State will is usually regarded as the law. Unless we conceive of all law as a part of Political Science, it becomes necessary then to differentiate Political Science from legal science. Strictly speaking, of course all law which does not affect the relations of the State and its officers is to be assigned to legal rather than to Political Science. For the science of the private law, *i.e.* the law affecting the relations of private individuals one with another, is based upon social rather than political considerations. At the same time we must remember that the State, in either its central or local organization, is a subject of the private law, since it may enter into almost all the relations into which a private individual may enter. . . . For these reasons the American Political Science Association has included among the subjects which are not foreign to it comparative legislation and historical and comparative jurisprudence, whether that legislation or jurisprudence is private or public. . . . In laying this emphasis upon the necessity of the study of public law for the political scientist, I would not be regarded as depreciating the importance of the work of the theorist. Without him progress would be impossible; without him the public lawyer becomes a mere slave of precedent. Our study of the public law should therefore embrace a study of what it is, and what it should be.

It has been said that Political Science has to do with the execution of the State will, once it has been expressed. The subject of the execution of the State will, or the enforcement of law is one which, it seems to me, has never been accorded the importance which it deserves. . . . I cannot let this opportunity pass without attempting to emphasize the importance of the ascertainment and application of correct principles of administration. I cannot accept the truth of the saying,

> For forms of government let fools contest;
> That which is best administered is best,

for there is no one who has endeavored to secure some change in existing

governmental organization who has not had this couplet thrown in his face so often that he has come to regard its use as an evidence of an absolutely hopeless condition of mind in the one who uses it. A study of government which excludes the consideration of the administrative system and actual administrative methods is as liable to lead to error as the speculations of a political theorist which have no regard for the principles of public law.

2. Divisions of political science. In the introduction to his great work, " Lehre vom modernen Staat," Bluntschli gives the divisions of political science as follows:

The ancient Greeks applied the name πολιτική to all political science. We (Germans) distinguish Public Law and Politics as two special sciences. Alongside of these we put many special branches with distinct names, e.g. Political Statistics, Administration, International Law, Police, etc.

Public Law and Politics both consider the State on the whole, but each from a different point of view and in a different direction. In order to understand the State more thoroughly, we distinguish its two main aspects — its existence and its life. We examine the parts in order more completely to comprehend the whole. In this procedure there are not only theoretic but practical advantages. Law has gained in clearness, moderation, and strength, since it has been more sharply distinguished from politics; and Politics has gained in fullness and in freedom by being considered separately.

Public Law *deals with the State as it is*, i.e. its normal arrangements, the permanent conditions of its existence.

Politics, on the other hand, has to do with *the life and conduct of the State*, pointing out the end toward which public efforts are directed and teaching the means which lead to these ends, observing the action of laws upon facts and considering how to avoid injurious consequences and how to remedy the defects of existing arrangements.

Public Law is thus related to Politics as order to freedom, as the tranquil fixedness of relations to their complex movement, as bodies are related to their actions and to the various mental movements. Public Law asks whether what is conforms to law: Politics whether the action conforms to the end in view. . . .

Public Law and Politics must not be absolutely separated from one another. The actual State lives, i.e. it is a combination of Law and Politics. Again, Law is not absolutely fixed or unalterable; and the movement of Politics has rest as its aim. Law is not merely a system, it has a history; on the other hand, politics has to do with legislation.

As with all organic beings, the influence is reciprocal. The difference we have recognized is not thereby set aside, but is better explained. The distinction between the history of Law and political history is just this: the former has only to point out the development of the normal and established existence of the State and to describe the rise and change of permanent institutions and laws: the latter lays stress chiefly on the changing fortunes and circumstances of the nation, the motives and conduct of its statesmen, and the actions and sufferings of both the nation and its statesmen. The highest and purest expression of Public Law is to be found in the Constitution or enacted positive laws: the clearest and most vivid manifestation of Politics is the practical conduct or guidance of the State itself, viz. Government. Politics is more of an art than a science. Law is a presupposition of Politics, a fundamental (though not of course the only) condition of its freedom. Politics in its course must have regard to legal limits, caring as it does for the varying needs of life. Law, on the other hand, requires the help of Politics in order to escape the numbness of death and to keep step with the development of life. Without the animating breath of politics the *corpus juris* would be a corpse; without the foundations and the limits of Law, Politics would perish in unbridled selfishness and in a fatal passion for destruction.

It is solely for the sake of clearness and simplicity that before these two branches of the Theory of the State — Public Law and Politics — we place a third, or rather a first, division of Political Science, viz. the Theory of the State *in general*. In this we consider the State *as a whole* without as yet distinguishing its two aspects (Law and Politics). The conception of the State, its basis, its principal elements (the people, the country), its rise, its end or aim, the chief forms of its constitution, the definition and the division of sovereignty form the subjects of the Theory of the State in general, and this in turn is at the base of the two special political sciences, Public Law and Politics.

3. Outline of political science. The content of political science has been analyzed and classified according to numerous points of view. A good working outline is found in the division into (1) historical political science, — the origin and development of the state; (2) descriptive political science, — the nature and organization of the state; and (3) applied political science, — the purpose and functions of the state.[1] The following table, based on a fundamental distinction between "the general theory of the state and

[1] R. G. Gettell, "Introduction to Political Science," p. 15.

its possible forms" and "the study of particular institutions and the action of the state for particular purposes," aims to "show the range and variety of modern political science."[1]

THEORETICAL POLITICS	APPLIED POLITICS
A. Theory of the state	*A.* The state
Origin of polity	Existing forms of government
1. Historical	Confederations and federal states
2. Rational	Independence
Constitution	Protectorates and extraterritorial jurisdiction
Classification of forms of government	
Political sovereignty	
B. Theory of government	*B.* Government
Forms of institutions	Constitutional law and usage
Representative and ministerial government	Parliamentary systems
Executive departments	Cabinet and ministerial responsibility
Defense and order	Administrative constitutions
Revenue and taxation	Army, navy, police
Wealth of nations	Currency, budget, trade
Province and limits of positive law	State regulation or noninterference
C. Theory of legislation	*C.* Laws and legislation
Objects of legislation	Legislative procedure (embodiment of theory in legislative forms)
General character and divisions of positive law (philosophy of law or general jurisprudence)	Jurisprudence of particular states
Method and sanction of laws	Courts of justice and their machinery
Interpretation and administration	Judicial precedence and authority
Language and style	
D. Theory of the state as artificial Person	*D.* The state personified
Relations to other states and bodies of men	Diplomacy, peace, and war
International law	Treaties and conventions
	International agreements for furtherance of justice, commerce, communications, etc.

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II. Relation to Allied Sciences

4. Political science and sociology. Stuckenberg, who considers sociology "the general social science of which the special social sciences are differentiations," thus states its relation to political science:

The science of politics needs differentiation from Sociology and the other social sciences, in order that its own peculiar sphere may be made more distinct. The function of the state is among the most momentous problems of the times; but this function can be distinctly brought out only when contrasted with the other social forces. In Russia the government aims to make society; in the United States society makes the government; in Russia the progress of voluntary association is a menace to the government; in the United States independent organizations may ignore the very existence of the government. Neither theoretically nor practically is there agreement respecting the limits of the state and its relation to voluntary associations.

The science of politics confines itself to the state, explaining its structure and functions, marking the peculiarity of its organization as distinguished from other societies, treating of the relations of the citizens to one another and to the state, and of the government to the governed, the constitution and laws, and all that belongs to the domain of national life. Some have questioned, as intimated above, whether the state ought to be included in Sociology or treated separately as outside of society. It is unquestionably a form of association, and therefore within the scope of Sociology; but it is only one of many social forms, and therefore political science cannot take the place of the science of society. The distinctive elements in the state, the peculiar authority it exercises, and the vast importance of the subject must receive full recognition. Its sphere is that of collective authority and coercion; the sphere of other societies is that of coöperation. Owing to the importance and extent of politics, it has become a special science. It is, however, a social science, which indicates its intimate relation to Sociology. The state of the people is society in a truer sense than when the state is treated as an abstraction, or as a power hovering over the people, to which unconditional submission is required. We can indeed distinguish between social and political, referring the latter to all that pertains to the state, and the former to society as distinct from the state; but reflection shows that political action is social action as organized in the form of collective authority. The state, whatever its particular form and whoever exercises the authority, is sovereignty. The functions and limits of the sovereignty are among the most important questions of the day. . . .

The essence of the matter consists in the fact that in the individuals of a nation we abstract the political social factor from all other social factors. It thus becomes evident what the relation of Sociology to political science must be. It regards the state as social, and as therefore a part of the general social organism, determines its place and functions in that organism (correlates the state to the other social factors), but does not take the state by itself and develop the science of politics. This work, and all particulars about the state, it leaves to political science.

5. Political science and sociology. Giddings differentiates the fields of sociology and political science as follows:[1]

In like manner, in political science as it has been written, there have been, since Aristotle's day, long prefatory accounts of the origins of human communities, usually mere elaborations of the patriarchal theory. But the greatest step forward that political science has made in recent years, has been its discovery that its province is not coextensive with the investigation of society, and that the lines of demarcation can be definitely drawn. In his important work on "Political Science and Comparative Constitutional Law," Professor Burgess has not only sharply distinguished the government from the state, but for the first time in political philosophy he has clearly distinguished the state as it is organized in the constitution from the state behind the constitution. "A population speaking a common language and having ideas as to the fundamental principles of rights and wrongs, and resident upon a territory separated by high mountain ranges or broad bodies of water, or by climatic differences, from other territory," such is the state behind the constitution. It "presents us with the natural basis of a true and permanent political establishment." It is "the womb of constitutions and of revolutions." Political science studies the state within the constitution and shows how it expresses its will in acts of government. It inquires how this state within the constitution is created and molded by the state behind the constitution, but beyond this political science proper does not go. The state behind the constitution, or natural society as we should otherwise call it, is for politics, as for political economy, a datum. The detailed study of its origins and evolution falls within the province of sociology. . . .

How is it with the theory of the state? Political science, too, finds its premises in facts of human nature. The motive forces of political life, as of economic life, are the desires of men, but they are no longer merely individual desires, and they are no longer desires for satisfactions that must come for the most part in material forms. They are desires

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massed and generalized; desires felt simultaneously and continuously by thousands, or even by millions of men, who are by them simultaneously moved to concerted action. They are desires of what we may call the social mind in distinction from the individual mind, and they are chiefly for such ideal things as national power and renown, or conditions of liberty and peace. Transmuted into will, they become the phenomenon of sovereignty — the obedience-compelling power of the state. Political science describes these gigantic forces of the social mind and studies their action; but it concerns itself with their genesis no more than political economy concerns itself with the genesis of individual desires. It simply assumes for every nation a national character, and is content that the political constitution of the state can be scientifically deduced from the character assumed. It takes the fact of sovereignty and builds upon it, and does not speculate how sovereignty came to be, as did Hobbes and Locke and Rousseau. It starts exactly where Aristotle started, with the dictum that man is a political animal.

6. Political science and history. In the presidential address delivered by the Right Honorable James Bryce before a joint meeting of the American Political Science Association and the American Historical Association, held at Washington, D.C., January 28, 1908, the relation of political science to history was discussed as follows:

Now let us see what the materials of Political Science are. They are the acts of men as recorded in history. In other words they are such parts of history as relate to the structure and government of communities. Political Science takes all the facts that history gives us on this subject and rearranges them under proper heads, describing institutions and setting forth those habits of men and tendencies of human nature which correspond to what in the sphere of inanimate nature we call natural laws. Thus Political Science may be defined as the data of political history reclassified and explained as the result of certain general principles. It is not any more a science than history is, because its certainty is no greater than the certainty of history. But whereas history takes the form of a record of facts and tendencies as they have occurred or shown themselves in past times, Political Science assumes the form of a systematic statement of the most important facts belonging to the political department of history, stringing these facts (so to speak) upon the thread of the principles which run through them. They are so disposed and arranged as to enable us more easily to comprehend what we call the laws that govern human nature in political

communities, so that we can see these laws as a whole in their permanent action and can apply what we have learned from history to the phenomena of to-day and to-morrow.

Thus Political Science stands midway between history and politics, between the past and the present. It has drawn its materials from the one, it has to apply them to the other. . . .

From among the maxims which might be laid down for the student who wishes to turn political history into political science, I select three:

He must be critical: must test his sources of information: never get his data at second-hand if he can (without too much expenditure of time) get them at first-hand.

He must beware of superficial resemblances. So-called historical parallels are usually interesting, often illuminative. But they are often misleading. History never repeats itself.

He must endeavor to disengage the personal or accidental from the general causes at work. By the personal cause I mean the presence of some wholly exceptional man who so much affects the situation as to disturb all calculations. People are wont to say that the time or the need produces the man. That is not true. The man often appears quite outside what people call the natural course of things: and often does not appear when the natural course of things seems to require him. He is, not indeed in reality, for there is no chance in Nature, but so far as our knowledge goes, an accident, i.e. the product of antecedents altogether unknown and unknowable. Only in a broad and rough sort of way can we say how much is due to the presence of such a person (or group of persons) and how much to the general causes at work.

7. Political science and history. The late Sir J. R. Seeley, in his lectures on political science before his students at Cambridge, was accustomed to introduce his subject by showing that history, since various of its phases were being shared by other sciences, tended to be limited specifically to a study of states.[1]

It is the first aphorism in the system of political science which I am about to expound to you, that this science is not a thing distinct from history but inseparable from it. To call it a part of history might do some violence to the usage of language, but I may venture to say that history without political science is a study incomplete, truncated, as on the other hand political science without history is hollow and baseless — or in one word:

History without political science has no fruit;
Political science without history has no root. . . .

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In my view a science has for a very long time past been insensibly growing up by the side of history, and every one has perceived that it has some connection with history, and must draw a great part of materials from history; this is political science. On the other side, within the department of history itself, it has been more and more felt that the accumulation of facts suggested the possibility of a science; what was to be done with them if no generalizations were possible which might reduce them to order? But all this time it has been overlooked that the science which lay so near to history was itself the very science which historians were calling out for. . . .

When, twenty years ago, Mr. Buckle succeeded in flashing upon the English mind the notion of a science of history, he threatened us with a revolution in historical writing. We were to read henceforth comparatively little about governments and parliaments and wars; history was to resolve itself into a discussion of the physical environment of a people, the climate, the geography, the food. The view I present, you see, is different, and it is not at all revolutionary. I do not dispute the importance of those physical inquiries, and the results of them must be used by the historian; but his own province, according to me, is distinct. He is not an anthropologist or an ethnologist, but if I may coin a word, he is a politicist. The political group or organism — the state — is his study. On this principle it will appear that historians hitherto, instead of being wrong in the main, have been right in the main. Their researches into legislation and the growth of institutions have laid a firm basis for the first part of political science, which is concerned with the classification and analysis of states. Their investigation of wars, conquests, alliances, federations, have laid a basis for the second part, that which is concerned with the action of states upon each other.

8. Political science and economics. Seligman gives the following strong statement of the close relation existing between political science and economics:

The study of politics or the science of the state has gone through several stages. For a long time history was dominated by the "great man" theory of politics; attention was centered chiefly in the kings and the battles, the court intrigues and military problems. At a later period more emphasis was put on the development of institutions compared with which any individual, however eminent, was insignificant. Finally, it was recognized that political life itself is closely intertwined with the economic life, and that the forms as well as the practices of government are profoundly influenced by the conditions of production as well as by

those of distribution. Economic facts would then be the cause; political

On the other hand, since all modern economic action is carried on within the framework of the state, when we deal with any practical economic institution no final solution of the problem can be reached until the effect of the political condition be weighed. In discussing the economic consequences of government ownership, for instance, the status of the governmental civil service is a potent consideration. Political facts may profoundly modify the economic conditions, instead of being modified by them. While, therefore, politics deals with the relation of the individual to the government, and economics with one aspect of the relations of individuals to each other, there is almost always a distinct interaction between the two. It is a necessity for the publicist to comprehend the economic basis of political evolution; it is the business of the economist to remember the political conditions which affect economic phenomena.

What has been said of politics applies with still greater force to jurisprudence. All systems of law are in the main the crystallization of long-continued social usage. Social customs are coeval with the origin and growth of society itself; the mandatory force of the positive law comes at a later stage in the evolution. The unwritten gradually turns into the written law, until the positive enactment is invested with the sanction of a sovereign command. As society develops, the law is in a perpetual process of change. No code is final; it always represents a given stage of social life. The law is the outward manifestation; the social, and especially the economic, fact is the living force. The formal juristic conception may remain the same; its content must be modified by every change of economic life. Legal history is really a handmaid to economic history; legal development is inexplicable apart from economic forces. The economic fact in this sense is the cause; the legal situation is the result.

At any given moment, however, economic phenomena take place within a legal framework. The elemental forces of economic life cannot indeed in the long run be conditioned by legal forms; but the law may for a time hold in check, or give a new direction to, economic forces. Take as an example the English law of primogeniture and of entailed estates as compared with the French laws which have led to the system of small farms. History is full of instances where the law has for good or for evil affected the economic environment. Just because the economic life, however, is prior to the legal system, there is always, at any given moment, the danger of a lack of harmony between the two. It is in the interval between the economic changes and the readjustment of the

legal facts that the influence of law upon economics is keenly felt. Life indeed consists of a perpetual adaptation of outward forms to inner forces, and thus the economic basis of a legal system is really the important fact to the social philosopher. In practical life, however, we deal with outward forms, and thus the legal shape of the economic relations must never be lost from sight. In economics and jurisprudence there is continual action and reaction.

9. Political science and ethics. The following paragraph, entitled The Moral Value of the State, suggests the important relation of political science to ethics.

If then we take modern social life in its broadest extent, as including not only what has become institutionalized and more or less fossilized, but also what is still growing (forming and re-forming), we may justly say that it is as true of progressive as of stationary society, that the moral and the social are one. The virtues of the individual in a progressive society are more reflective, more critical, involve more exercise of comparison and selection, than in customary society. But they are just as socially conditioned in their origin and as socially directed in their manifestation.

In rudimentary societies, customs furnish the highest ends of achievement; they supply the principles of social organization and combination; and they form binding laws whose breach is punished. The moral, political, and legal are not differentiated. But village communities and city states, to say nothing of kingdoms and empires and modern national States, have developed special organs and special regulations for maintaining social unity and public order. Small groups are usually firmly welded together and are exclusive. They have a narrow but intense social code: — like a patriarchal family, a gang, a social set, they are clannish. But when a large number of such groups come together within a more inclusive social unity, some institution grows up to represent the interests and activities of the whole as against the narrow and centrifugal tendencies of the constituent factors. A society is then *politically* organized; and a true public order with its comprehensive laws is brought into existence. The moral importance of the development of this public point of view, with its extensive common purposes and with a general will for maintaining them, can hardly be overestimated. Without such organization society and hence morality would remain sectional, jealous, suspicious, unfraternal. Sentiments of intense cohesion within would have been conjoined with equally strong sentiments of indifference, intolerance, and hostility to those without. In the wake of the formation

of States have followed more widely coöperative activities, more comprehensive and hence more reasonable principles of judgment and outlook. The individual has been emancipated from his relative submergence in the local and fixed group, and set upon his own feet, with varied fields of activity open to him in which to try his powers, and furnished with principles of judging conduct and projecting ideals which in theory, at least, are as broad as the possibilities of humanity itself.

PART I

THE NATURE OF THE STATE

CHAPTER II

PRELIMINARY DEFINITIONS AND DISTINCTIONS

10. Necessity for definitions and distinctions. Amos gives the following reasons for the misuse of political terms:

There are some special reasons why language is peculiarly subject in political speech and discussion to flux and vacillation of import, and therefore, why the processes of definition and explanation are peculiarly difficult. In the first place, political terms are largely in use among classes who either are habitually inexact in their use of language or who have a positive motive, — good, bad or indifferent, — to be inexact themselves or to encourage inexactness in others. Popular speech is at every moment handling the common words which are, of necessity, pressed into the service of political speculation and debate. These words, therefore, carry with them, wherever they go, the looseness and variability of meaning they contract in the market place and by the domestic fireside. . . .

But political terms do not merely suffer in fixity of meaning from the abuses common to words in familiar popular use. They are, furthermore, peculiarly exposed to a special liability to abuse from the practice of rhetorical argument conducted either on the public platform or in the popular legislature or in the columns of the public journal. The terms *republic*, *democracy*, *aristocracy*, *centralization*, *liberty*, *self-government*, and the like are all capable of a favorable or unfavorable use, and it can only be on a fair examination of all the circumstances of the case to which they purport to apply that the sense in which they are employed in any special case can be determined. It, unfortunately, is often for the apparent and momentary interest of the speaker or writer to wrest the meanings of political terms and to hide from the hearer or reader one of its undoubted significations, while forcing into undue prominence another. . . .

In the second place, political terms are liable to distortion from a cause which is the opposite of the one just described. For legal, diplomatic, and certain administrative purposes, political terms are often employed with an inflexible rigidity of meaning which is at once diverse from their lax popular use and also from the less rigid though definite signification needed by the requirements of a true political science. . . . Thus it comes about that while the terms of political science are peculiarly exposed to abuse and vacillation through conversational laxity, they are likewise exposed to the risk of ambiguities owing to the simultaneous functions they perform in the technical language of law, diplomacy, and administration.

In the third place, political terms suffer in a peculiar degree from a cause which is the enemy of all fixity of meaning in terms, — incessant, though imperceptible, changes in the nature of the things and facts which they are used to denote. History is full of illustrations of this phenomenon, and sometimes the consequence is even widespread misunderstandings. This is especially the case when the people of one country try to acquaint themselves with the political condition, wants, and controversies of another country.

I. Nation: Nationality

11. The essentials of nationality. According to Willoughby, the influences that create a spirit of national unity are as follows:[1]

In Germany the word "People" has primarily and predominantly a political signification, as denoting a body of individuals organized under a single government; while the term "Nation" is reserved for a collection of individuals united by ethnic or other bonds, irrespective of political combination. According to this use "a Nation is an aggregate of men speaking the same language, having the same customs, and endowed with certain moral qualities which distinguish them from all other groups of like nature. . . ."

That which welds a body of individuals into a national unity is no rigid political control, but ethnic and other factors largely sentimental or psychological in character. Now when we say that it is these influences of race, religion, custom, language, and history that create a Nation, we mean that from these sources springs the feeling or sentiment that binds together a community of people, and constitutes from them a Nation. Each of these factors invites the formation of a Nation, but no one of them compels it. The essential principle is the feeling that is the result

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of one or more of these factors. Thus, as says Renan: "A nation is a spiritual principle, resulting from the profound complications of history; a spiritual family, not a group determined by the configuration of the soil. . . . A Nation is, then, a great solidarity constituted by the sentiment of the sacrifices that have been made, and by those which the people are disposed to make. It supposes a past; it is, however, summed up in the present by a tangible fact: the consent, the clearly expressed desire of continuing the common life. . . ." According to Mill, "a portion of mankind may be said to constitute a nationality if they are united among themselves by common sympathies which do not exist between them and others — which make them cooperate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively." [1]

12. The idea of the nation. Numerous recent writers have emphasized the idea of the nation, and the importance of national unity and the influence of the national genius on political ideas and institutions. Burgess says:

Primarily and properly the word nation is a term of ethnology, and the concept expressed by it is an ethnologic concept. It is derived from the Latin *nascor*, and has reference, therefore, primarily to the relations of birth and race-kinship. . . . As an abstract definition, I would offer this: A population of an ethnic unity, inhabiting a territory of a geographic unity, is a nation.

There is, however, an objection to this definition. The nation as thus defined is the nation in perfect and completed existence, and this is hardly yet anywhere to be found. Either the geographic unity is too wide for the ethnic, or the ethnic is too wide for the geographic, or the distinct lines of the geographic unity partially fail, or some of the elements of the ethnic unity are wanting.

Further, the definition requires explanation. By geographic unity I mean a territory separated from other territory by high mountain ranges, or broad bodies of water, or impenetrable forests and jungles, or climatic extremes, — such barriers as place, or did once place, great difficulties in the way of external intercourse and communication. By ethnic unity I mean a population having a common language and literature, a common tradition and history, a common custom and a common consciousness of rights and wrongs. Of these latter the most important element is that of a common speech. It is the basis of all the

[1] "Representative Government," chap. xvi.

rest. Men must be able to understand each other before a common view and practice can be attained. It will be observed that I do not include common descent and sameness of race as qualities necessary to national existence. It is true that they contribute powerfully to the development of national unity; but a nation can be developed without them, and in spite of the resistance which a variety in this respect frequently offers. Undoubtedly, in earliest times, sameness of race was productive of a common language and a common order of life; but the early mixing of races by migration, conquest and intermarriage eliminated, in large degree, the influence of this force. Territorial neighborhood and intercourse soon became its substitutes. In the modern era, the political union of different races under the leadership of a dominant race results almost always in national assimilation. Thus, although the nation is primarily a product of nature and of history, yet political union may greatly advance its development, as political separation may greatly retard it. Sameness of religion was once a most potent power in national development, but the modern principle of the freedom of religion has greatly weakened its influence.

Where the geographic and ethnic unities coincide, or very nearly coincide, the nation is almost sure to organize itself politically, — to become a state. There can, however, be political organization without this. The nation must pass through many preliminary stages in its development before it reaches the political, and meanwhile other forces will control in larger degree the formation of the state. Some forms of political organization are even based upon national hostility between different parts of the population subject to them. . . .

On the other hand, where several nations are embraced within the same state, and the national feeling and consciousness rise to strength and clearness, there is danger of political dissolution. The mere mixture of a variety of nationality over the same territory will not, however, necessarily have this effect. This more frequently leads to a centralization of government. . . .

Lastly, a nation may be divided into two or more states on account of territorial separation, — as, for example, the English and the North American, the Spanish-Portuguese and the South American, — and one of the results of this division will be the development of new and distinct national traits.

From these reflections, I trust that it will be manifest to the mind of every reader how very important it is to distinguish clearly the nation, both in word and idea, from the state; preserving to the former its ethnic signification, and using the latter exclusively as a term of law and politics.

II. State

13. Definitions of the state. The following definitions of the state, given by leading modern authorities, show essential identity:

Holland: A "State" is a numerous assemblage of human beings, generally occupying a certain territory, amongst whom the will of the majority, or of an ascertainable class of persons, is by the strength of such a majority, or class, made to prevail against any of their number who oppose it.

Bluntschli: The State is a combination or association of men, in the form of government and governed, on a definite territory, united together into a moral organized masculine personality; or, more shortly — the State is the politically organized national person of a definite country.

Burgess: Our definition must, therefore, be that the state is a particular portion of mankind viewed as an organized unit.

Willoughby: As a preliminary definition of the State, we may therefore say that wherever there can be discovered in any community of men a supreme authority exercising a control over the social actions of individuals and groups of individuals, and itself subject to no such regulation, there we have a State.

Woolsey: The body or community which thus by permanent law, through its organs administers justice within certain limits of territory is called a State.

United States Supreme Court: A State is a body of free persons, united together for the common benefit, to enjoy peaceably what is their own, and to do justice to others.

14. The nature of the state. Sidgwick analyzes the concept of the state and indicates some of its essential attributes as follows:[1]

I have spoken in the summary survey above given, sometimes of "political society" or "state," and sometimes of "nation." Before we proceed further, it will be well to examine more carefully the meaning and relations of these terms. As I have already explained, I generally use "state" and "political society" as convertible terms, except that I confine the term "state" to societies that have made a certain advance in political civilization. But we should observe that the word "state" is sometimes used in a narrower sense, to denote a political society considered as being what jurists call an "artificial person," and as such, having rights and duties distinct from the rights and duties of the individuals comprising it. I shall allow myself, where there is no danger of

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ambiguity, to use the word in this narrower sense without further explanation: and I think we may define the degree of civilization which a political society must have reached in order to be properly called a "state," partly by this characteristic: — that it must have arrived at a clear consciousness of this fundamental distinction between the rights and obligations of the community in its corporate capacity, and those of the individuals comprising it. In the primitive "tribal" condition of our Germanic ancestors and other uncivilized and semicivilized peoples, this distinction is still obscure.

Further, it belongs to our ordinary conception of a State that the political society so-called should be attached to a particular part of the earth's surface: and should have a generally admitted claim to determine the legal rights and obligations of the persons inhabiting this portion, whether they are members of the society or not. This is so much the case that we sometimes use the word "state" to designate the portion of the earth's surface thus claimed.

I have so far treated the "unity" of a state as depending solely on the fact that its members obey a common government. And I do not think that any other bond is essentially implied in the conception of a state. Still, it should be recognized that a political society, whose members have no consciousness of any ties uniting them independently of their obedience to government, can hardly have the cohesive force necessary to resist the disorganizing shocks and jars which external wars and internal discontents are likely to cause from time to time. If a political society is to be in a stable and satisfactory condition, its members must have — what members of the same state sometimes lack — a consciousness of belonging to one another, of being members of one body, over and above what they derive from the mere fact of being under one government; and it is only when I conceive them as having this consciousness that I regard the state as being also a "nation." According to the generally accepted ideal of modern political thought a state ought certainly to be also a nation; still we cannot say that the characteristic of being a nation is commonly implied in the current use of the term "state" or "political society." What is commonly implied is merely (1) that the aggregate of human beings thus denoted is united — if in no other way — by the fact of acknowledging permanent obedience to a common government, and having, through the permanence of the relations between government and governed, a corporate life distinguishable from the lives of its members; (2) that the government exercises control over a certain portion of the earth's surface; and (3) that the society has a not inconsiderable number of members, though the number cannot be definitely stated.

15. Essentials of the state. The essential elements of the state are given briefly by Willoughby in the following paragraph:[1]

Without, however, further multiplying these definitions, or more particularly explaining them, we may, at this preliminary stage, declare the essential elements of a State to be three in number. They are:

(1) A community of people socially united.

(2) A political machinery, termed a government, and administered by a corps of officials termed a magistracy.

(3) A body of rules or maxims, written or unwritten, determining the scope of this public authority and the manner of its exercise.

16. Characteristics of the state. In addition to the essential elements, — population, territory, organization, and sovereignty, — states possess certain distinguishing attributes. Burgess gives "the peculiar characteristics of the organization which we term the state" as:

First, I would say that the state is all-comprehensive. Its organization embraces all persons, natural or legal, and all associations of persons. Political science and public law do not recognize in principle the existence of any stateless persons within the territory of the state.

Second, the state is exclusive. Political science and public law do not recognize the existence of an *imperium in imperio*. The state may constitute two or more governments; it may assign to each a distinct sphere of action; it may *then* require of its citizens or subjects obedience to each government thus constituted; but there cannot be two organizations of the state for the same population and within the same territory.

Third, the state is permanent. It does not lie within the power of men to create it to-day and destroy it to-morrow, as caprice may move them. Human nature has two sides to it, — the one universal, the other particular; the one the state, the other the individual. Men can no more divest themselves of the one side than of the other; *i.e.* they cannot divest themselves of either. No great publicist since the days of Aristotle has dissented from this principle. Anarchy is a permanent impossibility.

Fourth and last, the state is sovereign. This is its most essential principle. An organization may be conceived which would include every member of a given population, or every inhabitant of a given territory, and which might continue with great permanence, and yet it might not be the state. If, however, it possesses the sovereignty over the population, then it is the state.

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17. The idea and the concept of the state. A distinction is sometimes drawn between the abstract idea and the concrete concept of the state.[1]

Finally, as recognized by most modern publicists, and as already indicated, a distinction is to be made between the abstract idea of the State and its empiric conception. The one is the result of abstract speculation, the other of concrete thinking. The first is what the Germans designate "*Staatsidee*," being the idea of the State in its most general form. It is that idea which embraces all that is essential to, and which is possessed by all types of State life. It is the State reduced to its lowest terms. The empiric conception, on the other hand, is particular, and has reference to special civic types as historically manifested.

The State is an almost universal phenomenon. Everywhere, and in all times, we find men, as soon as their social life begins, submitting to the control of a public authority exercising its powers through an organization termed Government. In no two instances do we find the character or scope of this public authority identical or exercising its functions through precisely similar governmental organizations. We recognize, however, that no matter how organized, or in what manner their powers be exercised, there is in all States a substantial identity of purpose; and that underneath all these concrete appearances there is to be found a substantial likeness in nature. If now we disregard all nonessential elements, and overlook inconsequential modifications, we shall be able to obtain those elements that appear in *all* types of State life, whether organized in the monarchical or republican, the despotic or limited, the federal or unitary form. We shall thus discover those characteristics that are of the very essence of the State's life, and which unfailingly distinguish it from other public bodies.

All concrete instances of State that are historically afforded us are to be considered as embodying the *Staatsidee* as their principal essence. Variations in governmental organizations and administration are to be considered as merely differences in form that have arisen in response to demands of time, place, and peculiarities of political temperament of the people, but without disturbing the State's fundamental nature.

With this abstract, general conception of the State in our minds, we will be furnished with the criterion for distinguishing between mere variations and anomalous formations of civic life, and those public bodies that resemble, but do not possess this essential element, and are therefore not to be dignified with the title State.

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III. Sovereignty

18. Definition of sovereignty. Sovereignty, the essence of the state, is thus defined by Burgess:

What now do we mean by this all-important term and principle, the sovereignty? I understand by it original, absolute, unlimited, universal power over the individual subject and over all associations of subjects. This is a proposition from which most of the publicists, down to the most modern period, have labored hard to escape. It has appeared to them to contain the destruction of individual liberty and individual rights. The principle cannot, however, be logically or practically avoided, and it is not only not inimical to individual liberty and individual rights, but it is their only solid foundation and guaranty. A little earnest reflection will manifest the truth of this double statement. Power cannot be sovereign if it be limited; that which imposes the limitation is sovereign; and not until we reach the power which is unlimited, or only self-limited, have we attained the sovereignty.

19. The nature of sovereignty. Holland distinguishes the internal and external aspects of sovereignty as follows:

Every state is divisible into two parts, one of which is sovereign, the other subject. . . . The sovereignty of the ruling part has two aspects. It is "external," as independent of all control from without; "internal," as paramount over all action within. Austin expresses this its double character by saying that a sovereign power is not in a habit of obedience to any determinate human superior, while it is itself the determinate and common superior to which the bulk of a subject society is in the habit of obedience.

IV. Government

20. Distinction between state and government. This distinction, of fundamental importance to political science, is nevertheless of recent origin. Several American writers have done good service in insisting upon clear thinking on this point.[1]

The first fundamental distinction that must be made is that between "State" and "Government." By the term "Government" is designated the organization of the State, — the machinery through which its purposes are formulated and executed. Thus, as we shall see, while the

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term "State" is, when strictly considered, an abstract term, Government is emphatically concrete. More than that, Government is purely mechanical and governed by no general laws. Its varying forms are in all cases determined by political expediency, and the examination of its essential character involves no such philosophical considerations as will interest us in our present inquiry. The subject of Government thus lies almost wholly without the field of Political Theory, and is comprehended within the domains of descriptive and historical politics.

Simple and definite as is this distinction between the State and its governmental machinery (corresponding as it does very much to the distinction between a given person and the material bodily frame in which such person is organized), we shall find it to be one that has been but seldom made. In fact, it has been the confusion between these two terms that has led directly or indirectly to a great majority of the erroneous results reached by political philosophers in the past.

21. Definition of government. Dealey, in a recent book, gives the following suggestive definition of government:

As the state is the nation organized for the protection of life and property, there will evidently be in every state a definite political organization authorized to exercise the sovereign powers of the state. This organization is called the *government*, and may be defined as that organization in which is vested by constitution the right to exercise sovereign powers.

CHAPTER III

PHYSICAL BASIS OF THE STATE

22. Physical causes that act in history. The following suggestive chapter outlines the general nature of the relation between the natural environment and political development:[1]

The reciprocal influence of Man and Nature is one of the hard subjects with which modern scientists and philosophers are called upon to deal. The action of Nature and the reaction of man, or, as some might prefer to state it, the action of man and the reaction of Nature, are the questions that it presents for answer. While it is not necessary that the teacher of history should deal with these questions on their speculative side, it is necessary for him to recognize the principal physical factors.

Naturally, the first of these factors to attract attention was climate, the influence of which on the character and history of nations was recognized by the Greek thinkers. This recognition is well illustrated by the passage, hereafter quoted, in which Aristotle points out the contrast between Asia and Europe. However, the Greek writers never worked out the subject.

Bodin, who died in 1596, was apparently the first modern writer to investigate the historical influence of physical causes, as well as the first to vindicate the claim of all religious confessions in a state to equal political toleration. Dividing nations into northern, middle, and southern, he investigated with much fullness of knowledge how climate and other geographical conditions affect the bodily strength, the courage, the intelligence, the humanity, the chastity, and, in short, the mind, morals, and manners of peoples; what influence mountains, winds, diversities of soil, etc., exert; and elicited a great number of general views, some of which are false, but some also true.

In the Spirit of Laws, published in 1748, Montesquieu sought to explain how laws are related to manners, climates, creeds, and forms of government. He laid great stress on the physical factors in civilization, and is sometimes said to have originated the doctrine of climates. Five of his books bear titles that indicate, in a general way, the range of his inquiries: Of Laws as relative to the Nature of Climate; In what manner

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the Laws of Civil Slavery are relative to the Nature of the Climate; How the Laws of Domestic Slavery have a Relation to the Nature of the Climate; How the Laws of Political Servitude have a Relation to the Nature of the Climate; of Laws in the Relation that they bear to the Nature of the Soil. Although he trenches upon the practical denial of the freedom of man, he stills checks himself, arguing that laws also bear a relation to the principles which form the general spirit of the morals and customs of a nation — that is, the principles of human nature. . . .

Mr. Buckle pushed the naturalistic theory to its farthest limit. He denied all freedom to man, and made climate, food, soil, and the general aspects of Nature the supreme and ultimate historical causes. For example, he attributed the superstition of Italy, Spain, and Portugal to earthquakes and volcanic eruptions, and the Calvinistic theology of Scotland to the rocks and mountains of the country and the surrounding ocean waste.

Dr. J. W. Draper wrote his History of the Intellectual Development of Europe, Civil Polity in America, and History of the Civil War, on the naturalistic theory.

M. Taine laid great stress upon soil, sky, sea, climate, and food as factors in the intellectual and literary history of England, in fact, he wrote his History of English Literature on what he called scientific lines. This distinguished writer was accustomed to refer historical results to race, environment, and the time.

The distinguished scholar and diplomatist, Mr. George P. Marsh, handled the subject in his Man and Nature, now better known under the title, The Earth, as modified by Human Action. He undertook to "indicate the character and extent of the changes produced by human actions in the physical conditions of the globe, to point out the dangers of undue interference with the spontaneous arrangements of the organic or inorganic world, to suggest the possibility and importance of the restoration of harmonies that have been disturbed, and incidentally to illustrate the doctrine that man is, in both kind and degree, a power of a higher order than any of the other forms of animated life, which, like him, are nourished at the table of bounteous Nature." Without discussing his subject in its speculative bearings, Mr. Marsh accumulates a mass of most interesting facts showing that man can waste and repair Nature, and that he is rather her master than her slave. . . .

The general subject has not been introduced for discussion on its speculative side, but merely to pave the way for some examples of physical causation. First, however, it should be observed that Nature exerts upon man two kinds of influence. How far climate, food, soil, and the general aspects of Nature affect his mind and character directly, we

have no means of determining; but it is obvious that the direct effect of such agents is much less than the indirect effect. Through the social wants and activities that they create and modify, through man's occupations and pleasures, through his general habits, they exert upon him a profound influence from his cradle to his grave. The sum total of such influence is known as environment.

Professor Bryce, discussing with much learning and acuteness the relations of history and geography, divided the general subject of environment into three groups of factors, all closely related:

I. The influences that are due to the configuration of the earth's surface — that is to say, to the distribution of land and sea, the arrangement of mountain chains, table-lands, and valleys, the existence of rivers, and the basins which they drain. Nothing can be more evident than that these facts almost wholly controlled the early movement of races, such as migration, and that they powerfully affect military operations, the character and extent of conquests, the size and the boundaries of states, the location and character of cities, the direction, kind, and abundance of facilities for travel and transportation, the presence or absence of harbors, and maritime commerce, growth of military and naval power, the development of special industries, and many other things of the greatest interest.

Dr. Draper remarks that Europe is geographically a peninsula, and historically a dependency of Asia. The plains of Central and Northern Asia are prolonged through Central Europe to the German Ocean and the Baltic; the average height of the larger continent is 1,132 feet above the level of the sea, of the smaller one 671 feet; from the Pacific to the Atlantic Ocean, north of the great central east-and-west mountain axis, a distance of more than 6,000 miles, an army could march without having to encounter any elevation of more than a few hundred feet; with an abundance of springs and headwaters, but without any stream capable of offering a serious obstacle, this tract has a temperature well suited to military operations; it coincides practically with the annual isothermal line of fifty degrees, keeping just north of the limit of vine production — in which physical facts Dr. Draper finds the reasons why the Oriental hordes have again and again poured themselves over Europe.

The Spanish Peninsula has a marked geographical character, as any one who will look at its mountain and river systems, its plains and forests on a map, can see; and this character has given a marked individuality to Spanish warfare from the earliest times, as well as influenced its history in many other important ways. Spain is a hard country to subdue, an easy one to defend — as witness its history in the days of Hannibal, of Sertorius, and of Napoleon and Wellington. . . .

The position and configuration of England, her insular character and relations to the continent, the distribution of her river valleys and uplands, and the relations of these features to one another and to the seashore, have had a prodigious influence upon English history and character. . . .

II. The influences which belong to meteorology and climate, meaning thereby the conditions of heat and cold under which a race of men develops itself with the amount of rain and the recurrence of drought. The winds also play their part. These agents directly affect man's health, strength, and mental character; while indirectly, through soil and fertility, with which they are so closely connected, they almost wholly control his occupations. It is no accident that great peoples and states have never appeared beyond the polar circles or within the tropics, or that the main historical movement has been confined to the north temperate zone. The Greek genius was largely indebted to the physical influences under which it was developed. "Mild and clement is our atmosphere," says Euripides; "the cold of winter is for us without rigor, and the arrows of Phœbus do not wound us." . . . Thucydides observed that thought was the only peculiarity of the Athenians.

III. The third class of elements that make up environment are the productions which a country offers to human industry. Here we inventory mines, quarries, the products of wells and springs, field and forest, fisheries of all kinds, and animals both wild and domesticated. Professor Bryce illustrates how a narrow range of productions fatally restricts progress in the arts and refinements of life, by instancing Iceland. The race is of admirable quality, but the country produces nothing save a few sheep and horses, and some sulphur; it has not even fuel, except such driftwood as is cast upon its shores. He adds that if the highest European races were placed in Central or Northern Asia they would find it almost impossible to develop a high type of civilization for want as well of fuel as of the sources of commercial wealth. Before entering upon that industrial stage in which she has distanced all other countries, England had reached a high stage of agricultural development; she has now acquired such a momentum that she could possibly survive as an industrial nation the exhaustion of her mineral wealth; but she could never have emerged from the agricultural state and attained her present industrial, commercial, and financial standing without her abundant supplies of tin, copper, iron, and coal. In the earlier period the center of her population, power, and wealth lay in the south, where the richest agricultural districts are found; but in the present period this center has moved northward, where exist the sinews of manufacturing and commerce. Geological maps and maps showing the

distribution of population, of wealth, and even of political parties, are very significant when studied in relation. Eastern Yorkshire and western Lancashire are strongly conservative in politics; western Yorkshire and eastern Lancashire tend to radicalism; the eastern part of the one county and the western part of the other are mainly agricultural districts, where the influence of the upper classes and of the farmers is decisive, while within these limits lies a great manufacturing, mining, and trading population, with wit, education, and radical opinions. "Those who examine Lancashire schools are struck," says Professor Bryce, "by the difference between the sharpness of the boys in the east Lancashire hill country and the sluggishness of those who dwell on the flats along the coast between Liverpool and Morecambe." The mines of Lancashire called manufactures into being and created trade; and these factors, with all that they imply, have changed the region from a fastness of Toryism into a hive of Radicalism. . . .

Mr. Buckle points out that the growth of civilization is possible only in countries having a class of men who possess the time, the disposition, and the means to observe and to investigate the various subjects upon which such growth depends, as the facts of Nature and the laws of the human mind. But a class of men in the possession of leisure, disposition to study, and opportunity to study, can exist only in countries where there is a sufficient accumulation of wealth to free them from the necessity of constant physical toil. Obviously, if every man is intensely absorbed in the struggle for physical existence, society cannot move forward. The accumulation of wealth depends upon natural factors; soil and climate condition the rewards of labor, climate conditions the energy and constancy of labor. Hence those countries were sure to become the earliest seats of civilization where Nature provided good opportunities for the accumulation of wealth, and so the material possibility of study and mental progress. Finally, he remarks that such conditions existed in Hindustan and in Egypt, in Central America, in Mexico, and in Peru, countries that became early if not the earliest seats of civilization on their respective continents. Herodotus called Egypt the gift of the Nile. The Nile Valley is a thick deposit of the richest soil, which the annual overflow of the river constantly replenishes; the rainless sky and the equable temperature make continuous labor possible, while the river furnishes the source of natural or artificial irrigation. The early husbandman was assured good harvests and abundant food, and thus the first condition of progress was secured.

Greece affords one of the best illustrations of the effect of environment upon historical development. The psychological effects of the sky and atmosphere have already been mentioned. The geniality of the

climate tends to moderation in eating and to the use of light clothing, necessities that the country well supplied; as a result, man was not compelled to undergo grinding toil to procure the means of material subsistence, and so was left with time to indulge the disposition to investigate, which all the influences that played upon him tended to create. The country is a peninsula, or rather a complex of peninsulas, the whole singularly pierced by gulfs and bays, as well as crossed and recrossed by mountain ranges, and so divided into a great number of small plains and valleys, each more or less cut off from the others, at the same time that it lies open to the sea. At no point is the traveler far from the seashore, and at few points is he out of sight of the great mountain mass of Parnassus, which occupies such an important place in Greek history. It is said to be very difficult for one who has never visited Greece to realize the diminutive scope of its geography. Attica and Ægina together contain no more than seven hundred and fifty square miles of territory, and in antiquity they never had a population exceeding half a million people. In addition to this remarkable accessibility from the sea, attention must be drawn to the larger geographical relations of Greece — to the islands, large and small, that surround it on all sides except the north; to the not distant shores of Thrace, of Asia Minor, of Africa, and of Italy; to the Black Sea, to the Nile, and to the Mediterranean. In these factors scholars have found causes of the most prominent features of the Greek mind and life; the wonderful mental gifts of the people, their seafaring, trading, and colonizing habits, their free, adventurous spirit, and especially their political institutions, and the whole form and spirit of their public life. In her early history Greece contained about as many independent states as she had definite units of territory, plain or valley; a state of things that resulted in a free and vigorous political life, marked by intense patriotism and local spirit, but tending to division and strife, to the lack of general political ideas, to internal war, to what the Germans call particularism, and Americans States-rights, and so to eventual weakness. The final result was, since these divisive and separatist tendencies could never be overcome, that Greece became a prey to internal faction and external force. Environment, first by contributing to the creation of the people, and then to the direction and control of their activity, certainly had much to do with causing the brilliant development and early decadence of the Grecian race. It was no miracle and no accident that the first European civilization, and in some respects the greatest European civilization, sprang up in Greece.

As a rule, the location of cities has been controlled by what Mr. Mackinder happily calls "geographical selection." Two excellent

examples of such selection may be borrowed from that writer. On the northeast of the Ganges Valley lie the vast Himalayas, practically impassable to man; on the northwest is the Sulaiman range, pierced by passes through which numerous conquerors have entered India from the uplands of Iran. Parallel with the Sulaiman is the Thar, or great Indian Desert. Between the desert and the Himalayas the fertile belt is closely contracted, forming a pass that affords the only approach to the valley at that extremity. Close to the eastern end of this pass, at the head of the Ganges navigation, stands Delhi, the natural center of commerce and the natural base of military operations in all that region. At its eastern extremity the valley is very inaccessible, owing to the absence of natural harbors and to the heavy surfs that beat upon the shore. But the mouth of the river is a great water gate for the interior, and here on the Hooghly, at the intersection of ocean and river transportation, a natural base of naval and military operations, the British have built up Calcutta. The fertility of the Ganges Valley is proverbial; at its extremities are found the two gates of India, and it is quite in the nature of things that these gates are held by the cities of Delhi and Calcutta.

Alexander located the city that bears his name at the intersection of the Mediterranean and Nile commerce, having particularly in view the control of the most southern of the old lines of communication between the Indies and the West. For many centuries Alexandria was the grand depot from which the Indian goods were distributed throughout the Mediterranean basin. Constantinople is the gate both to the Black Sea and the Ægean, both to southeastern Europe and northwestern Asia, according as you approach it from the one direction or the other. This city also sits upon one of the old channels of Eastern commerce.

Study of the cities of Italy is peculiarly interesting. Rome was probably founded by shepherds, who, moved by volcanic disturbances or by an insufficiency of pasture lands, or by both, descended with their flocks and herds from their ancestral seats on the Alban hills into the extensive and fertile plain watered by the Tiber and encircled by mountains and the sea that has long been known as the Campagna. Coming to the conspicuous group of hills and ridges near the river, they seized and fortified the Palatine, which best met their need of a dwelling place and a protection. Livy describes Rome as situated on healthy hills, by a convenient river, equally adapted to inland and maritime commerce, the sea not too far off to prevent a brisk international trade, or so near as to expose it to the danger of a sudden attack from foreign vessels; a site right in the center of the peninsula — a site made, as it were, on purpose to allow the city to become the greatest in the world. No whit

inferior were the military and political advantages of the site. . . . The great change in their circumstances wrought a gradual change in the character of the primitive shepherds and their descendants. They took on one that better suited their new position. Planted as they were in a meeting place of nations, brought into close and constant competition with the strongest peoples of Italy, the Romans developed those practical, industrial, and business habits, and those military and political virtues that finally gave them universal empire. Rome made the Romans quite as much as the Romans made Rome. Hidden away in some out-of-the-way place, there is not the slightest reason to think that they would ever have made a name in history. All roads led to Rome before the first one had been built.

It is interesting to observe the relations of the principal cities of Northern Italy to the great valley of the Po on the one side and to the mountain passes that connect the Peninsula with Central and Western Europe on the other. Turin commands the approach to the Mont Cenis Pass from the south. Milan, which has as changeful a history perhaps as any city in Europe, stands almost in the mouths of the Simplon and St. Gothard passes. Verona is at the opening of the Brenner. It is difficult to imagine a state of things in Northern Italy other than complete barbarism in which Milan would not be an important city. At first one might not detect the hand of geographical selection in the case of Venice. Still, under the extraordinary circumstances of the times in which it was founded its site was happily chosen. In his course of destruction, Attila obliterated many towns, including the colony of Aquilia, which stood at the head of the Adriatic, in some such relation as Trieste stands to-day. The homeless inhabitants of Aquilia sought refuge among the islands formed by the detritus brought down to the gulf by the network of rivers that rise in the Alps and that discharge themselves on that shore. This immigration was the beginning of Venice. Shut in by the sea, cut off from the land, protected by her inaccessibility, favored in later times by the Eastern Empire, and planted on what was long the best route for the conveyance of the rich products of Indian commerce to Central and Western Europe, Venice slowly raised her obscure head above the mud of the lagoons, developed a population rich in practical talents and in genius, and won and long held a foremost place among the powers of the world. . . .

Geographical selection is easily recognizable in the location of the large cities of our own country. New York has clearly demonstrated its superiority to all other points on the Atlantic coast as a great mart of trade. At the time of the Revolution both Boston and Philadelphia had about the same population, but once connected with the West by a

great line of internal communication, the Erie Canal, its extraordinary growth began. It should have been perfectly apparent from the first opening up of the Great West to the light of civilization, that whenever that vast region should become the seat of empire, there would be a great center of population, trade, and wealth at the head of Lake Michigan, at or near where Chicago stands. San Francisco is only the redemption of Nature's pledge that a great city would spring up at the Golden Gate whenever the Pacific Slope should really come into the possession of civilized men.

In such a sketch as the present one the sea calls for little more than casual mention. That it modifies climate, changing temperature and distributing moisture, and so bringing fertility of soil; that it affects the character and habits and the pursuits of men and nations; that it yields rich harvests of wealth to the industry of man — furs, fish, pearls, sponges, corals, ivory, amber, salt, oil, and chemicals; that it furnishes the great highways of commerce and of war, and opens to the statesman and jurist a whole volume of questions that profoundly affect human progress — these are commonplaces. The influence of sea currents, of the trade winds and the monsoons upon human society, is suggested, if not worked out, in every book of physical geography. On the maritime and naval side history does full justice to the theme. . . .

What has been said in this chapter is but a meager treatment of a great subject. It will, however, serve to explain the stress that historians place on environment, and also emphasize the observations of a distinguished living scholar: "A national history, as it seems to us, ought to commence with a survey of the country or locality — its geographical position, climate, productions, and other physical circumstances as they bear on the character of the people. We ought to be presented, in short, with a complete description of the scene of the historic drama, as well as with an account of the race to which the actors belong. In the early stages of its development, at all events, man is mainly the creature of physical circumstances; and by a systematic examination of physical circumstances we may to some extent cast the horoscope of the infant nation as it lies in the arms of Nature."

23. The natural environment. The influence of physical conditions, with special emphasis on their relation to economic life, is forcibly stated in the following paragraphs:

Man, like all animals, is indissolubly bound to the soil. He is in last resort dependent upon nature for what he is and what he has accomplished. This is especially true of his economic life, which, as we have

seen, consists ultimately of his relations to material things. The basis of economic activity is the material environment. . . . The economic aspects of the natural environment may be subsumed under the four heads of the climate, the geological structure, the flora and fauna, and the geographical location.

Only a portion of the globe is habitable. The uninhabitable parts, moreover, change with the geologic ages. Large sections of Northern Europe and America which are now the homes of a vast population were æons ago in the perpetual embrace of the ice king. On the other hand, explorations in the sandy wastes of the Asiatic deserts have brought to light the ruins of numerous and populous cities. Not only economic life, but all life, is at the mercy of the elemental forces of nature.

Even in the habitable portions of the globe the climatic conditions are of the first importance. At the very outset the influence of temperature is obvious. The rigor of the arctic regions and the bounty of the tropical zone are alike hostile to economic progress. Where the food supply is scanty and the low temperature benumbing, human resources are taxed to the utmost in securing the bare wherewithal of life, and no surplus energy is left to accumulate a store of wealth. Where, on the other hand, nature pours out her treasures with a lavish hand, and the torrid heat enervates and lulls into lethargy, scarcely any activity is needed to procure subsistence, and little is ordinarily exerted for other purposes. Although we have had civilization in hot countries, the real home of the greatest economic progress has always been in the temperate zones, where man is goaded out of his natural laziness by the prick of want and lured on to effort by the hope of reward.

In many other ways does climate affect economic life. The alternations of heat and cold, both seasonal and occasional, are of commanding importance. The character and length of the seasonal alternations condition the size and quality of the harvest. The variations of intra-seasonal temperature with its sudden oscillations go far to explain the nervous, active American temperament and its economic results, as compared with the comparative stolidity of the English, due to an equable climate. Scarcely second to the influence of temperature is the significance of the rainfall and the humidity. Insufficiency of moisture and lack of sunshine are alike inimical to economic welfare. Not only will differences in rainfall affect the forestry conditions, as well as the size and therefore the economic utility of the rivers, but in addition the laborious contest with a semiarid region will create in the individual stalwart economic and political qualities. The so-called Anglo-Saxon individualism is largely the product of climatic conditions. When the

Englishman leaves his moist and fertile home for the almost riverless wastes of the antipodes, he becomes, if not a socialist, at all events the next remove to one. In Australia we accordingly find government railroads, government insurance, government steamships, government frozen-meat industry and many other examples of government activity which would be viewed with dismay in the mother country.

In the same way the individualist theory in America is largely the product of definite economic conditions, resting on a new climatic environment. What careful interpreter of American history does not know that the arduous struggles with a rebellious soil and an inhospitable climate caused the American of a century ago to turn to government whenever he thought he might secure help? State roads, state canals, state railroads, state bounties, state enterprises of all kinds suited to the needs of the settlers were the order of the day. When, however, the mountains had been crossed and the fertile valleys of the Middle West, with abundant rainfall and a genial climate, had been reached, there came a wondrous change. Conscious of their new opportunities, the citizens now desired only to be let alone in their quest for prosperity. Private initiative replaced government assistance and the age of corporations was ushered in. Insensibly the theory of governmental functions changed, and the doctrine of *laissez faire* carried all before it. The theory of individualism was a natural result of the economic, and at bottom of the climatic, conditions of a new environment.

While the climate is one of the causes that influence the earth's surface, the economic life is profoundly affected by the entire geological formation. In the first place we have the fundamental fact of altitude, including the distinction between mountain and valley, coast and plain, with their varying degrees of production. Furthermore, upon the chemical ingredients of the soil rests in last analysis its original fruitfulness. The difference between the soil of the black belt and the hill lands of Alabama explains the varying aspect of the negro problem there; and in like manner the contrast between the arable and the grazing lands of the Far West enables us to comprehend the economic and political conflicts between the farmer and the ranchman.

Of still more importance than the surface of the earth is what lies beneath the surface. There are writers who interpret the entire progress of humanity in terms of the metals. While this is assuredly an exaggeration, there is no doubt that the metals have played a dominating rôle in the history of economic progress. In more primitive times the advance of civilization was in many places in large measure bound up with the copper and tin deposits. Even at present, with the active interchange of commodities, the mineral wealth in the shape of copper

and iron fields, gold and silver mines, lead and tin deposits, goes far to explain the preponderance of the fortunate countries or sections where they are found. If we add to the metals the coal, the diamond and the oil fields, we shall readily recognize the enormous influence exerted, especially in modern times, by the existence of these mineral treasures in such places as Colorado, Pennsylvania, Western England, and South Africa.

The character and extent of the vegetable and animal life are a result of the climatic and geological conditions that have just been mentioned. Upon the union in proper proportions of rain, sun and chemical ingredients of the soil depends the possibility of raising all the staple crops like hay, wheat, cotton, rice, tobacco, sugar, coffee or tea, or of obtaining the timber, rubber, cork and other products of the forest. The American Indian civilization was built up to a large degree on maize, as that of the Asiatic Indian largely rested on rice. If cotton was king in the South before the war, wheat and hay were to a great extent the monarchs in the North. The control of these natural resources is responsible for many of the mutations of nations. To give only two examples: the struggle for the spice islands of the East is the key that unlocks the mysteries of the European political contests of the sixteenth and seventeenth centuries; the sugar situation in Cuba led to the revolution which brought about our recent Spanish war, and thus indirectly the expansion of the American republic into imperialism.

Of at least equal importance in early economic progress is the existence of animals that can easily be domesticated. The fact that the horse, the cow and the sheep were found in Asia rendered possible the transition from the hunting to the pastoral stage and laid the foundation of the later economic edifice of the more advanced Asiatic and European races. For these animals subserved the various ends not only of food supply and provision of clothing, but of means of locomotion and above all of beast of burden. Their absence in recent geological periods in America was perhaps the chief cause of the backwardness of the Indians. Where a relatively advanced civilization was reached, as by the Incas in Peru, it was in great part due to the existence of the llama, although the inferiority of this animal to the horse, the cow and the sheep explains in large measure the backwardness of the South American civilization. In Australia there was not even this resource, for the kangaroo could not be utilized and the blackfellow remained a savage.

In contrast to the flora and fauna which are of importance from the first, favorable situation, although it also plays a rôle from the outset, becomes of signal importance in the later stages of economic life when commerce has developed. Proximity to the sea, possession of a safe

and ample harbor, location on a river, — all these explain the maritime supremacy on which so much of past civilization has rested. It is no mere accident that the world's progress centered for many centuries around the Mediterranean, and that Egypt, Greece and Rome in turn controlled for thousands of years the destinies of the human race. Passing over the medieval Italian seaports and the German Hansa towns, it is again significant that the two greatest metropolitan centers of the world to-day, London and New York, have attained their position chiefly because of their maritime importance. Some writers have even gone so far as to maintain that all civilization can be expressed in terms of the great rivers and seas. Of the twenty largest cities of the United States, nine are found on the seacoast, five on the Northern Lakes, and five on the Mississippi and Ohio rivers.

It would, however, be a mistake to lay too much stress upon mere water communication. Trade conducted on *terra firma* has played a scarcely smaller rôle. Many a populous city is nothing but the development of a crossroads village, become the busy mart of transit on a great thoroughfare. The centers of the Babylonian and Assyrian civilization of old were largely of this character; and to a similar favorable inland situation must we ascribe the prosperity of numerous cities in all parts of the world to-day, such as Berlin, Manchester (England), and Denver, especially where the rivers are few or small. A distinguished French author, Demolins, has even ventured to explain the existence of the primary social types of humanity by the land routes which the various nations traversed in the course of the long migrations from their ancestral home to their present abodes. However exaggerated this insistence upon a single factor may be, there is little doubt as to the cardinal influence of location upon commercial opportunities.

With the further development of economic life, commerce becomes a handmaid not only to agriculture but to industry. The industrial centers are dependent not only on the commercial facilities for disposing of their products, but also upon the ease with which they can secure the raw material and cheap power. Contiguity to the coal and iron fields explains the growth of the great steel industries. The presence of local water power made possible the early centers of the textile industries in New England, as well as the rapid growth of Minneapolis in milling. The grain fields of the Middle West are responsible for the breweries in the western and the distilleries in the eastern states adjoining the Mississippi.

The slaughtering and meat-packing centers have gradually moved west with the change in the ranching frontier, and the incipient industries of the Pacific slope are still largely determined by their propinquity to the forests, the orchards or the river fisheries.

24. Lines of social movement. The contour of the earth's surface has always exerted a determining influence upon the movements of peoples. Other things being equal, migration, colonization, and emigration, as well as routes of trade and communication, follow lines of least geographic resistance.

Finally, the contour of the surface determines the lines of social movement. Physical forces always follow the lines of least resistance. This is true alike of the projectile's regular curve, and the lightning's jagged path. The primitive horde gradually forms beaten tracks about its abode. These tracks, and in fact all intercourse with other peoples, are determined by the easiest courses, and necessarily avoid all obstacles. Civilization and culture follow these same lines, for they can only go where social and economic intercourse have preceded. Caravans still traverse natural courses from Egypt into Palestine, and from Babylonia up to Syria. These ancient avenues of civilization, and even the direction which civilization should take, were determined by the contour of the earth's surface. War and conquest have always followed lines marked out for them beforehand. Ancient and modern migrations have been similarly directed. Sometimes the course of an ancient horde overrunning a part of Europe, can be followed in detail, and each deviation from a straight course is explained by natural obstacles, or by the physical strength of those already in possession of the soil. To-day, emigration is from some crowded quarter to the spot which seems to offer opportunity for an easier and richer life. Every redistribution of the parts of society has its physical side, and, like any redistribution of matter, it follows the lines of least resistance. "The final and highest truths of the geographical sciences are included in the statement that the structure of the earth's surface, and the differences of climate dependent upon it, visibly rule the course of development for our race, and have determined the path for the changes of the seats of culture; so that a glance at the earth's surface permits us to see the course of human history as determined (or, one may say, purposed) from the beginning, in the distribution of land and water, of plains and heights."[1]

25. Fertility of the soil. Bluntschli, following Buckle in the main, emphasizes the disadvantages of extreme fertility of soil as well as those of sterility.

Certainly a very barren soil is unfavorable for social life: for man is then obliged to procure his food from a distance, by means of commerce.

[1] Peschel, "Geschichte der Erdkunde," S xv.

In such cases commercial cities may rise and flourish, as did Venice, the daughter of the unfruitful sea. But the peoples as a whole in barren countries can only live poorly and painfully; the population is sparse and has but a meager growth. A fixed home is hardly possible; men live a nomadic life in scattered families and hordes. Buckle has pointed out that the Mongols and the Tartars made little progress on their own barren steppes, only developing a civilization in the richer soil of China and India: and that the Arabs did not become an advanced state till they left Arabia for the fruitful lands of Persia and the coast of the Mediterranean.

A very fruitful soil, which furnishes sufficient food without requiring labor, is better than an unproductive soil, but it is by no means the best basis for the State, for these reasons: —

The main motive to human effort is the desire for subsistence. If this is removed by the bounty of nature, men work little, or not at all; and generally sink into indolence and sensuality. Where they do not work, men fail to develop the hidden resources of their nature, and society does not advance. On many tropical islands the people live a happy sensual life, but remain uncivilized. Naples made a great advance when she converted her idle lazzaroni into industrious laborers.

Where labor is not needed, labor and laborer are despised; the life of the mass of the people counts for nothing. Nowhere is human life so brutally disregarded as in the negro despotisms of Africa, where the soil is fruitful without tillage, and there is no industry to ennoble labor.

Great fertility of soil promotes an unequal distribution of property. We find a few rich men, living in superfluity, hardly any middle class, and a great mass of poor and servile population. As there is no check on population in such countries, it increases rapidly. But an occasional famine or invasion reduces the careless population to misery. Those few who have had the providence to hoard their fruits, compel the masses to surrender their fruit trees and their land in return for food. Military leaders, in return for their protection, exact taxes and service: priests, who reconcile the gods and invoke their blessing, receive large estates from the faithful. Thus there gradually arises a class of rich landlords and princes, of nobles and priests, who own the whole country. They attain to some degree of civilization and to great material wealth. They exact labor from the subject classes, but hold them cheap, because there are plenty of laborers, and man, as such, has no value. The masses become poor, despised, and completely dependent: they live a dull and brutal life of service, completely cut off from any civilizing influence. . . .

The most favorable soil then is one of moderate fertility, which requires the expenditure of serious and persistent labor. There labor

and the laborer are properly valued, but they are not overtasked, and there is no destitution. Man's powers are developed, and the conditions of life perfected: families enjoy a secure existence in moderate prosperity, and wealth is so distributed that the middle class is numerous and well to do. One class shades off gradually into another: there is no danger of the lower classes being enslaved, nor of the higher becoming a privileged caste. There is a great diversity of occupations, but the people form a coherent whole, animated by a common spirit.

26. Effects of dryness and moisture. Spencer points out important results of differences in humidity, as follows:

Passing over such traits of climate as variability and equability, whether diurnal, annual, or irregular, all of which have their effects on human activities, and therefore on social phenomena, I will name one other climatic trait that appears to be an important factor. I refer to the quality of the air in respect of dryness or moisture.

Either extreme brings indirect impediments to civilization, which we may note before observing the direct effects. That great dryness of the air, causing a parched surface and a scanty vegetation, negatives the multiplication needed for advanced social life, is a familiar fact. And it is a fact, though not a familiar one, that extreme humidity, especially when joined with great heat, may raise unexpected obstacles to progress; as, for example, in parts of East Africa, where "the springs of powder flasks exposed to the damp snap like toasted quills; . . . paper, becoming soft and soppy by the loss of glazing, acts as a blotter, . . . metals are ever rusty; . . . and gunpowder, if not kept from the air, refuses to ignite."

But it is the direct effects of different hygrometric states, which are most noteworthy — the effects on the vital processes, and, therefore, on the individual activities, and, through them, on the social activities. Bodily functions are facilitated by atmospheric conditions which make evaporation from the skin and lungs rapid. That weak persons, whose variations of health furnish good tests, are worse when the air is surcharged with water, and are better when the weather is fine; and that commonly such persons are enervated by residence in moist localities but invigorated by residence in dry ones, are facts generally recognized. And this relation of cause and effect, manifest in individuals, doubtless holds in races. Throughout temperate regions, differences of constitutional activity due to differences of atmospheric humidity, are less traceable than in torrid regions: the reason being that all the inhabitants are subject to a tolerably quick escape of water from their surfaces; since

the air, though well charged with water, will take up more when its temperature, previously low, is raised by contact with the body. But it is otherwise in tropical regions where the body and the air bathing it differ much less in temperature; and where, indeed, the air is sometimes higher in temperature than the body. Here the rate of evaporation depends almost wholly on the quantity of surrounding vapor. If the air is hot and moist, the escape of water through the skin and lungs is greatly hindered; while it is greatly facilitated if the air is hot and dry. Hence in the torrid zone, we may expect constitutional differences between the inhabitants of low steaming tracts and the inhabitants of tracts parched with heat. Needful as are cutaneous and pulmonary evaporation for maintaining the movement of fluids through the tissues and thus furthering molecular changes, it is to be inferred that, other things equal, there will be more bodily activity in the people of hot and dry localities than in the people of hot and humid localities.

The evidence justifies this inference. The earliest-recorded civilization grew up in a hot and dry region — Egypt; and in hot and dry regions also arose the Babylonian, Assyrian, and Phœnician civilizations. But the facts when stated in terms of nations are far less striking than when stated in terms of races. On glancing over a general rain map, there will be seen an almost continuous area marked "rainless district," extending across North Africa, Arabia, Persia, and on through Tibet into Mongolia; and from within, or from the borders of, this district have come all the conquering races of the Old World. We have the Tartar race, which, passing the southern mountain boundary of this rainless district, peopled China and the regions between it and India — thrusting the aborigines of these areas into the hilly tracts; and which has sent successive waves of invaders not into these regions only, but into the West. We have the Aryan race, overspreading India and making its way through Europe. We have the Semitic race, becoming dominant in North Africa, and, spurred on by Mohammedan fanaticism, subduing parts of Europe. That is to say, besides the Egyptian race, which became powerful in the hot and dry valley of the Nile, we have three races widely unlike in type, which, from different parts of the rainless district, have spread over regions relatively humid. Original superiority of type was not the common trait of these peoples: the Tartar type is inferior, as was the Egyptian. But the common trait, as proved by subjugation of other peoples, was energy. And when we see that this common trait in kinds of men otherwise unlike, had for its concomitant their long-continued subjection to these special climatic conditions — when we find, further, that from the region characterized by these conditions, the earlier waves of conquering emigrants, losing in

moister countries their ancestral energy, were overrun by later waves of the same kind of men, or of other kinds, coming from this region; we get strong reason for inferring a relation between constitutional vigor and the presence of an air which, by its warmth and dryness, facilitates the vital actions. A striking verification is at hand. The rain map of the New World shows that the largest of the parts distinguished as almost rainless is that Central American and Mexican region in which indigenous civilizations developed; and that the only other rainless district is that part of the ancient Peruvian territory, in which the pre-Ynca civilization has left its most conspicuous traces. Inductively, then, the evidence justifies in a remarkable manner the physiological deduction. Nor are there wanting minor verifications. Speaking of the varieties of negroes, Livingstone says — "Heat alone does not produce blackness of skin, but heat with moisture seems to insure the deepest hue"; and Schweinfurth remarks on the relative blackness of the Denka and other tribes living on the alluvial plains, and contrasts them with "the less swarthy and more robust races who inhabit the rocky hills of the interior": differences with which there go differences of energy. But I note this fact for the purpose of suggesting its probable connection with the fact that the lighter-skinned races are habitually the dominant races. We see it to have been so in Egypt. It was so with the races spreading south from Central Asia. Traditions imply that it was so in Central America and Peru. Speke says — "I have always found the lighter-colored savages more boisterous and warlike than those of a dingier hue." And if, heat being the same, darkness of skin accompanies humidity of the air, while lightness of skin accompanies dryness of the air, then, in this habitual predominance of the fair varieties of men, we find further evidence that constitutional activity, and in so far social development, is favored by a climate conducing to rapid evaporation.

I do not mean that the energy thus resulting determines, of itself, higher social development; this is neither implied deductively nor shown inductively. But greater energy, making easy the conquest of less active races and the usurpation of their richer and more varied habitats, also makes possible a better utilization of such habitats.

27. The general aspects of nature. No writer has more powerfully presented the materialistic conception of history than has Buckle.

It now remains for me to examine the effect of those other physical agents to which I have given the collective name of Aspects of Nature, and which will be found suggestive of some very wide and comprehensive

inquiries into the influence exercised by the external world in predisposing men to certain habits of thought, and thus giving a particular tone to religion, arts, literature, and, in a word, to all the principal manifestations of the human mind. To ascertain how this is brought about forms a necessary supplement to the investigations just concluded. For, as we have seen that climate, food, and soil mainly concern the accumulation and distribution of wealth, so also shall we see that the Aspects of Nature concern the accumulation and distribution of thought. In the first case, we have to do with the material interests of Man; in the other case, with his intellectual interests. . . . The relation between the Aspects of Nature and the mind of Man involves speculations of such magnitude, and requires such a mass of materials drawn from every quarter, that I feel very apprehensive as to the result; and I need hardly say, that I make no pretensions to anything approaching an exhaustive analysis, nor can I hope to do more than generalize a few of the laws of that complicated, but as yet unexplored process by which the external world has affected the human mind, has warped its natural movements, and too often checked its natural progress.

The Aspects of Nature, when considered from this point of view, are divisible into two classes: the first class being those which are most likely to excite the imagination; and the other class being those which address themselves to the understanding commonly so called, that is, to the mere logical operations of the intellect. For although it is true that, in a complete and well-balanced mind, the imagination and the understanding each play their respective parts, and are auxiliary to each other, it is also true that, in a majority of instances, the understanding is too weak to curb the imagination and restrain its dangerous license. The tendency of advancing civilization is to remedy this disproportion, and invest the reasoning powers with that authority, which, in an early stage of society, the imagination exclusively possesses. . . .

Now, so far as natural phenomena are concerned, it is evident, that whatever inspires feelings of terror, or of great wonder, and whatever excites in the mind an idea of the vague and uncontrollable, has a special tendency to inflame the imagination, and bring under its dominion the slower and more deliberate operations of the understanding. In such cases, Man, contrasting himself with the force and majesty of Nature, becomes painfully conscious of his own insignificance. A sense of inferiority steals over him. From every quarter innumerable obstacles hem him in, and limit his individual will. His mind, appalled by the indefined and indefinable, hardly cares to scrutinize the details of which such imposing grandeur consists. On the other hand, where the works of Nature are small and feeble, Man regains confidence: he seems more

able to rely on his own power; he can, as it were, pass through, and exercise authority in every direction. And as the phenomena are more accessible, it becomes easier for him to experiment on them, or to observe them with minuteness; an inquisitive and analytic spirit is encouraged, and he is tempted to generalize the appearances of Nature, and refer them to the laws by which they are governed.

CHAPTER IV

POPULATION OF THE STATE

I. Importance of the Population

28. Human causes that act in history. The relative importance of the physical environment and of the people who inhabit it is suggestively treated in the following:[1]

It must not be supposed that environment alone accomplishes any historical result. Environment acts upon and through man, contributing to the formation of his character and conditioning his activities. In the truest sense, Nature is not an historical cause at all. History is not primarily a study of circumstances, but of the human agents that exist and act among circumstances; not a study of environment, but of what man does acting under environment. . . .

Human nature sums up the main historic causes and agents; the native and universal qualities of the race, the complex of characters that mark man off from inferior creatures. Sagacious as are some species of animals, we have no difficulty in distinguishing the works of man from their works — the ant, the bee, or the beaver. . . . Although hedged about with metes and bounds, he is capable within certain large limits of rising above circumstances or conditions and of asserting a lordship over Nature. Man, then, is the starting point in history. . . .

I. How far race character and national character are due to native inherent qualities, and how far to environment, is a hard question, but fortunately one that lies outside of our present field. Certainly they are among the most potent of historical causes. In a celebrated passage Aristotle pointed out the obvious contrast between the repose of Asia and the energy of Europe. After speaking of the number of citizens of a state, he proceeds to speak of what should be their character: "This is a subject which can be easily understood by any one who casts his eye on the more celebrated states of Hellas, and generally on the distribution of races in the habitable world. Those who live in a cold climate and in (northern) Europe are full of spirit, but wanting in intelligence and skill; and therefore they keep their freedom, but have no political organization,

[1] Copyright, 1893, by D. Appleton and Company.

and are incapable of ruling over others. Whereas the natives of Asia are intelligent and inventive, but they are wanting in spirit, and therefore they are always in a state of subjection and slavery. But the Hellenic race, which is situated between them, is likewise intermediate in character, being high-spirited and also intelligent. Hence it continues free, and is the best governed of any nation, and, if it could be formed into one state, would be able to rule the world. There are also similar differences in the different tribes of Hellas; for some of them are of a one-sided nature, and are intelligent or courageous only, while in others there is a happy combination of both qualities." . . .

The national character of the Jews, the Greeks, and the Romans — the first religious, the second philosophical and literary, and the third practical and legal in their genius — are historical factors of the greatest value and consequence. Such factors should be studied both with reference to the causes that produce them and the effects that they themselves produce. . . .

II. To analyze the genius of the age — what the German calls the Time Spirit — showing what it is, how it comes, and why it goes — is no easy task. That it exercises a controlling power, subordinate only to race and national character, cannot be doubted. Great events cannot be accomplished until the world is ready for their accomplishment. . . . At one time the dogmatic spirit, at another time the scholastic spirit, at a third the spirit of classical antiquity, and then again the rationalistic or modern spirit has swayed the minds of men.

The Time Spirit creates the age. Some things can be done but once. The world will not see the Crusades repeated. The medieval cathedrals, which, as has been said, "often rose out of towns which were then little better than collections of hovels, with but small accumulations of wealth, and without what we now deem the appliances of civilized life, and that also mark the highest ascent of man's spiritual nature above the realities of his worldly lot," cannot be duplicated. We do not anticipate new migrations of nations like those that broke up the Roman Empire, and a second age of maritime discovery is impossible.

The spirit of the age is not the creature of chance, but is the product of causes that may in part be discovered. For example, as one has observed, every great change of belief in Europe has been preceded by a great change in its intellectual condition; the success of any opinion has depended less upon the force of its arguments or the ability of its advocates than upon the predisposition of society to receive it, while this predisposition results from the intellectual type of the age. Men do new things because they want to do them, and they cease doing them because they have come to feel more interest in something else.

So they change their opinions, not so much because they are convinced by formal arguments of the unsoundness of the old and of the soundness of the new, as because they grow out of the old and grow into the new.

III. Individual genius is an historic cause. To adjust the great man and his time is almost as difficult as it is to adjust free will and universal causation. How far is the great man a cause, how far an effect? At this point two divergent tendencies of thought present themselves.

Carlyle emphasizes in the strongest manner individualities, and denounces the opposite tendency as machinelike and degrading. He sneers at all attempts to account for the great man, as to show that he is a product of the times, and maintains that universal history, "the history of what man has accomplished in this world, is at bottom the history of the great men who have worked here." His doctrine is that "history is the essence of innumerable biographies."

Mr. Buckle is perhaps the best representative of the counter tendency. He makes almost nothing of individualities, denies the fact of free will, and resolves history into a necessary sequence, the action of general causes. . . .

The truth lies between these two extremes. Both individualities and general causation play important parts in history. Peter the Hermit must preach the Crusade, Luther must lift up the banner of the Reformation, Napoleon must lead the armies of the Revolution; but, on the other hand, the world must be ready for Peter the Hermit, for Luther, and for Napoleon, or he will accomplish little or nothing. Certainly the mere effervescence and fermentation of society in itself leads to nothing useful and permanent. The crusading spirit did not preach the Crusade, mere reforming tendencies did not nail the theses to the church door or confront Charles V at Worms, the Revolution as a *Zeitgeist* did not overrun and conquer all western and central Europe. Carlyle, in his hero worship, scouts the very conditions that make the hero possible; Buckle, in his devotion to history as a science, overlooks the hero altogether. "The times," says Carlyle, "have indeed called loudly enough for the great man, and he has not answered." To which Mr. Buckle might reply with equal truth, "The great man has indeed called loudly enough to the times, and the times have not answered." . . .

Without entering further into the speculative discussion of the subject, we shall altogether miss the mark unless we recognize the force and value of the leaders of mankind, who are genuine historic causes of great potency. The history of no country more forcibly illustrates the regular and orderly flow of historical causation than our own; but it is impossible to conceive what our history would have been without Washington, Hamilton, Jefferson, Marshall, Lincoln, and Grant.

Among the potent causes that act in history — in war, politics, religion, industry, and trade — ideas and sentiments must be assigned a high rank. Under every historical movement can be found some human factor that transcends mere physical causation. Even the most repulsive political and military struggles can be made intelligible by referring them to human motives. Armies have sometimes been counted the playthings of kings, and war their pastime. But the lines —

> But war 's a game which, were their subjects wise,
> Kings would not play at —

is only partly true. Ambitious rulers have much to answer for, but war has not often been mere ruthless slaughter, killing for the sake of killing; on the contrary, state policies or national ideas are almost always more or less involved. Rome and Carthage contested the supremacy of the Mediterranean Sea; they represented antagonistic ideas and policies, and the best interests of mankind demanded that Rome should triumph. The rule of England in India, harsh as it sometimes seems, promotes the well-being of the people, and autocratic Russia is fulfilling a mission in Central Asia. The destroyers Alaric and Attila embodied the ideas and the passions of the societies that produced them, and from which they derived their power. Napoleon was the child of the Revolution; Emerson says of him that he succeeded because he was surrounded by little Napoleons, who saw in him only their own aims and desires. "Generally speaking," says Count von Moltke, "it is no longer the ambition of monarchs which endangers peace; the passions of the people, its dissatisfaction with interior conditions and affairs, the strife of parties, and the intrigues of their leaders are the causes." . . .

The relations of the two great groups of historic factors are very much a question of time and development. "With each advance of intellectual power, the dependence (of man) upon environment becomes more and more intimate, for with that intelligence the creature seeks beyond itself for opportunities to gratify its desires." So says Professor Shaler. Professor Bryce presents a different view: "Man in his early stages is at the mercy of Nature. Nature does with him practically whatever she likes. He is obliged to adapt himself entirely to her. But in process of time he learns to raise himself above her. It is true he does so by humoring her, so to speak, by submitting to her forces. In the famous phrase of Bacon, *Natura non nisi parendo vincitur*, Nature is not conquered except by obeying her; but the skill which man acquires is such as to make him in his higher stages of development always more and more independent of Nature, and able to bend her to his will in a way that aboriginal man could not do. He becomes

independent of climate, because he has houses and clothes; he becomes independent of winds, because he propels his vessels by steam; to a large extent he becomes independent of daylight, because he can produce artificial light." . . .

Thus, in his savage state, man is a feeble slave, cowering at the feet of Nature, his foster mother; while in a state of high civilization he obtains a mastery and lordship over her. . . . We may sum up in the words of M. Lavisse: "Nature has written on the map of Europe the destiny of certain regions. She determines the aptitudes and hence the destiny of a people. The very movement of events in history creates, moreover, inevitable exigencies, one thing happening because other things have happened. On the other hand, Nature has left on the map of Europe free scope to the uncertainty of various possibilities. History is full of accidents, the necessity of which cannot be demonstrated. Finally, there exists free power of action, which has been exercised by individuals and nations. Chance and freedom of action oppose alike the fatality of Nature and the fatality of historical sequence. To what extent each of these four elements has influenced history cannot be determined with exactness."

29. The agents of civilization. As opposed to the idea that the natural environment is the determining factor in civilization, may be noted the following paragraph by Ward:

Civilization is something that is produced by some kind of agency, and we have seen that that agency is not to be found in the physical surroundings of man, which are passive and inert. And as the only elements in existence are men and things the agents of civilization must be men. The idea that they consist in things, although it passes in some quarters for the scientific view *par excellence*, is really a metaphysical conception worthy of medieval times. It arose as a reaction against that form of hero worship which deified a few individuals and ignored the mass of mankind and their most essential activities. Civilization is the result of the activities of all men during all time, struggling against the environment and slowly conquering nature. . . . This much is certainly true, that the agents of civilization are men, and the question is narrowed down to that of determining what men, and in what manner they have brought it about.

Even a cursory glance at human history reveals the fact that there are immense differences among men in this respect. . . . Whatever the great mass may have done in the way of preserving, perpetuating, and multiplying copies — in a word, through imitation — the number who

originate and invent, who investigate and discover, is surpassing small. . . . But the social value of these few agents must not be underestimated. If it is foolish to worship them as heroes, it is equally unwise to ignore their true significance in the history of the world.

We are confronted by the old question of the rôle of *great men*. We have seen that by certain subtle and obscure processes of nature such rare combinations of ancestral qualities are occasionally formed in the process of generation in the human race as to produce extraordinary minds. It is such minds when afforded the proper opportunity that have produced all the results that the world values. How many such minds there may be at any given time it is impossible to determine, because those that are known to exist are only such as have been permitted by the environment to assert themselves. Great men, then, are the mentally endowed who have had a chance to use their talents. There is reason to believe that this is only a small percentage of those who possess talents. Opportunity alone can show what the true number of mentally endowed individuals is in human society. But the few that we have and have had constitute the real living force of human society. Human achievement is due to them, and but for them there would have been no achievement. It is absurd to talk about civilization as the product of blind natural forces and general environmental conditions unless the men who have chiefly produced it are included among such forces and conditions. We can readily conceive of their absence, but we cannot conceive of the same results being accomplished in their absence. Without them there would be no results. If by any force of circumstances the *élite* of any country were to be removed, that country would be left in a state of intellectual stagnation. Indeed, history has demonstrated this on more than one occasion. When Spain killed off and drove out its *élite* it fell into decadence and never has recovered its vigor. Italy suffered immensely from the same cause and is to-day far behind the leading nations of the world. And these are not the only instances. On the other hand, the brilliant rôle played by Switzerland in the history of science is chiefly due to the rich recruits which that country received from the persecutions carried on in other countries, as de Candolle has so fully shown. There is a still broader aspect to the subject. National degeneracy, while it might be produced by the actual sacrifice of the entire *élite* of any country, is usually due much more to the more or less voluntary abandonment of such countries by their great men, or by men who subsequently become great in the land of their adoption. This need not necessarily be due to oppression. It may be due to other causes. But whatever the cause may be, the country which cannot retain its progressive spirits is doomed to decay. All of which

shows in the most convincing manner that the agents of civilization are the great men and the strong and brilliant minds in the world, and not any vague, impersonal environmental conditions.

II. Race

30. Causes of the fixation of ethnic traits. The cause of the origin of races is a much-disputed question. The influences that account for the creation of physical types are stated by Brinton as follows:

These causes are mainly related to climate and the food supply. The former embraces the questions of temperature, humidity, atmospheric pressure (altitude), malarial or zymotic poisons, and the like. All these bear directly upon the relative activity of the great physiological organs, the lungs, heart, liver, skin and kidneys, and to their action we must undoubtedly turn for the origin of the traits I have named. On the food supply, liquid and solid, whether mainly animal, fish, or vegetable, whether abundant or scanty, whether rich in phosphates and nitrogenous constituents or the reverse, depend the condition of the digestive organs, the nutrition of the individual, and the development of numerous physical idiosyncrasies. Nutrition controls the direction of organic development, and it is essentially on arrested or imperfect, in contrast to completed development, that the differences of races depend.

These are the physiological and generally unavoidable influences which went to the fixation of racial types. They are those which placed early man under the dominion of natural, unconscious evolution, like all the lower animals. To them may be added natural selection from accidental variations becoming permanent when proving of value in the struggle for existence, as shown in the black hue of equatorial tribes, special muscular development, etc.

But I do not look on these as the main agents in the fixation of special traits. No doubt such agencies primarily evolved them. but their cultivation and perpetuation were distinctly owing to *conscious* selection in early man. Our species is largely outside the general laws of organic evolution, and that by virtue of the self-consciousness which is the privilege of it alone among organized beings.

This conscious selection was applied in two most potent directions, the one to maintaining *the physical ideal*, the other toward *sexual preference*. As soon as the purely physical influences mentioned had impressed a tendency toward a certain type on the early community, this was recognized, cultivated and deepened by man's conscious endeavors.

Every race, when free from external influence, assigns to its highest ideal of manly or womanly beauty its special racial traits, and seeks to develop these to the utmost. African travelers tell us that the negroes of the Sudan look with loathing on the white skin of the European; and in ancient Mexico when children were born of a very light color, as occasionally happened, they were put to death. On the other hand the earliest records of the white race exalt especially the element of whiteness. The writer of the Song of Solomon celebrates his bride as "fairest among women," with a neck "like a tower of ivory"; and one of the oldest of Irish hero tales, the *Wooing of Emer*, chants the praises of "Tara, the whitest of maidens." Though both Greeks and Egyptians were of the dark type of the Mediterranean peoples, their noblest gods, Apollo and Osiris, were represented "fair in hue, and with light or golden hair."

The persistent admiration of an ideal leads to its constant cultivation by careful preservation and sexual selection. Thus the peoples who have little hair on the face and body, as most Chinese and American Indians, usually do not like any, and carefully extirpate it. The negroes prefer a flat nose, and a child which develops one of a pointed type has it artificially flattened. In Melanesia if a child is born of a lighter hue than is approved by the village, it is assiduously held over the smoke of a fire in order to blacken it. The custom of destroying infants markedly aberrant from the national type is nigh universal in primitive life. Such usages served to fix and perpetuate the racial traits.

A yet more powerful factor was *sexual preference*. This worked in a variety of ways. It is well known to stock breeders that the closer animals are bred in and in, that is, the nearer the relationship of father and mother, the more prominently the traits of the parents appear in their children and become fixed in the breed. It is evident that in the earliest epoch of the human family, the closest interbreeding must have prevailed without restriction, as it does in every species of the lower animals. By its influences the racial traits were rapidly strengthened and indelibly impressed. This, however, was long before the dawn of history, for it is a most remarkable fact that never in historic times has a tribe been known that allowed incestuous relations, unless as in ancient Egypt and Persia, for a sacrificial or ceremonial purpose. The lowest Australians, the degraded Utes, look with horror on the union of brother and sister. The general principle of marriage in savage races is that of "exogamy," marriage outside the clan or family, the latter being counted in the female line only. This strange but universal abhorrence has been explained by Darwin as primarily the result of sexual indifference arising between members of the same household, and the high

zest of novelty in that appetite. Whatever the cause, the consequences will easily be seen. The racial traits once fixed in the period before this abhorrence arose would remain largely stationary afterwards, and by exogamous marriages would be rendered uniform over a wide area.

This form of conscious selection has properly been rated as one of the prime factors in the problem of race differentiation. The apparently miscellaneous and violent union of the sexes in savage tribes is in fact governed by the most stringent traditional laws, and their confused cohabitations are so only to the mind of the European observer, not to the tribal conscience.

31. Race elements of the United States. The following summary of the racial composition of the American population is given by Hart:

No great modern country has been so much affected by the coming in of foreigners as the United States. In 1900 about 10,500,000 of its residents were born outside of the country: of these nearly 3,000,000 were from Germany or other German-speaking countries; about 1,800,000 were Irish born, England, Scotland, and Canada furnished a total of 1,800,000; Norway, Sweden, and Denmark, about 1,000,000; Slavs of various origin, about 1,200,000; France, Italy, and Mexico together, about 700,000. In forty years the number of Irish-born Americans has been stationary, the Germans have more than doubled, and great numbers of Latin and Slav immigrants have come in from countries unrepresented in 1860.

These race elements are erratically distributed. The Irish and Slavs prefer the cities, the Germans and Scandinavians the open country. Some sections of the United States have almost no immigrants: thus, in the Southern states, leaving out Texas and Missouri, there are only about 400,000 foreigners, — less than are to be found in the single city of Chicago. These foreigners have furnished laborers and workmen for the farm, for railroad building, and for the factory, and they have greatly contributed to the building up of the great Northern cities.

In addition to the 10,500,000 immigrants, nearly 16,000,000 of our countrymen are born of a foreign-born father or mother or both parents; so that of the 75,000,000 Americans, 26,000,000 are chiefly of foreign origin, 9,000,000 are negroes, and only about 40,000,000 are of what may be termed an American stock. Hardly in the history of mankind has a great country received such an influx of mixed population from without; and the present prosperity of the republic is proof that this foreign element upon the whole is safe, and that in the course of

time most of the descendants of foreigners will be absorbed into the body politic.

The negro population of 9,000,000 includes nearly every person who has any discoverable admixture of negro blood, even to the thirty-second degree. That population has a large birth rate, but also a large death rate, and hence increases at a ratio a little less than that of the neighboring white population. The negro population is not altogether confined to the Southern states: there are about 400,000 in the states from Maine to Pennsylvania, and 500,000 in the states from Ohio to the Dakotas. In two of the states in the Union, Mississippi and South Carolina, the negroes are in excess of the white population; and in Alabama, Georgia, and Florida they are nearly equal. In general the negro population tends to concentrate in the counties in which there is already the largest number of negroes, and the white population to move slowly into other parts of the same state.

32. Races in Austria-Hungary. In this state race elements are peculiarly diverse and cause grave problems in politics.[1]

This curiously shaped state [Austria] is divided into seventeen provinces all enjoying extended political powers, and almost all the theater of struggles between two or more of the different races. Some idea of the number of distinct races in the Empire can, indeed, be gathered from the fact that on the assembling of the Reichsrath, or parliament, it has been found necessary to administer the oath in eight different languages. Yet these include only a small part of the tongues and dialects that are spoken in the land. Among the many races that inhabit Austria there are, however, only five important enough to have a marked influence on politics. These are, first, the Germans, who comprise scarcely more than a third of the population, but possess a much larger share of the wealth and culture. They are scattered more or less thickly all through the country, and predominate along the Danube and in the provinces immediately to the south of it. Second, the Bohemians, or Czechs, who are the next most powerful race, and compose a majority of the people in Bohemia and Moravia. Third, the Poles, who form a compact mass in Galicia. Fourth, the Slowenians and other Slavs, living chiefly in the southern provinces in the direction of Trieste. And fifth, the Italians, who are to be found in the southern part of the Tyrol, and in the seaports along the Adriatic. . . .

There are four leading races in Hungary, the Magyar, the Slav, the German, and the Roumanian. The oldest of these is the Roumanian,

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which claims to have sprung from the Roman colonists and the Romanized natives near the mouths of the Danube, and the members of the race certainly speak a language that has a close affinity with Latin. They live in the eastern part of the kingdom, and are especially numerous in Transylvania. . . .

The Slavs are, no doubt, the next most ancient race in Hungary, although the precise time of their migration into the country is obscure. They are now broken up into two distinct branches, that of the Slowachians in the north; and that of the Croats and Serbs, who inhabit Croatia, in the southwest, and extend along the whole southern border of the kingdom. . . .

The Teutonic hordes that swept over Hungary at the time of the downfall of the Roman Empire of the west have left no permanent traces, and the Germans who live there to-day are descended from the more peaceful immigrants of later times. They are found in considerable numbers in the cities throughout the center of the land from west to east, but nowhere do they form the bulk of the population, except in certain parts of Transylvania. Here at the end of the twelfth century a large colony of Saxons was established, who preserved their Teutonic culture, and were allowed to govern their cities after their own customs. . . .

The Magyars, who live chiefly in the vast plains that cover the center and west of Hungary, although a decided minority of the whole people, are the most numerous and by far the most powerful of the races They have ruled the country ever since their first invasion at the close of the ninth century, and in fact they regard it as peculiarly, and one may almost say exclusively, their own. This people is of Turanian origin, but with their conversion to Christianity under Stephen, their first king (997–1038), they acquired the civilization of the west, and lost their Asiatic traditions. The fact that the Magyars are not Aryans has probably been one of the chief causes of their failure to assimilate the other races, but in some ways it has been a source of strength. It has prevented them from looking for support and sympathy, like the Germans and the Slavs, to their kindred in neighboring countries, and thus by making them self-dependent has increased their cohesion and intensified their patriotism.

33. The race problem in modern colonial empires. The question of racial difficulties that must be met by modern colonizing states is suggestively treated by Coolidge:[1]

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The treatment of alien races gives rise to complex questions, some of them of infinite difficulty. The simplest ones relate to the peoples lowest in the social scale. It is comparatively easy to rule over mere savages, especially if they are, like the natives of tropical Africa, far enough away; for in such cases firmness, honesty, patience, and common sense, qualities in which the English as colonial administrators have been preëminent, are the chief requisites. It is another matter to handle people with a higher grade of intelligence and with a history and civilization of their own, such as the Hindus, the Egyptians, or the Arabs of Algeria and Tunis; for the more that is done to educate them and to improve their condition, the more impatient they become at being kept in a state of political inferiority.

Every nation holding colonies will have to face such problems sooner or later. In this respect the Germans have least to trouble them; for their outlying possessions are not numerous, and the few they have are inhabited by peoples who are in such a low state of civilization that it will be long before they can claim self-government of any kind. Many Germans, to be sure, think of the Poles within their own boundaries as an inferior breed; but this inferiority would vanish at once if only the Poles would consent to be Germanized. Greater France contains more subjects than citizens, and the British Empire has some six inhabitants of the subject races to one of the ruling people. Both empires include — one in north, the other in south, Africa — possessions of the kind most difficult to manage; namely, those where the native population is increasing rapidly, but where there are also not merely a few officials and merchants, but a large body of immigrant colonists. The same thing is true of Japan in Korea. It is in such cases, when conquerors and conquered meet in every walk of life, that it is hardest to establish good relations between them. The arrogance of the privileged poor white or the coolie is more galling than the domination of the official, and the task of the home government in reconciling the support which it is obliged to give its colonists with its duty toward the natives under its rule is arduous in the extreme. France and Great Britain, however, enjoy, like Germany, the immense blessing of having no race questions in their home countries, no populations of different color· whatever may happen at a distance, house and home at least are secure from the horrors of race war. In this respect Russia is less favorably situated, for her various peoples all live in one unbroken block of territory, though most of them are within fairly definite separate areas. But they shade into one another to such an extent that it would be hard to say just where the inferior peoples begin. From top to bottom there is no such gap as there is between the American and the negro.

Of all countries, the United States is afflicted with the most complicated race problems. The Filipinos and the Hawaiians are indeed far away, and America could get along pretty well without them; but inside her own borders are populations whose presence brings with it difficulties that tax all the wisdom of her statesmen and make every demand on the self-control, not to say the generosity, of her citizens. Of these populations, only an insignificant fraction represents the original dispossessed inhabitants; the vast majority have inherited an even worse grievance, for they are the descendants of imported slaves. The proper treatment of these people is a matter of momentous importance for the future of the republic.

34. The destiny of races. Brinton discusses the indications that inferior races are disappearing, and comments on the rapid increase of the Eurafrican race.

Beginning at home, we may first inquire concerning the American race. The question, Are the Indians dying out? was investigated some years ago by learned authorities at Washington, who announced the cheerful result that, contrary to the universal opinion, the red man is not decreasing at all, but increasing in numbers! . . .

My own studies convince me that the American race is and has long been disappearing, both actually, tribe by tribe, and relatively, by admixture with the whites. . . . Beginning at the north with the Eskimos we find their number steadily diminishing. . . . The same is true all over the Continent. The American Indian as such is destined to disappear before European civilization. If he retains his habits he will be exterminated; if he aims to preserve an unmixed descent, he will be crushed out by disease and competition; his only resource is to blend his race with the whites, and this infallibly means his disappearance from the scene.

The Island World, extending from Easter Island to Madagascar, presents the same spectacle. . . . This extreme fatality has received the earnest attention of philanthropists and scientific physicians. Its causes are visible. They are the introduction of new epidemics, as measles, smallpox, syphilis and consumption, the last mentioned peculiarly fatal, and now recognized as eminently contagious under certain conditions, an increased infant mortality; drunkenness and its consequences; and diminished fecundity in the women. . . .

Add to the death-rate the considerable percentage of children who are born of unions with the White, the Asian or the African races, and are thus no longer representatives of the ancestral stock, and we must

acknowledge that these insular peoples are in no better, even a worse case than the American Indians. They, too, are sitting beneath the Damocles sword of extinction.

We have been taught in this country to look with something like terror on the teeming millions of China, only awaiting the chance to overrun the whole earth, underbid all other laborers, profit by the fruits of our more liberal governments and nobler religions, and give nothing in return. A few centuries ago a still more dreadful fear haunted the nations of Europe that some other Timurlane or Genghis Khan would lead his countless hordes of merciless Mongolians from the steppes of Siberia across the cultivated fields of the Danube to wipe out, as with a sponge, the glorious picture of renascent European culture.

The latter fear no longer disturbs any mind. The mightiest of the Tartar powers is but a shadow, maintained by the mutual jealousy of Europeans themselves, the illimitable steppes of Tartary and Mongolia acknowledge the suzerainty of the Slavonian; and the nomadic hordes of the steppes and tundras are steadily diminishing under the same baneful influences of civilization which are blighting the Australian and the American.

Whether this is true also of the Sinitic stocks, especially of the Chinese, we have no positive information. It has been rumored that of late years repeated periods of drought, resulting in disastrous famine, have materially reduced the population of the interior of China, many perishing and others removing nearer the coast. As it is only near the coast that foreigners have the opportunity to observe the people, it is likely that they bring away an exaggerated notion of the density of population in the country at large. It is at any rate doubtful if the Chinese are more than stationary.

Widely different is the vista which appears before us when we contemplate the Eurafrican race. It goes forth conquering and to conquer, extending its empire over all continents and to the remotest islands of the sea. Never has that progress been so rapid as to-day. Two centuries ago the whole of the white race which could lay claim to purity of blood numbered not over one hundred millions, or ten per cent. of the population of the world, and was confined to the limits of Europe and North Africa; now the European branch of it alone counts nearly five hundred millions, or one third of the whole. In the year 1800, the nonresident whites of European descent were ten millions; now they are over eighty millions. Every navy and every army of any fighting capacity belong to the European whites and their descendants. No nation and no race of other lineage dare withstand an attack or disobey an order from a leading European power. Africa and Asia are dismembered and parceled

out at London, Berlin and St. Petersburg, and no one dreams of asking the consent of the inhabitants of those continents.

This astonishing progress is not due alone to the North Mediterranean branch of the Eurafrican race. The representatives of the South Mediterranean branch are for a large part in it. In the forefront of it, whether in the great capitals of Europe or in the pioneer towns of the frontiers, we find the acute and versatile Semite full of energy and knowledge, guiding in councils, his master hand on the levers of the vastest financial schemes, his subtle policy governing the diplomacy of statesmen and the decisions of directors. As Professor Gerland has well said, there is something in the Semitic character which is complementary to that of the Aryan, and it is not without significance that the surprising development of the latter began when the religious prejudices against the Jews commenced to yield to more enlightened sentiments. They are now the growing people. Statistics show that in Europe, while the Aryac population doubles in number in thirty-four years, the Semites double in twenty-five years, having more children to a marriage and less infantile mortality. When bigotry ceases on both sides, and free intermarriage restores the Aryo-Semitic stock to its original unity, we may look for a race of nobler capacities than any now existing.

III. Nationality

35. Nationality and the formation of states. The part played by the spirit of nationality in the formation of modern states is thus stated by Bluntschli:

At all times in the history of the world nationality has had a powerful influence on States and on politics. It was the sense of national kinship and national freedom which inspired the Greeks in their struggle with Persia, and the Germans in their conflict with the Romans. Differences of nationality were at the root of the division of the Roman world between the Latin and Greek emperors. The split in the Frankish monarchy, and the separation of France and Germany, was largely due to the difference between the Roman and German languages. Even in the middle ages differences of nationality at times became prominent. But it was not till the present age that the principle of nationality was asserted as a definite political principle. During the middle ages the State was based on dynastic or class interests, and was rather territorial than national. Later centuries saw the growth of the great European peoples, but the State did not as yet gain a basis of nationality nor a national expression: it developed a magisterial character, finding a center in the king and his officials. . . .

When Napoleon, at the beginning of this century, attempted to revive the empire of Charles the Great, and, resting on the French people as a support, to erect a universal monarchy over Europe, he found a stumblingblock in the other peoples, who regarded the French rule with disgust and hatred. In spite of his genius, national resistance proved too strong for the Emperor who could not appreciate nationality. Even then the sense of nationality was only imperfectly developed. Though the sentiment was at work among the unconscious masses, the spirit of nationality was not yet aroused. Even the stubborn and enduring hatred of the English for the French was not so much based on a desire of freeing nationalities from French oppression, as on the hatred of the English aristocracy for the French Revolution, on fear of French preponderance in Europe, and on commercial interests.

The English, in spite of the heightened political consciousness which springs from their manly pride and sense of law, distrust nationality as a political principle. They know that their island kingdom includes different nationalities, and that the national feeling of the Celtic Irish has more than once threatened the unity of the State. Their Indian Empire, too, might be endangered by too strong an insistence on nationality. The Spaniards, in their struggle with the French, felt their own unity as a nation, and hated the French as foreigners: but they regarded it not so much as a struggle for nationality, as a war for their legitimate prince and the Catholic religion against the fiends of the Revolution. The Germans, owing to the differences of religion and the disintegration of the empire into independent dynastic kingdoms, had lost all sense of nationality in politics, and only a few educated people listened to the inspiring words of Fichte and songs of Arndt, when they tried to revive it. The Russians went to battle and to death to defend their Czar and his holy empire against the godless West. they had no thought for their claims as a nation. The French Revolution vaguely proclaimed the principle of the independence of nationalities, but it was trodden under foot at the Restoration. The Congress of Vienna, with utter disregard of national rights, distributed fragments of great peoples among the restored dynasties. As Poland had been already divided among Russia, Austria, and Prussia, so now Italy and Germany were cut up into a number of sovereign states, and Belgium and Holland pieced together into one kingdom, in spite of conflicting nationalities.

The fact that neither the statesmen of the Revolution nor those of the Restoration recognized nationality as a political principle makes its influence on the political history of to-day more marked and striking. Science, especially in Germany and Italy, had already pointed to the idea of nationality, and hinted at its consequences in politics. But only since

about 1840 has the natural right of Peoples to express themselves in the State been appealed to as a practical principle. The impulses to nationality were roused more strongly than ever before, even among the masses, and demanded satisfaction in politics. Peoples desired to give their union a political form and to become Nations. The dynastic system which European States had inherited from the middle ages was now threatened by national demands and passions. Austria especially was shaken by the consequent striving for independence among its various nationalities. The foundation of a united Italy and of the German Empire was inspired by the idea of nationality which gathered the scattered members of one people and organized them in one State. The power of this national impulse is unquestionable, though its limits are not so certain.

Nationality clearly has a closer and stronger connection with the State than with the Church, for it is easier for the Church to be universal. The State is an organized nation, and nations receive their character and spirit mainly from the peoples which live in the State. Hence there is a natural connection and constant interaction between People and Nation.

A people is not a political society; but if it is really conscious of its community of spirit and civilization, it is natural that it should ask to develop this into a full personality with a common will which can express itself in act, in fact, to become a State.

36. Nationality in modern politics. The emphasis placed upon national unity by modern states, and their efforts to secure it at all costs, is clearly brought out in the following:[1]

In spite of the cosmopolitan tendencies of modern socialism, there can be no doubt that the spirit of nationality in one form or another is still a tremendous political force. The last hundred years are full of examples of its action in building up and in destroying. By welding together into national communities states long separated, and by throwing off foreign dominion, it has forged modern Germany, Italy, Roumania, Greece, Servia and Bulgaria. It has nerved the resistance of Poles, Finns, Armenians, and others against the attempts of alien peoples to absorb them. Under its influence, Norway has separated herself from Sweden, Austria is in peril of going to pieces, and even Great Britain is weakened by Irish disaffection. But the same spirit of nationality that awakens the longing for independence also leads to the persecution of recalcitrant minorities. Race conflicts to-day are as intense in their fierceness as the religious ones of earlier times, and are even harder to adjust by fair compromise. When favored by fortune, the oppressed easily become the oppressors.

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Governments and nations fear, and not without reason, that what is at first harmless pride in race and language on the part of some minority may easily take the form of political sedition dangerous to the existence of the state. If the American republic is ever threatened with the formation of distinct national communities within its borders, its unity for the future will cease to be secure.

One difficulty in dealing with all such topics as this is the looseness in meaning of the terms we have to use. When we speak of a nation, we usually have in mind an independent people with a common language; but the Swiss, the Belgians, the Austrians, are nations and each composed of several nationalities with equally acknowledged rights. Nor need a nation be all of the same race, — according to the Fifteenth Amendment to the Constitution, the people of the United States are not. Nor is it always politically independent: the Poles are a nation, though they are under several governments, and the term is sometimes applied to the Jews, who have neither a common speech nor a common dwelling place. Nevertheless, as the history of the last century has shown, the tendency nowadays is for nations and nationalities to correspond as nearly as may be, and for the idea of nationality to be based on language alone, regardless of descent or of the preferences of those concerned, — a tendency which the French have experienced to their cost in the case of Alsace, which was taken away from them on the ground that its inhabitants were Germans, whether they wanted to be or not, and hence properly belonged to Germany. The movement known as Pan-Germanism is a logical outcome of the same theory. The earlier nationalistic movements proclaimed the right of peoples to determine their own destinies; the later extensions have tended to look on nationality as a sort of higher law which is as much justified in overriding the opposition of minorities as were the Northern States of the Union in putting down the rebellion of the Southern. Such a doctrine may easily be pushed to great lengths: sweet reasonableness, not to say common fairness, is seldom a characteristic of ardent champions of nationality, who, as a rule, calmly overlook the most obvious inconsistencies, and while warmly advocating a policy for the assimilation of all alien elements at home, cry out oppression if the same treatment is given to those of their ilk in foreign lands. The German who favors severe measures in order to denationalize the Poles in Posen is sure to be full of indignation at the way in which the German language is discriminated against in Hungary and in the Baltic provinces; and many an American who has condemned the iniquity of trying to Russianize the Finns or the Armenians believes as a matter of course that the English language should be imposed as soon as possible on the inhabitants of Porto Rico.

37. Nationalism in recent politics. Reinsch points out the importance of nationalism and the dangers of its exaggeration :[1]

When we view the historical development of the world since the Renaissance, we find that the one principle about which the wealth of facts can be harmoniously grouped is that of nationalism. Ever since the world-state ideals of the Middle Ages were left behind, this principle has been the touchstone of true statesmanship. The reputation of a statesman, as well as his permanent influence on human affairs, depends on his power to understand and aid the historical evolution, from out the medieval chaos, of strong national states. . . .

Especially during the nineteenth century has nationalism been a conscious influence in political life. The nations that, at its beginning, had partly achieved their independent political existence, have since been striving for the attainment of completely self-sufficing life; while those races that regard themselves as unjustly held in bondage by others have been engaged in a stern struggle to obtain national independence. . . .

It has thus come about that the successful nations have developed a clearly marked individuality. The cosmopolitanism of the Middle Ages and of the Renaissance, the dreams of world unity, have been replaced by a set of narrower national ideals concerning customs, laws, literature, and art, — by a community of independent states, each striving to realize to the fullest its individual aptitudes and characteristics. . . .

It will, however, be difficult to preserve a balance of this kind, as the nationalistic principle bears within it the possible source of its own destruction, and unless carefully guarded against exaggeration, will of itself lead to a disturbance of the equilibrium upon which the diversity of our civilization depends. Within the latter half of the nineteenth century, nationalism has been thus exaggerated; going beyond a healthy desire to express the true native characteristics of a people, it has come, in some quarters, to mean the decrying, as barbarous or decadent, of everything originating outside of the national boundary. Within the state itself, there is a growing tendency to enforce, by custom and law, absolute uniformity of characteristics. Languages and literatures peculiar to smaller communities are not encouraged, the effort being rather made to replace them by the national language. In international politics the motives of foreign nations are being constantly misunderstood. Each nation looks upon itself as the bearer of the only true civilization. . . . Even in art and science, perhaps the most cosmopolitan of all pursuits, this nationalizing tendency has left its mark.

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IV. Political Genius of Various Nations

38. Influences that affect the natural ability of nations. Galton points out certain conditions that affect national ability:

I shall have occasion to show that certain influences retard the average age of marriage, while others hasten it; and the general character of my argument will be to prove, that an enormous effect upon the average natural ability of a race may be produced by means of those influences. I shall argue that the wisest policy is that which results in retarding the average age of marriage among the weak, and in hastening it among the vigorous classes; whereas, most unhappily for us, the influence of numerous social agencies has been strongly and banefully exerted in the precisely opposite direction. . . .

The average age of marriage affects population in a threefold manner. Firstly, those who marry when young have the larger families; secondly, they produce more generations within a given period, and therefore the growth of a prolific race, progressing as it does, "geometrically," would be vastly increased at the end of a long period by a habit of early marriages; and, thirdly, more generations are alive at the same time among those races who marry when they are young. . . .

The time may hereafter arrive, in far distant years, when the population of the earth shall be kept as strictly within the bounds of number and suitability of race as the sheep on a well-ordered moor, or the plants in an orchard house; in the meantime, let us do what we can to encourage the multiplication of the races best fitted to invent and conform to a high and generous civilization, and not, out of a mistaken instinct of giving support to the weak, prevent the incoming of strong and hearty individuals.

The long period of the dark ages under which Europe has lain is due, I believe in a very considerable degree, to the celibacy enjoined by religious orders on their votaries. Whenever a man or woman was possessed of a gentle nature that fitted him or her to deeds of charity, to meditation, to literature, or to art, the social condition of the time was such that they had no refuge elsewhere than in the bosom of the Church. But the Church chose to preach and exact celibacy. The consequence was that these gentle natures had no continuance, and thus, by a policy so singularly unwise and suicidal that I am hardly able to speak of it without impatience, the Church brutalized the breed of our forefathers. She acted precisely as if she had aimed at selecting the rudest portion of the community to be, alone, the parents of future generations. She practiced the arts which breeders would use who aimed at creating ferocious,

currish and stupid natures. No wonder that club law prevailed for centuries over Europe; the wonder rather is that enough good remained in the veins of Europeans to enable their race to rise to its present, very moderate level of natural morality.

The policy of the religious world in Europe was exerted in another direction, with hardly less cruel effect on the nature of future generations, by means of persecutions which brought thousands of the foremost thinkers and men of political aptitudes to the scaffold, or imprisoned them during a large part of their manhood, or drove them as emigrants into other lands. In every one of these cases, the check upon their leaving issue was very considerable. Hence the Church, having first captured all the gentle natures and condemned them to celibacy, made another sweep of her huge nets, this time fishing in stirring waters, to catch those who were the most fearless, truth-seeking, and intelligent in their modes of thought, and therefore the most suitable parents of a high civilization, and put a strong check, if not a direct stop, to their progeny. Those she reserved on these occasions to breed the generations of the future were the servile, the indifferent, and, again, the stupid. Thus, as she — to repeat my expression — brutalized human nature by her system of celibacy applied to the gentle, she demoralized it by her system of persecution of the intelligent, the sincere, and the free. . . .

It is very remarkable how large a proportion of the eminent men of all countries bear foreign names, and are the children of political refugees, — men well qualified to introduce a valuable strain of blood. We cannot fail to reflect on the glorious destiny of a country that should maintain, during many generations, the policy of attracting eminently desirable refugees, but no others, and of encouraging their settlement and the naturalization of their children.

No nation has parted with more emigrants than England, but whether she has hitherto been on the whole a gainer or a loser by the practice, I am not sure. No doubt she has lost a very large number of families of sterling worth, especially of laborers and artisans; but, as a rule, the very ablest men are strongly disinclined to emigrate; they feel that their fortune is assured at home, and unless their spirit of adventure is overwhelmingly strong, they prefer to live in the high intellectual and moral atmosphere of the more intelligent circles of English society, to a self-banishment among people of altogether lower grades of mind and interests. England has certainly got rid of a great deal of refuse through means of emigration. She has found an outlet for men of adventurous and Bohemian natures, who are excellently adapted for colonizing a new country, but are not wanted in old civilizations; and she has also been disembarrassed of a vast number of turbulent radicals and the like,

men who are decidedly able but by no means eminent, and whose zeal, self-confidence, and irreverence far outbalance their other qualities.

The rapid rise of new colonies and the decay of old civilizations is, I believe, mainly due to their respective social agencies, which in the one case promote, and in the other case retard, the marriages of the most suitable breeds. In a young colony, a strong arm and an enterprising brain are the most appropriate fortune for a marrying man, and again, as the women are few, the inferior males are seldom likely to marry. . . .

The best form of civilization in respect to the improvement of the race, would be one in which society was not costly; where incomes were chiefly derived from professional sources, and not much through inheritance; where every lad had a chance of showing his abilities, and, if highly gifted, was enabled to achieve a first-class education and entrance into professional life, by the liberal help of the exhibitions and scholarships which he had gained in his early youth; where marriage was held in as high honor as in ancient Jewish times; where the pride of race was encouraged (of course I do not refer to the nonsensical sentiment of the present day, that goes under that name); where the weak could find a welcome and a refuge in celibate monasteries or sisterhoods, and lastly, where the better sort of emigrants and refugees from other lands were invited and welcomed, and their descendants naturalized.

39. National psychology. Some fundamental contrasts between Anglo-Saxon and Latin political psychology are stated by Coolidge as follows:[1]

Nations, like individuals, are often inconsistent, thereby laying themselves open to the charge of dishonesty on the part of uncharitable neighbors. This is particularly true of the Anglo-Saxon peoples, whose minds are not so uncompromisingly logical as those of the French or the Russians, it explains, for instance, why the English have so often been accused of hypocrisy When the Englishman or the American finds that his premises lead him to conclusions that he dislikes, he is pretty sure to kick over the traces and, regardless of the premises, to accept other conclusions that suit him better. He never allows previous logical subtleties to tempt him into a position which his common sense condemns; but guided by a sound instinct, he acts as he thinks best in each instance, careless of the fact that, by any course of general reasoning, he will appear inconsistent. For a striking example of the difference between Latin and Anglo-Saxon political conceptions, we have but to compare two well-known sayings, — the "Périssent les colonies plutôt qu'un

[1] Copyright, 1908, by The Macmillan Company.

principe" of the French Revolution, and Cleveland's famous remark, "It is a condition which confronts us, not a theory." It is highly characteristic that even Jefferson, perhaps the most theoretical of all American statesmen, accepted without hesitation the responsibility of the purchase of Louisiana, although he believed that he had no constitutional right to take such action.

40. Types of statesmen. The types of statesmen required in Europe and in America are described as follows by Bryce:[1]

In such countries as England, France, Germany, and Italy there is room and need for five sorts of statesmen. Men are wanted for the management of foreign and colonial policy, men combining the talents of a diplomatist with a wide outlook over the world's horizon. The needs of social and economic reform, grave in old countries with the mistakes of the past to undo, require a second kind of statesman with an aptitude for constructive legislation. Thirdly there is the administrator who can manage a department with diligence and skill and economy. Fourthly comes the parliamentary tactician, whose function it is to understand men, who frames cabinets and is dexterous in humoring or spurring a representative assembly. Lastly we have the leader of the masses, who, whether or no he be a skillful parliamentarian, thinks rather of the country than of the chamber, knows how to watch and rouse the feelings of the multitude, and rally a great party to the standard which he bears aloft. The first of these has no need for eloquence; the second and third can get on without it; to the fourth it is almost, yet not absolutely, essential; it is the life breath of the fifth.

Let us turn to America. In America there are few occasions for the first sort of statesman, while the conditions of a Federal government, with its limited legislative sphere, are unfavorable to the second, as frequently changing cabinets are to the third. It is chiefly for persons of the fourth and fifth classes we must look. Persons of those classes we shall find, but in a different shape and guise from what they would assume in Europe. American politics seem at this moment to tend to the production of two types, the one of whom may be called *par excellence* the man of the desk or of the legislature, the other the man of the convention and the stump. They resemble the fourth and fifth of our European types, but with instructive differences.

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CHAPTER V

ORIGIN OF THE STATE

I. General Process of State Formation

41. The origin of the state. The gradual historical process by which the state arose, and some of the main phases in its primitive transitions, are indicated by Burgess in the following:

We know nothing of the influences and the conditions under which the human mind first awakened to the consciousness of the state, and felt the impulse to exert itself for the objective realization of that consciousness. We are fully warranted, however, by the status of human society which history first presents us, in concluding that this great light did not come to all at once. The period of barbaric liberty and self-help permits and promotes the development of the few mighty personalities and their elevation to those heights of superiority over their fellows which the dawn of civilization first illumines. These few great personalities form the nuclei of political organization. They are, at first, priests rather than statesmen. They are inspired by the belief that what they behold in themselves is divinity. They so represent it to the masses of the uninitiated. They invent the means to impress this belief upon the masses. They establish a cult, and from behind its power and influence they govern the people. The religious sanction secures obedience to the laws of the state. Religion and law, church and state, are confused and mingled. They are joint forces in the period when the human race emerges from barbarism and enters upon its course of civilization, but the state is enveloped by the church, and exists only by the moral support which it receives from the church. Under this form the people are disciplined and educated. The consciousness of the state spreads wider. Nonpriestly personalities begin to be touched by its light. They are forced thereby either to regard themselves as priests, or to reflect that the state, in its subjective character, is not a special revelation of the divinity. They either seek entrance into the ranks of the priesthood or begin to dispute its exclusive political powers. The resistance of the priesthood to these movements provokes the view on the part of the newly enlightened that the existing system is a pious fraud, and incites

them to organization about one of their number, as chief, for the purpose of forcing the priesthood to a division of power. The struggle must not be allowed to come to open conflict. The newly initiated must not declare what they have seen to the masses, lest the faith of the masses be shaken and the supports of law and order, of civilization and progress, be destroyed. The two parties must compromise. The priests must divide their powers with the warriors. They must also support the rule of the warriors by the power of religion. The despotism results. In spite of its ugly name, it marks a great step in advance. It gives greater exhibition of violence, but, at the core, it is far less despotic than the theocracy. It leaves a larger sphere of individual activity unrestrained. It lightens the spiritual oppression and depression which rest upon the souls of men, subject at every step and turn to the immediate intervention of divine command. It is a more human, if not a more humane, system. It tends to prevent the respect and obedience for law developed by the theocracy from becoming too timorous and servile. It raises human courage. It opens the way for a more general exertion of human reason. It makes it easier for the consciousness of the state to spread to still wider circles, while it holds fast to what has been won in political piety during the preceding era. It prepares the forces for the terrible struggle of the succeeding era, to whose awakening and exciting power we owe the spread of the consciousness of the state to the masses. The conflict in principle between the royal organization and the priesthood becomes irrepressible. The king loses his religious support in the eyes of the masses. His official subordinates learn to defy him successfully, and by the help of the priesthood to change their official agencies into more or less independent powers. It is an all-around battle between all the existent directing forces of human society. So far as these forces are concerned, it is not only irrepressible, but interminable. They can never bring peace, at best only armistice. A new and still more controlling force must appear. At last, through the educating power of the terrible antagonism, a large proportion of the population is awakened to the consciousness of the state, and feels the impulse to participate in the work of its objective realization. Animated by patriotism and loyalty, by the sense of human interests and by rationality, they gather about their king, as the best existing nucleus of their power. They give him the strength to overcome both defiant priesthood and rebellious officials. They establish the objective unity of the state. They bring the absolute sovereignty to objective realization. They subject all individuals and all associations of individuals to its sway. Apparently they make the king the state. Really they make him but the first servant of the state. The state is now the people in sovereign organization.

This is an immense advance in the development of the state. It is the beginning of the modern political era. Under its educating influence the consciousness of the state spreads rapidly to the great mass of the population, and the idea of the state becomes completely secularized and popularized. The doctrine that the people in ultimate sovereign organization are the state becomes a formulated principle of the schools and of political science and literature. The jurists, the publicists and the moral philosophers lead in the evolution of the idea. The warriors and the priests are assigned to the second place. The sovereign people turn their attention to the perfecting of their own organization. They lay hands upon the royal power. They strip it of its apparent sovereignty and make it purely office. If it accommodates itself to the position, it is allowed to exist; if not, it is cast aside. At last the state knows itself and is able to take care of itself. The fictions, the makeshifts, the temporary supports, have done their work, and done it successfully. They are now swept away. The structure stands upon its own foundation. The state, the realization of the universal in man, in sovereign organization over the particular, is at last established, — the product of the progressive revelation of the human reason through history.

Many are the races of men whose powers have been expended in the process of this development. The torch of civilization has been handed from one to another, as each exhausted bearer has ceased to be the representative of the world's progress. Many are the races, also, which still wait to be touched by the dawn of this great light. Of all the races of the world only the Roman and the Teuton have realized the state in its approximately pure and perfect character. From them the propaganda must go out, until the whole human race shall come to the consciousness of itself, shall realize its universal spiritual substance, and subject itself to the universal laws of its rationality.

This, in many words, is what we mean by the proposition that the state is *a* product, nay, *the* product, of history. It contains, certainly, a nobler conception of the state in origin, development, and ultimate character, and of the relation of the individual to the state, than does any other doctrine or theory. In its contemplation, men feel the impulse to heroic effort, rejoice in sacrifice, learn to know true liberty and to despise fear. If it makes the state more human, it makes humanity more divine.

42. The origin of the state. In discussing the origin of the state, Willoughby emphasizes the subjective phase — the growth of a consciousness of political unity — as follows: [1]

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Though we may not be able to obtain the facts regarding the actual origin of the State, yet we may be able to obtain from history and anthropology data from which, in combination with the operation of the natural and physical forces working in societies of which we do know, we may be able to draw valuable conclusions regarding the conditions of early political society and the early stages of its development.

With the association of man with his kind, arise by necessity social interests. These interests not being in all cases identical with individual interests, and selfishness being an universal trait of mankind, there early comes the necessity for some means whereby the common welfare may be protected. To a certain extent at least it becomes necessary that there should be some means whereby the actions of men may be restrained in so far as they are directed to the satisfaction of individualistic desires that conflict with the common weal.

In addition to the task of preserving internal order is soon imposed that of maintaining the individual autonomy of a society as a political unit. Indeed, it is probable that it is this necessity that is first *consciously* felt. With communal life, and, to a large extent, communal goods, there naturally arises in the mind of each individual a feeling of interest in the welfare and continuance of the social unit of which he is a member. To these utilitarian grounds there are early added sentimental feelings that in the aggregate constitute what is known as Patriotism. Thus is begotten in the minds of the people not only a consciousness of their unity, but an appreciation of the necessity for some sort of organization through which they may continue their existence as a social unit against hostile interests from without, as well as from disintegrating forces from within. As has been said, it is probably this necessity for a military organization that is first consciously felt. Afterwards, when social development has proceeded further, the existence of this armed organization is utilized for the satisfaction of internal needs as their existence is recognized.

Whether by original force or by voluntary recognition and establishment, whether founded upon acknowledged supremacy of personal prowess and sagacity of the leader selected, or whether springing from patriarchal authority the public authority becomes established, cannot now be known and undoubtedly differed in different instances. *But however originated, a public authority once created, the State becomes an established fact.*

With the permanent settlement of tribes upon definite areas of land, the territorial element becomes embraced in the empiric conception of the State, and is henceforth an integral part of its life. The State now becomes a people politically organized in a particular territory, and the

bonds of kinship and tribal relations become supplemented by geographical unity. The duties of the government necessarily widen with the cultivation of land, and with the growth of personal property arises the necessity for increased duties of protection and regulation. Thus as civilization progresses, *pari passu*, social interests become greater, and, by necessity, the governing powers more elaborately organized and endowed with more extensive jurisdictions.

Together with this increasing elaboration of structure comes an increasing definiteness. The powers of the public authority become more strictly defined and their scope and manner of exercise more and more regulated by customs that have crystallized into fixed rules, — rules that collectively represent the jural idea of the given society at its then stage of development.

II. Forces in State Building

43. Prominent forces in state building. Blackmar summarizes the most important influences that tend to create the state, as follows: [1]

The origin of the state is difficult to determine. Like other institutions it has arisen from many sources and under many varying conditions, and like them it came into being gradually and almost imperceptibly. Likewise, its evolution has not been uniform or continuous. Its development cannot be traced to a succession of forms continuously merging into each other, but rather it is a method of life working through all forms. Logically and chronologically the family precedes the formal creation of the state. Yet in the horde, when family grouping is uncertain, or in the patriarchal family, or the tribe, elements of the state frequently appear. For wherever there is concerted action for public good, wherever there is an expression of civic life, however faint, there are the beginnings of the state. . . .

Among the several influences which brought about the state we shall find that of the kinship very strong. It was the foundation of the ancient family group, and when the family government became too unwieldy and the state became necessary the relations of kinship formed the basis of the ethnic group. Religion always proved a strong force in creating the unity and solidarity of the state, for the family religion expanded with the development of the tribe and in the transition from the tribal life to the state a national religion was established. Thus, the family religion of Abraham became the national religion of the Hebrew commonwealth,

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and so the expanded religion of the Aryan household became the national religion of the Greeks. But more powerful perhaps than these as direct agencies were a necessity for order and a desire for protection of all members of the group. It is beyond the power of one man to regulate, control, and deal justly with a large body of people, just as a father deals with his children. The social life becomes too complex for paternalism and so services and functions must be delegated to others. This delegation makes a perpetual differentiation of governmental functions, which is the process of state building. Also, in the encroachments of foreign nations and tribes it becomes essential to organize a whole body of people for defense, and the idea of protection became a strong force in state building.

44. Primitive social organization. The following is a brief description of a type of social life that preceded definite political organization: [1]

It is the custom to speak of the Australians and other savages as living in "tribes." . . . The primitive "tribe" appears to be mainly a group of people engaged in hunting together, a cooperative or communal society for the acquisition of food supply. It would really be better to call it the "pack", for it far more resembles a hunting than a social organization. All its members are entitled to a share in the proceeds of the day's chase, and, quite naturally, they camp and live together. But they are not sharply divided, for other purposes, from other "packs" living in the neighborhood. . . .

The real social unit of the Australians is not the "tribe," but the *totem group*. . . . The totem group is, primarily, a body of persons, distinguished by the sign of some natural object, such as an animal or tree, who may not intermarry with one another. In many cases, membership of the totem group is settled by certain rules of inheritance, generally through females. . . .

The Australian may not marry within his totem. "Snake may not marry snake. Emu may not marry emu." That is the first rule of savage social organization. Of its *origin* we have no knowledge; but there can be little doubt that its *object* was to prevent the marriage of near relations. Though the savage cannot argue on principles, he is capable of observing facts. And the evils of close inbreeding must, one would think, have ultimately forced themselves upon his notice. . . .

The other side of the rule is equally startling. The savage may not marry within his totem, but he must marry into another totem specially

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fixed for him. More than this, he not only marries *into* the specified totem, but he marries the whole of the women of that totem in his own generation. . . . Of course, it must not be supposed, that this condition of marital community really exists in practice. As a matter of fact, each Australian contents himself with one or two women from his marriage totem. But it is a fact that an Australian would see nothing wrong in a man living as the husband of any woman of his marriage totem, provided she were of his own generation. And if an Australian is traveling from tribe to tribe, he will, as a matter of course, find a wife waiting for him in every tribe which contains women of his marriage totem. . . . It will be obvious that, under these arrangements, there are no bachelors or spinsters among the Australian savages; but that . . . marriage is, among them, "a natural state into which both parties are born."

It has been hinted before that some classification is necessary to distinguish the different degrees or generations within the totem group; and this is one of the objects of the mysterious *corroborees*, or ceremonial gatherings, which play so large a part in the life of the savage. . . . At these ceremonies, often lasting for several days, the youths and maidens who have attained to maturity are initiated into some of the mysteries of the totem, often to the accompaniment of painful rites, such as circumcision and other laceration. It is possible that, on such occasions, the initiated are subjected to tattooing, with a view of establishing their identity, and of allotting them to a certain totem, and to a certain generation within that totem.

By this or some other artificial means, the curiously simple system of Australian relationship is constructed. All the women of his marriage totem in his generation are a man's wives, all their children are his children, all the members of his totem in the same generation are his brothers and sisters (whom he may not marry); all the members of his mother's totem are his parents (for descent is nearly always reckoned through females). Parent, child, brother and sister are thus the only relationships recognized. . . .

Whether the totem serves any other purpose than that of prohibiting intermarriage of near relations, and what is the precise connection which the savages believe to exist between themselves and their totems, are much-disputed questions. With regard to the latter, it has been suggested by recent observers that the Australian believes himself to be, in some mysterious way, the *offspring* of his totem. There can also be little doubt that, in some cases at least, the totem is an object of worship, a fetich which will deal destruction if the rule of the intermarriage is not rigidly observed. And, if this be so, we get an interesting glimpse at the rudiments of two of the most powerful factors in human progress —

Religion and Law. It has been said that the progress of religious ideas follows three stages. In the first, man worships some object entirely external to himself, a stone or an animal. In the second, he worships a human being like himself, usually one of his own ancestors. In the third, he has risen to the idea of a God who is both divine and human, unlike and distinct from himself, and yet like to and connected with himself. The Australian totem would answer to the first of these three stages. But it is somewhat significant to notice that the savage's view of his deity is usually that of a malevolent Power, dealing disease and death, and thirsting for human blood. . . .

Closely connected with this view is the savage's rudimentary notion of Law. With him it is a purely negative idea, a list of things which are prohibited, or *taboo*. The origin of these prohibitions is often ludicrous, but they are generally found to be connected with the apprehension of danger. A man is walking along a path, and is struck by a falling branch. Instead of attributing the blow to natural causes, he assumes it to be the result of the anger of the Tree-Spirit, offended by his action in using the path. In the future, that path is *taboo*, or forbidden. . . . The practice of burying alive a victim in the foundations of a house, as a sacrifice to the Earth-Spirit, whose domain is being invaded, is widely spread in savage countries. . . .

Whether the totem bond also serves the purpose of uniting its members together for offense and defense, is also a disputed question. There are traces of such a state of things, and its existence would certainly explain the development of a conspicuous feature of the second or patriarchal stage of society, the *blood-feud* group. But the relations of one group of savages to another are obscure and uncertain. Doubtless the members of a group, whether it be the "tribe" or hunting unit, or the totemistic marriage group, do not recognize any duties towards strangers. But their actual attitude is probably determined by the state of the food supply and the amount of elbow-room. If game is abundant, and hunting grounds large in proportion to the population, distinct groups of savages may exist side by side in a given area without conflict. But if game is scarce, and the land thickly peopled (in the savage state the two things would probably go together), wars and murder are, probably, frequent. Even the revolting practice of cannibalism probably originated in hunger; though there are some races which seem unable to abandon it, even in times of plenty, and plausible reasons are invented for its continuance. But it is one of the surest laws of progress that, with each forward step, the same area is able to maintain an ever-increasing number of people. And so the temptations for war, or at least the excuses for war, are happily ever diminishing.

45. Kinship and state origin. The "patriarchal theory" of state origin is set forth by Woodrow Wilson as follows:

What is known of the central nations of history clearly reveals the fact that social organization, and consequently government (which is the visible form of social organization), originated in *kinship*. The original bond of union and the original sanction for magisterial authority were one and the same thing, namely, real or feigned blood relationship. In other words, families were the original units of social organization; and were at first, no doubt, in a large degree separate. . . . It was only by slow stages and under the influence of many changes of habit and environment that the family organization widened and families were drawn together into communities. A group of men who considered themselves in some sort kinsmen constituted the first State. . . .

Government must have had substantially the same early history amongst all progressive races. It must have begun in clearly defined family discipline. Such discipline would scarcely be possible among races in which consanguinity was subject to profound confusion and in which family organization therefore had no clear basis of authority on which to rest. In every case, it would seem, the origination of what we should deem worthy of the name of government must have awaited the development of some such definite family as that in which the father was known, and known as ruler. Whether or not the patriarchal family was the first form of the family, it must have furnished the first adequate form of government. . . .

When society grew, it grew without any change of this idea. Kinship was still, actually or theoretically, its only amalgam. The commonwealth was for long conceived of as being only a larger kindred. When by natural increase a family multiplied its branches and widened into a *gens*, and there was no grandfather, great-grandfather, or other patriarch living to keep it together in actual domestic oneness, it would still not separate. The extinct authority of the actual ancestor could be replaced by the less comprehensive but little less revered authority of some selected elder of the "House," the oldest living ascendant, or the most capable. Here would be the materials for a complete body politic held together by the old fiber of actual kinship.

Organization upon the basis of a fictitious kinship was hardly less naturally contrived in primitive society. There was the ready, and immemorial, fiction of *adoption*, which to the thought of that time seemed no fiction at all. The adopted man was no less real a member of the family than was he who was natural-born. . . . Whether naturally, therefore, or artificially, Houses widened into tribes, and tribes into

commonwealths, without loss of that kinship in the absence of which, to the thinking of primitive men, there could be no communion, and therefore no community, at all.

46. The family and the state. The fundamental change that has taken place in the relation of the state to the family is well stated by Seeley as follows:[1]

The primitive *man* may, no doubt, differ from the civilized *man* in a hundred different ways, but the primitive *state* — that is, the political organization of the primitive man when compared with that of the civilized — always, I think, differs from it in the same way, viz. that it is far more closely connected with the family. Take any highly civilized state, whether from ancient or from modern history, you scarcely perceive any relation or affinity between its organization and that of the families composing it. In modern England or France, in the Greece or Rome of Demosthenes and Cicero, the family has ceased to have any political importance. So much is this the case that those who, in the seventeenth century, speculated upon the origin of states often show themselves unaware even that in their origin and first beginning states were connected with families. The very tradition of the connection has been lost. It is supposed that a condition of lawless violence, in which the weak were at the mercy of the strong, originally prevailed, and that this was brought to an end by the invention of government, that is, by an agreement to surrender to a single strong man a part of the liberty which each man originally possessed, in return for protection. This theory seems to conceive the primitive community as a mere unorganized crowd of individuals. But the beginning of political organization is given by nature in the family relation. The authority of the paterfamilias may, or may not, be primeval and universal; but certainly in those cases where we are able to trace the history of states furthest back, the starting point seems not to be a condition of universal confusion, but a powerful and rigid family organization. The weak were not at the mercy of the strong, because each weak man was a member of the family, and the family protected him with an energy of which modern society can form no conception. In these cases, too, we are able to trace that the state was not suddenly introduced as a kind of heroic remedy for an intolerable confusion, but that the germ of organization given by nature was developed artificially; that the family grew into something more than a mere family; that it developed itself gradually so much, and acquired so much additional organization, as to disengage itself from the literal family, which now

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reappeared in an independent form within it; and that at last the conventional or fictitious family acquired a character of its own, until it first forgot and then at last denied and repudiated its connection with the natural family.

Observe, I do not mean to assert that the state has in all cases grown up in this way; only that in the most conspicuous instances, where its growth can be traced most certainly, it has gone through these stages.

47. Religion and the city state. Fustel de Coulanges has, probably more than any other writer, emphasized the important part played by religion in the beginnings of political life.

The members of the ancient family were united by something more powerful than birth, affection, or physical strength; this was the religion of the sacred fire, and of dead ancestors. This caused the family to form a single body, both in this life and in the next. The ancient family was a religious rather than a natural association; and we shall see presently that the wife was counted in the family only after the sacred ceremony of marriage had initiated her into the worship, that the son was no longer counted in it when he had renounced the worship, or had been emancipated; that, on the other hand, an adopted son was counted a real son, because, though he had not the ties of blood, he had something better — a community of worship, that the heir who refused to adopt the worship of this family had no right to the succession; and, finally, that relationship and the right of inheritance were governed not by birth, but by the rights of participation in the worship, such as religion had established them. Religion, it is true, did not create the family; but certainly it gave the family its rules; and hence it comes that the constitution of the ancient family was so different from what it would have been if it had owed its foundation to natural affection. . . .

The tribe, like the family and the phratry, was established as an independent body, since it had a special worship from which the stranger was excluded. Once formed, no new family could be admitted to it. No more could two tribes be fused into one; their religion was opposed to this. But just as several phratries were united in a tribe, several tribes might associate together, on condition that the religion of each should be respected. The day on which this alliance took place the city existed.

It is of little account to seek the cause which determined several neighboring tribes to unite. Sometimes it was voluntary; sometimes it was imposed by the superior force of a tribe, or by the powerful will of a man. What is certain is, that the bond of the new association was still

a religion. The tribes that united to form a city never failed to light a sacred fire, and to adopt a common religion. . . .

Thus, in time of peace, as in war time, religion intervened in all acts. It was everywhere present, it enveloped man. The soul, the body, private life, public life, meals, festivals, assemblies, tribunals, battles, all were under the empire of this city religion. It regulated all the acts of man, disposed of every instant of his life, fixed all his habits. It governed a human being with an authority so absolute that there was nothing beyond its control. . . .

These provisions of ancient law were perfectly logical. Law was not born of the idea of justice, but of religion, and was not conceived as going beyond it. In order that there should be a legal relation between two men, it was necessary that there should already exist a religious relation; that is to say, that they should worship at the same hearth and have the same sacrifices. When this religious community did not exist, it did not seem that there could be any legal relation. Now, neither the stranger nor the slave had any part in the religion of the city. A foreigner and a citizen might live side by side during long years, without one's thinking of the possibility of a legal relation being established between them. Law was nothing more than one phase of religion. Where there was no common religion, there was no common law. . . .

It is a singular error, therefore, among all human errors, to believe that in the ancient cities men enjoyed liberty. They had not even the idea of it. They did not believe that there could exist any right as against the city and its gods. . . . The government was called by turns monarchy, aristocracy, democracy; but none of these revolutions gave man true liberty, individual liberty. To have political rights, to vote, to name magistrates, to have the privilege of being archon, — this was called liberty; but man was not the less enslaved to the state. The ancients, especially the Greeks, always exaggerated the importance, and above all, the rights of society; this was largely due, doubtless, to the sacred and religious character with which society was clothed in the beginning. . . .

We have sought to place in a clear light this social system of the ancients, where religion was absolute master, both in public and private life; where the state was a religious community, the king a pontiff, the magistrate a priest, and the law a sacred formula; where patriotism was piety, and exile excommunication; where individual liberty was unknown; where man was enslaved to the state through his soul, his body, and his property; where the notions of law and of duty, of justice and of affection, were bounded within the limits of the city; where human association was necessarily confined within a certain circumference around a prytaneum; and where men saw no possibility of founding larger societies.

48. The struggle of races. Following Gumplowicz and Ratzenhofer in tracing the evolution of organized society through the struggle of races, Ward discusses the origin of the state as follows:[1]

The following are these steps arranged in their natural order: 1. *Subjugation* of one race by another. 2. Origin of *caste*. 3. Gradual mitigation of this condition, leaving a state of great individual, social, and political *inequality*. 4. Substitution for purely military subjection of a form of *law*, and origin of the idea of legal *right*. 5. Origin of the *state*, under which all classes have both rights and duties. 6. Cementing of the mass of heterogeneous elements into a more or less homogeneous *people*. 7. Rise and development of a sentiment of *patriotism* and formation of a *nation*. . . .

There are always great natural differences in men. In civilized societies everybody knows how immensely individuals differ in ability and character. We naturally assume that with savages and low races this is not the case, but this is certainly a mistake. The natural inequalities of uncivilized races are probably fully as great as among civilized races, and they probably exert a still greater relative influence in all practical affairs. For the complicated machinery of a high civilization makes it possible to cover up mediocrity and to smother talent, so that the places that men hold are very rude indices indeed to their fitness or their true merits. In savage life this is not the case, and a chief is almost certain to be a man of force and relative ability of the grade required at that stage of development.

In a conquered race such individual differences are likely to make themselves felt. The assumption all along is that the races considered are not primarily widely unlike. The issue of battle depends only to a small extent on real differences of mind or character. It may be merely accidental, or due to the neglect of the conquered race to cultivate the arts of war. In all other respects it may be even superior to the conquering race. The latter therefore often has to do with its social equals in everything pertaining to the life of either group. The difficulty of enforcing law in a community constituted as we have described must be apparent. With such an intense internal polarization of interests, the conquering race would find it difficult or impossible to frame laws to suit all cases. It could not understand the conquered race definitely enough to be successful even in securing its own interests. In a word, the conquering race needs the assistance of the conquered race in framing and carrying out measures of public policy. This it is never difficult to secure. A large number of the members of the subject race always sooner or later accept

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the situation and are willing to help in establishing and maintaining order. The only basis of such order is the creation of correlative rights and duties under the law. This can only be secured through concessions on the part of the master race to the subject race and the enlistment of the best elements of the latter in the work of social reorganization. This, in fact, is what is sooner or later always done. The conquering race may hold out doggedly for a long time in a harsh military policy of repression and oppression, but it is only a question of time when experience alone will dictate a milder policy in its own interest, and the basis of compromise will at last be reached. The two principles involved are both egoistic, but equilibrate each other and contribute jointly to the result. These are economy on the part of the governing class and resignation on the part of the governed class. These produce concessions from the former and assistance from the latter. The result is that form of social organization known as the state.

49. War and state origin. The important parts played by war and property in the origin and development of the state are, perhaps too strongly, stated in the following:[1]

The origin of the *State, or Political Society*, is to be found in the development of the *art of warfare*. . . . Historically speaking, there is not the slightest difficulty in proving that all political communities of the modern type owe their existence to successful warfare. As a natural consequence, they are forced to be organized on military principles, tempered, doubtless, by a survival of older (patriarchal) ideas. . . .

Although we cannot speak with certainty as to the causes of this development, it is not difficult to suggest one or two facts which may have led to it. Foremost comes the *increase of population*, with its consequent pressure on the means of subsistence. This increase is always, under normal circumstances, steadily going on; and it is dealt with in various ways. Sometimes a pestilence breaks out; and the superabundant population, enfeebled by short allowance of food, is swept away by disease. Sometimes wholesale *migrations* take place to less thickly populated districts; this may be regarded as a real remedy, though perhaps only a temporary one, for the trouble. Sometimes, again, a great new invention enables a largely increased food supply to be produced; the changes from hunting life to pastoral life, and again from pastoral life to agriculture, are examples. Finally, war may break out on a large scale; and the weaker peoples may be either exterminated or reduced to subjection by the stronger.

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Another cause may have been the great increase of *realized wealth* attendant upon successful agriculture, and, still more, industry. Pastoral wealth has this advantage, that it can be moved about with tolerable ease. A weak tribe can fold up its tents, and drive its cattle and sheep out of harm's way. But the wealth of the husbandman cannot be so disposed of. His wealth is in his fields, which he has patiently cultivated, and in his barns and presses which he has filled with corn and wine. He has built himself a permanent *house*, and he will not leave it while a chance of safety, or even of existence, remains. He is a very tempting bait to the military adventurer. Still more is the *craftsman*, with his rich store of wealth, a tempting object of plunder. The sack of an industrial town, with its shops and its stores of goods, is the dream of the freebooter. . . .

Once more, it is natural to suppose that the improvement in the art of working in metals did much to stimulate the military spirit. The superiority of iron, still more of steel weapons and armor, over the old wooden bows and arrows and leather shield and corselet, would give a natural impetus to warfare. Above all, with the tendency towards *specialization* which, as we have seen, is one of the master principles of development, this improvement in the means of warfare would tend to produce a *special military class*, the professional warrior of the modern world. In primitive times every man was a soldier, as civilization progressed, the bulk of people became interested in other things, and fighting became the work of specialists. This fact is directly connected with the origin of the *state*. . . .

A *State* is founded when one of these host leaders with his band of warriors gets permanent control of a definite territory of a considerable size. And, practically speaking, this always occurs in one of two ways. The host leader, after firmly establishing his position as ruler of his own tribe, extends his authority over neighboring tribes, until he becomes ruler of a large territory. . . . Or a State is founded by the successful *migration* and *conquest* by a band of warriors to and of a strange country.

III. Stagnation and Progress

50. The beginnings of progress. The emergence of the state bound by rigid custom, and the beginnings of change and progress, are brilliantly worked out by Bagehot:

The progress of *man* requires the coöperation of *men* for its development. That which any one man or any one family could invent for themselves is obviously exceedingly limited. . . . The rudest sort of

coöperative society, the lowest tribe and the feeblest government, is so much stronger than isolated man, that isolated man (if he ever existed in any shape which could be called man) might very easily have ceased to exist. The first principle of the subject is that man can only make progress in "cooperative groups"; . . . and that it is their being so which makes their value; that unless you can make a strong coöperative bond, your society will be conquered and killed out by some other society which has such a bond, and the second principle is that the members of such a group should be similar enough to one another to cooperate easily and readily together. The cooperation in all such cases depends on a *felt union* of heart and spirit; and this is only felt when there is a great degree of real likeness in mind and feeling, however that likeness may have been attained.

This needful cooperation and this requisite likeness I believe to have been produced by one of the strongest yokes and the most terrible tyrannies ever known among men — the authority of "customary law." . . . And the rule is often of most childish origin, beginning in a casual superstition or local accident. . . .

The necessity of thus forming cooperative groups by fixed customs explains the necessity of isolation in early society. As a matter of fact all great nations have been prepared in privacy and in secret. . . . And the instinct of early ages is a right guide for the needs of early ages. Intercourse with foreigners then broke down in states the fixed rules which were forming their characters, so as to be a cause of weak fiber of mind, of desultory and unsettled action, the living spectacle of an admitted unbelief destroys the binding authority of religious custom and snaps the social cord.

Thus we see the use of a sort of "preliminary" age in societies, when trade is bad because it prevents the separation of nations, because it infuses distracting ideas among occupied communities, because it "brings alien minds to alien shores." And as the trade which we now think of as an incalculable good, is in that age a formidable evil and destructive calamity; so war and conquest, which we commonly and justly see to be now evils, are in that age often singular benefits and great advantages. It is only by the competition of customs that bad customs can be eliminated and good customs multiplied. . . .

Similarly, the best institutions have a natural military advantage over bad institutions. The first great victory of civilization was the conquest of nations with ill-defined families having legal descent through the mother only, by nations of definite families tracing descent through the father as well as the mother, or through the father only. . . . The nations with a thoroughly compacted family system have "possessed the earth," that is,

they have taken all the finest districts in the most competed-for parts; and the nations with loose systems have been merely left to mountain ranges and lonely islands. . . .

I cannot expand the subject, but in the same way the better religions have had a great physical advantage, if I may say so, over the worse. They have given what I may call a *confidence in the universe.* . . . And more directly what I may call the *fortifying* religions, that is to say, those which lay the plainest stress on the manly parts of morality — upon valor, on truth and industry — have had plainly the most obvious effect in strengthening the races which believed them, and in making those races the winning races. . . .

The first work of the first ages is to bind men together in the strong bonds of a rough, coarse, harsh custom; and the incessant conflict of nations effects this in the best way. Every nation is an "hereditary coöperative group," bound by a fixed custom; and out of those groups those conquer which have the most binding and most invigorating customs, and these are, as a rough rule, the best customs. The majority of the "groups" which win and conquer are better than the majority of those which fail and perish, and thus the first world grew better and was improved.

This early customary world no doubt continued for ages. The first history delineates great monarchies, each composed of a hundred customary groups, all of which believed themselves to be of enormous antiquity, and all of which must have existed for very many generations. . . . Long ages of dreary monotony are the first facts in the history of human communities, but those ages were not lost to mankind, for it was then that was formed the comparatively gentle and guidable thing which we now call human nature.

And indeed the greatest difficulty is not in preserving such a world but in ending it. We have brought in the yoke of custom to improve the world, and in the world the custom sticks. In a thousand cases — in the great majority of cases — the progress of mankind has been arrested in this its earliest shape; it has been closely embalmed in a mummy-like imitation of its primitive existence. I have endeavored to show in what manner, and how slowly, and in how few cases this yoke of custom was removed. It was "government by discussion" which broke the bond of ages and set free the originality of mankind. . . .

As soon as this great step upwards is once made, all or almost all, the higher gifts and graces of humanity have a rapid and a definite effect on "verifiable progress" — on progress in the narrowest, because in the most universally admitted sense of the term. . . .

But there is no need to expand this further. The principle is plain

that, though these better and higher graces of humanity are impediments and encumbrances in the early fighting period, yet that in the later era they are among the greatest helps and benefits, and that as soon as governments by discussion have become strong enough to secure a stable existence, and as soon as they have broken the fixed rule of old custom, and have awakened the dormant inventiveness of men, then, for the first time, almost every part of human nature begins to spring forward, and begins to contribute its quota even to the narrowest, even to "verifiable" progress.

51. Social progress. The essential need filled by the state in the general process of social evolution, and the changes in its point of view due to changing conditions are well stated by Ward:[1]

The state is a natural product, as much as an animal or a plant, or as man himself. The basis of the state is law. It was the necessity for general regulation to take the place of the wasteful and difficult special regulation incident to conquest that gradually gave rise to a system of law, and it was the necessity for a social mechanism capable of enforcing law that the state grew up and took definite form. It was shown that until the state was formed there could be no property. Every one must keep his belongings on his person and defend them at every step. No matter how anything may have been acquired, every one has the same right to it and may seize it wherever found. There is no such thing as right outside the state. If property cannot exist except under the protection of the state there can of course be no such thing as capital. There can be no industry in the economic sense. There is no use accumulating, the surplus cannot be retained. Wealth is only possible under the state. The more we reflect upon it the clearer we see that while the state itself achieves little, it is the condition to nearly all achievement. The state was primarily the mediator between conflicting races. Immediately following the conquest the conquered race had no status. It was completely under the dominion of the conquering race. Under the state as soon as formed the conquered race acquired rights and the members of the conquering race were assigned duties. The state thus becomes a powerful medium of social assimilation. The capable and meritorious of the subject race are given opportunity to exercise their faculties. The members of the superior race not belonging to the nobility or the priestly caste enter into business arrangements, become a mercantile or capitalist class, and control the finances of the people. These two classes blend and ultimately form the "third

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estate," which, on account of its activity and usefulness, is destined to increase in influence. . . .

There was absolute need at the outset of regulation and restraint to prevent the destruction of the race, and the first collective action was taken with this end in view. At the stage which produced the state this unrestrained individualism was as strong as ever and equally destructive of order. However natural the origin of the state may seem when we understand the conditions that called it forth, it was, in the last analysis, the result of a social necessity for checking and curbing this individualism and of holding the social forces within a certain orbit, where they could interact without injury and where they could do constructive work. . . . The state was the semi-unconscious product of a sort of group sense of this, organizing the machinery for the protection of the physically weaker, but socially better elements calculated to enrich, embellish, and ultimately to solidify and advance social conditions.

The state was therefore the most important step taken by man in the direction of controlling the social forces. The only possible object in doing this was the good of society as a whole. In part it was no doubt a sentiment of safety. The greatest good possible would be its salvation. But this ethical sentiment was something more than mere race ethics. There was mingled with it some idea of actual social benefit. This went still farther and embraced some vague conception of amelioration and of social progress.

CHAPTER VI

EVOLUTION OF THE STATE

I. The Ancient State

52. Transition from tribal to political organization. The most important steps in the process by which primitive ethnic society is transformed into definite political organizations are stated by Giddings as follows:[1]

But how to incorporate in a tribal state a heterogeneous multitude of unrelated men, is a question which the practical politician . . . does not immediately answer. In the successive attempts of Athens and of Rome to reorganize the commonwealth, . . . all were suggested by the forms through which social evolution had passed or was passing. At Athens, for example, there was, first of all, the attempt which is associated with the name of the legendary hero Theseus, to organize society by classes, namely, the well-born, the husbandmen, and the artisans. . . . It was an attempt to destroy utterly the tribal system in the interest of the feudal system. It inevitably failed because it antagonized the conservative instincts of a majority of the voters. Next was made the attempt attributed to Solon, to organize society on a basis of property and military service. In this plan at Athens, as afterwards at Rome, all freemen, though not connected with any clan, were enrolled in the army and were given a certain voice in public affairs. This scheme also failed because it left the line of demarcation between the tribal and the miscellaneous population as sharp as ever. Not until the time of Cleisthenes was it seen that the most simple and obvious of all possible plans was the only practicable one. . . . The attempt to break down tribal lines was then given over. Clans and tribes had long been localized. Each claimed jurisdiction within definite territorial limits. Within each territorial subdivision were both clansmen and strangers. The state simply decreed that all men who lived within the boundaries of any local subdivision of a tribal domain should be enrolled as members of the local community which dwelt there; that all who dwelt within the domain of any tribe should be enrolled as members of that tribe. Kinship might still be

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traced by those who cared about it. . . . Thus a perfect organization of the state was at last accomplished with the least possible shock to ancient prejudices. In name and form the ancient system remained. Its substance, even, remained for social and religious purposes, but for political purposes its content was entirely changed.

Thus at length the gentile is converted into the civil organization of society. Civic association, irrespective of kinship, becomes the basis of political cooperation. Gradually tribal lines are more or less artificially redrawn, and at length it is forgotten that local boundaries ever marked tribal domains and that village names were once the names of clans. The tribal confederacy has become the territorial state.

It is not to be supposed, however, that the creation of the territorial state obliterates the thought of an ethnic unity. It only subordinates it to a higher ideal, in which the conception of territorial unity is given a more prominent place than it has hitherto held. The state still consciously strives to secure the ethnic unity of its population, but the attempt is not now to preserve the purity of an ancient blood. It is rather to perfect the new ethnic unity that is to emerge from the blending of many elements. . . . The possibilities of assimilation are perceived. It is realized that men who have identified their interests with those of an ancient race, who have learned its language and have adopted its religion, may, by these means, become identified with it in spirit, and ultimately, through intermarriage, may become united with it in blood. Through the influence of this idea the fiction of adoption is preserved in the law of naturalization and the *jus sanguinis* long remains as the law of nationality.

Animated by its enlarged ideas of ethnic and territorial unity, the state enters upon the realization of a positive policy. It endeavors to bring under one sovereignty all related peoples that speak allied languages and that have like interests. It endeavors to bring under one administration all fragments of territory that together form a natural whole for purposes of commerce, social intercourse, and military defense. It attempts, in short, to establish a scientific frontier.

To accomplish this purpose it enters upon a career of aggression which necessitates a perfect internal cohesion. Every interest is in some degree sacrificed to military discipline. Religion, which has long been a medley of ancestral faiths, becomes national and organic. Family, gentile, and local gods are thoroughly subordinated to the national god, who is represented by the king and a centralized priesthood. The national religion, therefore, by its sanctions, upholds the authority of the central administration. Divine qualities are imputed to the king and he is encouraged to assert arbitrary powers.

Under these influences political integration goes irresistibly forward. The stronger absorb the weaker states, until the resulting civil societies become doubly and trebly compound. Moreover, conquest does not end when the scientific frontier has been established. Ambition overleaps its proper bounds. One after another, visions of universal empire arise, before the eyes of Rameses and of Sargon, of Cyrus and of Alexander, of Cæsar and of Charlemagne. Distant peoples that can never be an integral part of the conquering nation are subjugated in mere wantonness of power, and are compelled to pay tribute, which flows in broadening streams of wealth to enrich the capital city. Material splendor rewards the military success. Palaces and temples are its monuments. Statues and tablets record the deeds of its heroes.

Such are the achievements of the nation-making age, of the military-religious period of social evolution. They contribute to civilization two of its essential elements; namely, security of property and of life, and a masterful creative activity of the human spirit, expressing itself in political and religious organization and in a rude but massive and enduring art.

53. Summary of Greek political development. The following brief outline of political history in Greece indicates a number of influences that affect the development of the state, and gives an illustration of the so-called "cycle of political evolution":[1]

First, we examined the "Primitive Polity," to be called monarchy if anything, but where it is interesting to note, in the council of subchiefs or elders and the assembly of the freemen in arms, undeveloped organs which become prominent respectively in the stages of oligarchy and democracy. Then we discussed the transition to primitive oligarchy, of which the most prominent aspect is the reduction of the power of the king, and ultimately the substitution for him of an annual magistracy. The council then becomes the ruling organ, the assembly was probably preserved, but the landowners of old family predominate in it. We observed different causes tending to give the assembly an oligarchical character, namely, conquest; growth, especially in colonies, of new populations without political rights; integration, under the influence of which small landowners and distant tend to drop out of the assembly; increase of inequalities of wealth and economic servitude of poorer freemen. The next phenomenon considered was Tyrannis — "irregular, unconstitutional reversion to monarchy," probably, as in Athens, with constitutional forms preserved; and we distinguished the earlier type

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developed out of the demagogue, and for which the reaction against early oligarchy gave the opportunity, from the later for which the employment of mercenaries was a favoring condition. We noted that Tyrannis was a prevalent type at certain periods, but not a necessary stage through which Greek states passed.

Then, when the earlier Tyrannis has, speaking broadly, disappeared, the brilliant period of Greek history has begun which is generally characterized by a drift towards democracy. We can trace the progress in the democratic direction from stage to stage at Athens, where a stable democratic constitution is finally established at the end of the fifth century, which remains substantially unaltered up to the time of the subjugation under Macedonia. And elsewhere in Greece the same tendency to democracy is seen — though it does not by any means prevail universally. In one or two cases, as far as we know, the oligarchical form of polity maintains itself throughout this period; more often we hear of oscillation between oligarchy and democracy. Also, in the later part of the time, the habit of employing mercenaries gives a new opportunity for Tyrannis. Then the Macedonian predominance and empire closes the period of effective independence of the city states, and we come to the last noteworthy product of the fertile inventiveness of the Greek mind in the department of political construction: the Federal system, of which the remarkable development in the third century B.C. sheds a gleam of interest on the last stage of the history of free Greece, the period intervening between Macedonian predominance and the final absorption of Greece under Roman rule.

In considering the causes of transition from one form of government to another, we have so far directed our attention chiefly — putting conquest aside — to internal causes. Among these, economic causes are very important; *e.g.* the growing inequality of wealth tended, as we saw, to alter the primitive polity in an oligarchical direction, making the poor freeman more dependent on the rich: while again the more extensive use of money, leading to borrowing on the part of the smaller cultivators, aggravated this inequality into a felt oppressiveness, and tended both in Greece and Rome to movements against the primitive oligarchy. Also — especially in colonies and commercial cities — the growth of new wealth, outside the privileged classes, was a cause making for change.

But, apart from economic causes, one main impulse to change is doubtless derived from the spread of the simple conviction that "one man is as good as another" — those outside the group politically privileged as good as those inside; a conviction of which the practical effect would be continually strengthened by the openness to new ideas — the weakening of the force of mere custom and habit — which the gradual

civilization and the mutual communication of so many independent communities would cause. This conviction is most obviously effective in the drift to democracy, but we may suppose it operative in earlier stages in a more limited form. . . .

But when we speak of the efficiency of the king or government, we have already passed the line separating internal from external relations of the community, since the efficiency of the primitive king was largely estimated with a view to war; in fact, as we saw, the introduction of a war chief, distinct from the hereditary king, is said to have been the first step in the process of change to oligarchy at Athens. And no doubt more generally, war was sometimes an important factor in producing a change in the form of government, and sometimes, on the other hand, a source of stability, when the established government proved itself efficient. We have noted again that the development of the city state out of the more primitive group of village communities was importantly favored by the value of the protection of the walled town in war.

And finally, the predominance of federalism in the last stages of the history of Greece was chiefly caused by the necessity, after the Macedonian conquest of the Persian empire, of having states larger than the old city state, to resist Macedonia and the large states formed out of the fragments of Alexander's empire. I may add that the necessity of greater strength for defense in war has been the cause of federalism in medieval and modern Europe as well as in ancient Greece.

54. Formation of the Roman Empire. The failure of the Roman republic and the causes that led to the establishment of the Empire are concisely given in the following:

Rome had left no state able to keep the seas or guard the frontiers of civilization. It was therefore her plain duty to police the Mediterranean lands herself. In her attempts to do this, she was drawn on from conquest to conquest, and became mistress of the world before she had learned how to rule it. Formerly she had devised a system fit for a free city as the center of allied Italy; but now she failed to create a new system fit for a free city as the center of the world. The reaction of her conquests, too, lowered her own moral tone and contributed to her decay, economic and political, until she could no longer fulfill her old task of governing Italy, or even herself. From the path of empire there was no retreat; but to that empire the city commonwealth was to sacrifice its own liberty.

There followed a miserable century of plunder in the provinces and of civil strife at home. The internal conflict was threefold: in Rome

itself, between rich and poor; in Italy, between Rome and the "Allies"; in the empire, between Italy and the Provinces. At the same time, the police duty itself was neglected; the seas swarmed with pirate fleets, and new barbarian thunderclouds gathered unwatched on all the frontiers.

The irresponsible senatorial oligarchy proved incompetent and indisposed to grapple with these problems, and its jealousy crushed individual statesmen who tried to heal the diseases of the state in constitutional ways. A century later, the situation had become unbearable within, and the Roman world seemed on the verge of ruin from barbarian assault from without. But, after all, the vigor of the Italian race was unexhausted; and the breakdown of senatorial rule, and the danger of a worse mob rule, bred the only resource, — the military rule of Marius, Sulla, Pompey, and Cæsar.

These leaders began a new system. We call it the Empire. Its essence was to be the concentration of power and responsibility. It was to remedy much. For centuries it guarded civilization against attacks from without, while it secured order, good government, and prosperity within. Political life for the people it could not restore. To combine liberty with imperial extent was to be left to a later race on a new stage.

II. The Medieval State

55. Similarities among Greek, Roman, and Teutonic institutions. Sidgwick points out certain similarities in the early political methods of Greeks, Romans, and Teutons, as follows:[1]

At the outset it is important to observe that, divergent as are the lines of development of Greco-Italian and Teutonic civilization, they yet are not so far apart in their beginnings. When we compare the earliest forms of political society in Greece, Rome, and Germany, as the best attainable evidence shows them, we find — among important differences — a certain agreement in general features. Indeed, according to Freeman, "there is one form of government which, under various modifications, is set before us in the earliest glimpses which we get of the political life of at least all the European members of the Aryan family. This is that of the single king or chief, first ruler in peace, first captain in war, but ruling not by his own arbitrary will, but with the advice of a council of chiefs eminent for age or birth or personal exploits, and further bringing all matters of special moment for the final approval of the general assembly of the whole people. . . . It is the form of government which

[1] By permission of The Macmillan Company.

we see painted in our first picture of European life in the songs of Homer. . . . It is the form of government which tradition sets before us as the earliest form of that ancient Latin constitution out of which grew, first the Commonwealth, and then the Empire of Rome. It is no less the form of government which we see in the first picture of our race drawn for us by the hand of Tacitus, and in the glimpses given us by our own native annals of the first days of our own branch of that race when they made their way into this island in which we dwell." [1]

56. The feudal state. The conditions in western Europe that led to feudalism, and some of the essential features of the system, are given by Adams as follows:

We have endeavored to present in this sketch, as fully as possible in the space at our command, the rise of the feudal system. Comparatively insignificant practices, of private and illegal origin, which had arisen in the later Roman empire, and which were continued in the early Frankish kingdom, had been developed, under the pressure of public need, into a great political organization extending over the whole West, and virtually supplanting the national government. The public need which had made this development necessary was the need of security and protection. Men had been obliged to take refuge in the feudal castle, because the power of the state had broken down. This breakdown of the state, its failure to discharge its ordinary functions, was not so much due to a lack of personal ability on the part of the king, as to the circumstances of the time, and to the inability of the ruling race as a whole to rise above them. The difficulty of intercommunication, the breakdown of the old military and judicial organization, partly on account of this difficulty, thus depriving the state of its two hands, the lack of general ideas and common feelings and interests, seen for example in the scanty commerce of the time, the almost total absence, in a word, of all the sources from which every government must draw its life and strength, this general condition of society was the controlling force which created the feudal system. The Germans, in succeeding to the empire of Rome, had inherited a task which was as yet too great for the most of them, Merovingian and Carolingian alike. Only by a long process of experience and education were they to succeed in understanding its problems and mastering its difficulties. This is only saying in a new form what we have before said in other connections, that the coming in of the Germans must of necessity have been followed by a temporary decline of civilization. This was just as true of government and political order

[1] "Comparative Politics," Lecture II, pp. 65, 66.

as of everything else, and the feudal system is merely, in politics, what the miracle lives and scholasticism are in literature and science. . . .

It is evident that a system of this sort would be a serious obstacle in the reconstruction of a strong and consolidated state. It is a fact still more familiar to us that the legal and social privileges, the shadow of a once dominant feudalism, which the state allowed to remain or was forced to tolerate, secured for it a universal popular hatred and condemnation. But these facts ought not to obscure for us the great work which fell to the share of feudalism in the general development of civilization. The preceding account should have given some indication, at least, of what this work was. The feudal castle, torn to pieces by the infuriated mob of revolted peasants, as the shelter of tyrannous privileges, was originally built by the willing and anxious labor of their ancestors as their only refuge from worse evils than the lord's oppression. . . .

Feudalism is a form of political organization which allows the state to separate into as minute fragments as it will, virtually independent of one another and of the state, without the total destruction of its own life with which such an experience would seem to threaten every general government. . . .

It was this that feudalism did. It was an arrangement suited to crude and barbarous times, by which an advanced political organization belonging to a more orderly civilization might be carried through such times without destruction, though unsuited to them, and likely to perish if left to its own resources. There is no intention of asserting in this proposition that such a system is ideally the best way to accomplish this result, or that it could not have been done, perhaps with less time and expense, by some other expedient, but only that this is what it did do historically, and possibly further that the general history of the world shows it to be a natural method in similar cases.

57. Essential principles of the medieval empire. The theory underlying the medieval concept of the Holy Roman Empire is brilliantly worked out by Bryce :[1]

There was, nevertheless, such a thing as medieval imperialism, a theory of the nature of the state and the best form of government, which has been described once already, and need not be described again. It is enough to say, that from three leading principles all its properties may be derived. The first and the least essential was the existence of the state as a monarchy. The second was the exact coincidence of the

[1] By permission of The Macmillan Company.

state's limits and the perfect harmony of its workings with the limits and the workings of the church. The third was its universality. These three were vital. Forms of political organization, the presence or absence of constitutional checks, the degree of liberty enjoyed by the subject, the rights conceded to local authorities, all these were matters of secondary importance. But although there brooded over all the shadow of a despotism, it was a despotism not of the sword but of law; a despotism not chilling and blighting, but one which, in Germany at least, looked with favor on municipal freedom, and everywhere did its best for learning, for religion, for intelligence; a despotism not hereditary, but one which constantly maintained in theory the principle that he should rule who was found the fittest. To praise or to decry the Empire as a despotic power is to misunderstand it altogether. We need not, because an unbounded prerogative was useful in ages of turbulence, advocate it now; nor need we, with Sismondi, blame the Frankish conqueror because he granted no "constitutional charter" to all the nations that obeyed him. Like the Papacy, the Empire expressed the political ideas of a time, and not of all time: like the Papacy, it decayed when those ideas changed; when men became more capable of rational liberty; when thought grew stronger, and the spiritual nature shook itself more free from the bonds of sense.

58. Individualism in the feudal state. The contributions of the medieval period to the principles that underlie modern democracy are pointed out by Woodrow Wilson:

Through all the developments of government down to the time of the rise of the Roman Empire the State continued, in the conception of the western nations at least, to eclipse the individual. Private rights had no standing as against the State. Subsequently many influences combined to break in upon this immemorial conception. Chief among these influences were Christianity and the institutions of the German conquerors of the fifth century. Christianity gave each man a magistracy over himself by insisting upon his personal, individual responsibility to God. For right living, at any rate, each man was to have only his own conscience as a guide. In these deepest matters there must be for the Christian an individuality which no claim of his State upon him could rightfully be suffered to infringe. The German nations brought into the Romanized and partially Christianized world of the fifth century an individuality of another sort, — the idea of allegiance to individuals. Perhaps their idea that each man had a money value which must be paid by any one who might slay him also contributed to the process of

making men units instead of State fractions; but their idea of personal allegiance played the more prominent part in the transformation of society which resulted from their western conquests. The Roman knew no allegiance save allegiance to his State. He swore fealty to his *imperator* as to an embodiment of that State, not as to an individual. The Teuton, on the other hand, bound himself to his leader by a bond of personal service which the Roman either could not understand or understood only to despise. There were, therefore, individuals in the German State: great chiefs or warriors with a following (*comitatus*) of devoted volunteers ready to die for them in frays not directed by the State, but of their own provoking. There was with all German tribes freedom of individual movement and combination within the ranks, — a wide play of individual initiative. When the German settled down as master amongst the Romanized populations of western and southern Europe, his thought was led captive by the conceptions of the Roman law, as all subsequent thought that has known it has been, and his habits were much modified by those of his new subjects; but this strong element of individualism was not destroyed by the contact. It lived to constitute one of the chief features of the Feudal System. . . .

This system was fatal to peace and good government, but it cleared the way for the rise of the modern State by utterly destroying the old conceptions. The State of the ancients had been an entity in itself, — an entity to which the entity of the individual was altogether subordinate. The Feudal State was merely an aggregation of individuals, — a loose bundle of separated series of men knowing few common aims or actions. It not only had no actual unity: it had no thought of unity. National unity came at last, — in France, for instance, by the subjugation of the barons by the king; in England by the joint effort of people and barons against the throne, — but when it came it was the ancient unity with a difference. Men were no longer State fractions; they had become State integers. The State *seemed* less like a natural organism and more like a deliberately organized association. Personal allegiance to kings had everywhere taken the place of native membership of a body politic. Men were now subjects, not citizens.

Presently came the thirteenth century with its wonders of personal adventure and individual enterprise in discovery, piracy, and trade. Following hard upon these, the Renaissance woke men to a philosophical study of their surroundings, — and above all of their long-time unquestioned systems of thought. Then arose Luther to reiterate the almost forgotten truths of the individuality of men's consciences, the right of individual judgment. Erelong the new thoughts had penetrated to the masses of the people. Reformers had begun to cast aside their scholastic

weapons and come down to the common folk about them, talking their own vulgar tongue and craving their acquiescence in the new doctrines of deliverance from mental and spiritual bondage to Pope or Schoolman. National literatures were born. Thought had broken away from its exclusion in cloisters and universities and had gone out to challenge the people to a use of their own minds. By using their minds, the people gradually put away the childish things of their days of ignorance, and began to claim a part in affairs. Finally, systematized popular education has completed the story. Nations are growing up into manhood. Peoples are becoming old enough to govern themselves.

III. The Modern State

59. Rise of monarchic states. The rise of national states, in the form of absolute monarchies, that characterized the close of medieval and the beginning of modern political history is briefly outlined in the following:

Before 1300, Europe had tried various principles of organization. *Feudal aristocracy* and *town democracy* had both been found wanting in order and permanence. The ideal of a *universal monarchy* had been shattered by the quarrel between popes and emperors. The *papacy* (theocratic rule) had seemed to come out of that struggle triumphant, but almost at once it was to fall before a new form of organization, — the separate *monarchic states*, into which Europe had been growing. Says Lavisse, "from the wreck of the two universal powers (papacy and empire), the various nationalities emerged. Just as Christendom had succeeded the Roman Empire, so Europe succeeded Christendom."

This rise of "new monarchies," each with a definite territory, is the political change that characterized the close of the Middle Ages. Each such territory had contained several distinct, mutually jealous classes, — nobles, burgesses, artisans, clergy, peasantry, — and for centuries, French nobility and German nobility had had more in common with each other than either had with the townsmen of their own country. So of the other classes. Social unity and sympathies had not been *national*, German or English: they had followed the lines of *class-cleavage* across Europe. The monarchies were to change all this. They were to weld these classes, within each of their respective territories, into one nation with a common patriotism. Probably no king put this end before him clearly as his task; but the result followed naturally from the thing the king did strive for, — namely, to consolidate the numerous petty feudal states within his realm into one state with a uniform administration centering in his will.

While this was being accomplished, some old liberties were lost and the monarchs became despots: but the liberties were of a kind that had proved to be intertwined with anarchy, and the seeming loss was only for a time. A few centuries later there was to grow up a freer, broader, more secure freedom than had ever before been possible.

In Germany and Italy the destructive conflict between papacy and Empire ruined all chance for progress toward national monarchies for hundreds of years. Until 1250, these countries had been the centers of interest; then leadership passed to England, France, and Spain, — the lands in which the new monarchic movement was best developed.

60. Science and the spirit of reform. One of the leading influences that struck a powerful blow at the remnants of feudal institutions in modern Europe is thus stated in a recent book:

A thoughtful observer in the eighteenth century would, as we have seen, have discovered many mediæval institutions which had persisted in spite of the considerable changes which had taken place in conditions and ideas during the previous five hundred years. Serfdom, the guilds, the feudal dues, the nobility and clergy with their peculiar privileges, the declining monastic orders, the confused and cruel laws, — these were a part of the heritage which Europe had received from what was coming to be regarded as a dark and barbarous period. People began to be keenly alive to the deficiencies of the past, and to look to the future for better things, even to dream of progress beyond the happiest times of which they had any record. They came to feel that the chief obstacles to progress were the outworn institutions, the ignorance and prejudices of their forefathers, and that if they could only be freed from this incubus, they would find it easy to create new and enlightened laws and institutions to suit their needs.

This attitude of mind seems natural enough in our progressive age, but two centuries ago it was distinctly new. Mankind has in general shown an unreasoning respect and veneration for the past. Until the opening of the eighteenth century the former times were commonly held to have been better than the present, for the evils of the past were little known while those of the present were, as always, only too apparent. Men looked backward rather than forward. They aspired to fight as well, or be as saintly, or write as good books, or paint as beautiful pictures, as the great men of old. That they might excel the achievements of their predecessors did not occur to them. Knowledge was sought not by studying the world about them but in some ancient authority. In Aristotle's vast range of works on various branches of

science, the Middle Ages felt that they had a mass of authentic information which it should be the main business of the universities to explain and impart rather than to increase or correct it by new investigations. Men's ideals centered in the past, and improvement seemed to them to consist in reviving, so far as possible, the "good old days."

It was mainly to the patient men of science that the western world owed its first hopes of future improvement. It is they who have shown that the ancient writers were mistaken about many serious matters and that they had at best a very crude and imperfect notion of the world. They have gradually robbed men of their old blind respect for the past and, by their discoveries, have pointed the way to indefinite advance, so that now we expect constant change and improvement and are scarcely astonished at the most marvelous inventions. . . .

Those who accepted the traditional views of the world and of religion, and opposed change, were quite justified in suspecting that scientific investigation would sooner or later make them trouble. It taught men to distrust, and even to scorn, the past which furnished so many instances of ignorance and gross superstition.

61. The eighteenth and nineteenth centuries. The following is a brief summary of the political development of the past two centuries. It also suggests the chief political problems of the present:

We have seen how, in the eighteenth century, the European monarchs light-heartedly made war upon one another in the hope of adding a bit of territory to their realms, or of seating a relative or friend on a vacant throne. Such enterprises were encouraged by the division of Germany and Italy into small states which could be used as counters in this royal game of war and diplomacy. But nevertheless in the eighteenth century European history was already broadening out. The whole eastern half of the continent was brought into relation with the West by Peter the Great and Catharine, and merchants and traders were forcing the problem of colonial expansion upon their several governments. England succeeded in driving France from India and America and in laying the foundation of that empire, unprecedented in extent, over which she rules to-day. Portugal and the Netherlands, once so conspicuous upon the seas, had lost their importance, and the grasp of Spain upon the New World was relaxing.

We next considered the condition of the people over whom the monarchs of the eighteenth century reigned, — the serfs, the townspeople with their guilds, the nobility, the clergy, and the religious orders. We noted the unlimited authority of the kings and the extraordinary

prerogatives and privileges enjoyed by the Roman Catholic clergy. The origin of the Anglican Church and of the many Protestant sects in England was explained. We next showed how the growing interest in natural science served to wean men from their reverence for the past and to open up vistas of progress; how the French philosophers, Voltaire, Diderot, Rousseau, and many others, attacked existing institutions, and how the so-called enlightened despots who listened to them undertook a few timid reforms, mainly with a view of increasing their own power. But when at last, in 1789, the king of France was forced to call together representatives of his people to help him fill an empty treasury, they seized the opportunity to limit his powers, abolish the old abuses, and proclaim a program of reform which was destined to be accepted in turn by all the European nations.

The wars which began in 1792 led to the establishment of a temporary republic in France, but a military genius, the like of which the world had never before seen, soon brought not only France but a great part of western Europe under his control. He found it to his interest to introduce many of the reforms of the French Revolution in the countries which he conquered and, by his partial consolidation of Germany and the consequent extinction of the Holy Roman Empire, he prepared the way for the creation later of one of the most powerful European states of to-day.

Since the Congress of Vienna, which readjusted the map of Europe after Napoleon's downfall, a number of very important changes have occurred. Both Germany and Italy have been consolidated and have taken their places among the great powers. The Turk has been steadily pushed back, and a group of states unknown in the eighteenth century has come into existence in the Balkan peninsula. Everywhere the monarchs have lost their former absolute powers and have more or less gracefully submitted to the limitations imposed by a constitution. Even the Tsar, while still calling himself "Autocrat of all the Russias," has promised to submit new laws and the provisions of his yearly budget to a parliament, upon which he and his police, however, keep a very sharp eye.

Alongside these important changes an Industrial Revolution has been in progress, the influence of which upon the lives of the people at large has been incalculably greater than all that armies and legislative assemblies have accomplished. It has not only given rise to the most serious problems which face Europe to-day but has heralded in imperialism. During the latter half of the nineteenth century the European powers, especially England, France, Germany, and Russia, have been busy opening up the vast Chinese Empire and other Asiatic countries to European

influences, and in this way the whole continent of Asia has, in a certain sense, been drawn into the current of European history. Africa, the borders alone of which were known in 1850, has, during the past thirty years, been explored and apportioned out among the European powers. It will inevitably continue for many years to be completely dominated by them. These are perhaps the most striking features of our study of the past two hundred years. . . . Among the most important questions which have been discussed in newspapers, books, and public assemblies since the opening of the French Revolution are those connected with government. They may, perhaps, be reduced to three: (1) Who shall control the government? (2) How far shall the government be forbidden to interfere with the independence of individual citizens in the conduct of their own affairs? (3) What, on the other hand, shall be the responsibilities of the government in protecting the members of society, preventing them from injuring one another, and in promoting the general welfare?

62. The modern national state. Burgess, the leading exponent of the importance of geographic and ethnic unity, gives the following panegyric of the modern national state:

The national state is the most modern product of political history, political science and practical politics. It comes nearer to solving all the problems of political organization than any other system as yet developed. In the first place, it rescues the world from the monotony of the universal empire. This is an indispensable condition of political progress. We advance politically, as well as individually, by contact, competition and antagonism. The universal empire suppresses all this in its universal reign of peace, which means, in the long run, stagnation and despotism. At the same time, the national state solves the problem of the relation between states by the evolution of the system of international law. Through this it preserves most of the advantages of the universal empire while discarding its one-sided and intolerant character. In the second place, the national state solves the problem of the relation of sovereignty to liberty; so that while it is the most powerful political organization that the world has ever produced, it is still the freest. This is easy to comprehend. The national state permits the participation of the governed in the government. In a national state the population have a common language and a common understanding of the principles of rights and the character of wrongs. This common understanding is the strongest moral basis which a government can possibly have; and, at the same time, it secures the enactment and administration of laws whose righteousness must be acknowledged, and whose effect will be the realization of the

truest liberty. In the third place, the national state solves the question of the relation of central to local government, in that it rests upon the principle of self-government in both domains. In the perfect national state there can thus be no jealousy between the respective spheres; and the principle will be universally recognized that, where uniformity is necessary, it must exist; but that where uniformity is not necessary, variety is to reign in order that through it a deeper and truer harmony may be discovered. The national state is thus the most modern and the most complete solution of the whole problem of political organization which the world has as yet produced; and the fact that it is the creation of Teutonic political genius stamps the Teutonic nations as the political nations *par excellence*, and authorizes them, in the economy of the world, to assume the leadership in the establishment and administration of states.

63. The future of the national state. Willoughby suggests that nationality may be a transient phase of political development, and points out the influences tending toward "internationality."[1]

The tendency of course is, as indicated in Mill's definition, for Nations to constitute themselves as individual States, and it may be said that this demand for political unity constitutes the surest index to the existence of a national feeling. Hence, most publicists see in the national State the most perfect type of political development thus far attained.

The advancing enlightenment of the masses has been instrumental in creating the true feeling of nationality, that is to say, a demand for unity based upon some other ground than mere coercive political control; and the present century has seen the enormous influence that this principle has had in reforming the political map of Europe. At the same time the point may be made that it is not too much to expect that this same spirit of enlightenment that has thus given rise to this demand for a redemarcation of political boundaries will, in turn, as civilization continues to advance, make this demand less imperative. And for this reason: While at first the enlightenment of the masses creates in them a consciousness of their own individuality and solidarity, and thus a national feeling; at the same time, as the culture of the people increases, their sympathies become more cosmopolitan, and their appreciation of the true unity of all humanity more real. Ethnic, lingual, and even political unity will thus exercise comparatively less and less influence as Nations find themselves drawn into a higher and more intellectual union. At the same time, also, economic interests will tend more and more to cross national

[1] Copyright, 1896, by The Macmillan Company.

and political boundaries, and thus unite with increasing closeness the material interests of different Peoples.

It may thus be entirely possible that the spirit of nationality at present so active in politics will prove to be a phase of civilization rather than a permanent product; and that while the realization of a true World-State may never be possible, we may yet look forward to a growth of internationality that will largely deprive the feeling of nationality of its present force.

64. The newer democracy. In his recent book Dealey emphasizes the political experiments that are now being tried in certain places, and considers them the vanguard of a newer democracy.

No one is yet prepared to prophesy the outcome of this movement toward a radical humanitarian form of democracy. In quiet nooks of civilization, such as Finland, Sweden and Switzerland, in the "Wild West" of the United States, and on the fringes of civilization in Australasia, may be found the vanguard and fighting line of a newer democracy. Casting precedent to the winds, the governments in these localities are pressing to a logical conclusion the teaching that all political power should be exercised directly by the people themselves. In these experimental laboratories they seem to be trying every conceivable political policy. The electorates, made up of every adult man, and for the most part of every adult woman, are dictating the principles of the fundamental law and are working out startling policies of reform. By building up through careful investigation a scientific system of legal regulation, they hope to restrain the monopolistic tendencies of capital and to elevate standards of living for the "submerged tenth" and the "depressed classes." For these purposes the state does not hesitate, in one place or another, to authorize, as necessity demands, governmental ownership of lands, mines, waters and the usual agencies for transportation; nor to embark in all sorts of business enterprises, even to the extent of lending money at low rates of interest to its citizens and serving as "middleman" for them in the disposal of their products. These regions seem more anxious to abolish pauperism and crime than to multiply millionaires; apparently they listen more readily to the demands of labor than to the allurements of capital, and, strangely enough, seem more interested in the health and education of children than in their exploitation in the industries.

Yet, after all, these commonwealths combined form but a petty fraction of human society, and on the face of it there seems no possibility that such iridescent visions of democracy can ever dominate the idealism

of western civilization as a whole. Progress as a rule goes on halting feet and with leaden step. And yet, if ever "young men see visions," there may come in their hearts an enthusiasm for a newer civilization founded on justice and intelligence. Then these seemingly rash and well-nigh chimerical experiments in democracy may pass into history as the silver lining of the clouds that hid a brighter day for mankind.

65. Political evolution of the future. The following striking sentence suggests the most important political tendency of the present day:

As we can follow through the feudal epoch the development of the monarchical idea which was to destroy feudalism, and as we can follow across the monarchical epoch the development of the national idea which was to throw dynastic interests back into the second place, so we can follow across the history of the last two centuries the development of economic and industrial interests, the social idea, which is destined to overthrow the national.

IV. Summary of Political Evolution

66. Aspects of the state. The following is a brief outline of the main phases of political evolution:

The various aspects assumed by the state in the course of its historical development may now be noted in review. In primitive times are to be traced the beginnings of the fundamental ideas involved in the theory of the modern state; the loosely organized horde represents the nation, and the power wielded by its natural leaders typifies the power of sovereignty in later times. The pastoral stage of the patriarchal period substituted the tribe for the horde, and gave greater definiteness to the organization of the community. The agricultural stage gave the clan or the village community, which slowly developed by conquest and alliance into loosely confederated empires. At the same time the influence of rapidly growing commerce gave birth to the city state, best known in the familiar Greek form, but found also in the mediæval cities of Germany and Italy. In the East, in Greece under Alexander, and in Rome, as well as in later Europe, developed the idea of a world empire, the dream and the ambition of every great military leader of all times. This ideal was translated by Christianity into dreams of a spiritual empire in which all the nations of the world would pay allegiance to the Founder of the Faith, and, with the development of the Papacy, to his successor seated in St. Peter's chair at Rome.

The rise of commerce and the consequent differentiation of interests among the peoples of western Europe resulted in the formation of national states held firmly together by ties of common interests and nationality. Intercourse among these gave great impetus to the development of diplomacy, permanent embassies and international law, all designed to aid in the development of economic interests and the maintenance of peace. The discovery of America not only poured mineral wealth into the impoverished kingdoms of Europe, but ushered in the great era of colonization in which Spain, Portugal, Holland, France and Great Britain vied with one another in seeking out by exploration all of the unknown world that could be utilized for purposes of commerce and exploitation. A happy combination of circumstances developed in the United States of America the federation, an improved form of confederation, combining in one organization the advantages of autonomous commonwealths with the high centralization of an empire in matters of general policy. This form, so well adapted to the needs of great empires, is rapidly proving its utility as a form of government; indeed, the time may yet come when the smaller states will best secure their autonomy and nationality by uniting in federation with one another and with the larger leading states.

67. Contributions of nations to political civilization. The following broad summary indicates the lines along which the great historic states have contributed to the political ideas of the present:

After a survey of political evolution and differentiation, he would have a difficult task who should try to estimate with any completeness the relative contribution of the world's great historic states to political civilization. Yet it would be easy enough to see that in India, in Egypt, on the plains of China and of Mesopotamia and in the cities and harbors of Asia Minor, there developed great patriarchal and commercial empires which fixed the fundamental type of state for civilized man; and that, notwithstanding the rise and fall of dynasties and races, the petty states of early Europe inherited from the East and the South all that was really valuable of a decadent civilization.

In Phœnicia, the most modern of ancient Asiatic governments, and in Carthage its great colony, in Greece and in Rome, centered the contributions of preceding ages, as each, one after the other, assumed prominence and made its own offering to the common stock. From the first three came that emphasis on commerce and colonization, which makes a modern Englishman feel perfectly at home as he reads of the expansion policy of these nations; Athens, in addition, taught philosophers how to reason about the principles of government and to work toward higher

and better standards of political life. The genius of Rome lay by contrast in its emphasis on law and administration. By the aid of Greek philosophy it enlarged its customary law into a code that will stand for many future centuries, as the high-water mark of attainment in respect to civil rights. By its administrative and centralizing capacity it developed a system of political organization that finds its best expression to-day in the imperialistic hierarchy of the Roman Catholic church, and in the highly centralized governmental organization of France. From England in later centuries came an efficient judicial system, a successful colonial policy and a parliament working out through a joint cabinet an harmonious coöperation of governmental and civic interests. France, a true daughter of the Roman empire, as shown by its capacity in war, in law and in administration, came to the front in the eighteenth century, set fire to the dry tinder of European politics and intoxicated the political world with the inspiration derived from the "Marseillaise," the pursuit of glory, and the ideals of democracy contained in the motto, Liberty, Equality and Fraternity. This influence spread through western and southern Europe, passed to the Latin colonies in South America, rivaling there the competing influences of Spain and the United States, and even affected in the latter country the policies of such democratic leaders as Jefferson and Monroe. Germany and Japan are adding their contributions to the world state in the form of applications of scientific principles to governmental functions and organization, thereby overcoming natural handicaps. The United States also is no mean factor in the modern political world. From it has come the federation, the written constitution, a humanitarianism cosmopolitan in its scope and a wide application of the principles of democracy. This development has been greatly aided by its freedom from military necessities, its system of general education and the inventive capacity of its people, devoted to the development of a large, well-watered, fertile land rich in fuels and minerals. Through these the nation, with its composite racial population, is deeply impressing its governmental type on the political systems of the world, and has by no means yet reached the height of its powers. Add to all these the many experiments being made in odd corners of the earth, such as in Australasia, Finland, Scandinavia and Switzerland, and the conviction might readily grow that the state, in its governmental functioning and organization, is still plastic, is still adapting itself to newer conditions and by steady improvement is becoming unquestionably the great agency through which humanity will continue to accomplish its ends of social development.

CHAPTER VII

THEORIES OF THE STATE

I. Political Theory

68. The value of political theory. In the preface to his discussion of the " Political Theories of the Ancient World," Willoughby indicates the importance of political theory as follows:

In the general field of philosophy political speculation has occupied an important place, attracting to its pursuit the greatest thinkers of all times. A study of the history of political theories thus not only brings one at once into touch with one of the most important subjects with which men's minds have been concerned since first was attempted the determination of the nature and end of human life, but, because of the special phenomena dealt with, renders possible, to a degree not to be attained through any other means, an insight into the logic and significance of political history. Political theories have ever been dependent upon, and have been evoked by, particular objective conditions. They therefore reflect the thoughts, and serve to interpret the actuating motives, at the root of important political movements. . . . Who, for instance, could hope to understand the Puritan movement, either in England or in our own country, without a knowledge of its political theories; or expect to appreciate the history of the middle and early modern ages without a comprehension of the various views regarding the relation between church and state promulgated by medieval writers? . . . Not only have political speculations been largely influenced by practical contemporaneous problems, but they have been, to an almost equal extent, though less directly, controlled by what has been called the " intellectual climate " of their times. . . . Beliefs which at one time have had almost universal currency are at another declared absurd, the reason for the change being, not so much that specific evidence or exact logic has overthrown the old ideas, as that the intellectual trend of the later time has been toward a skepticism as regards the particular class of facts involved. Witchcraft, for example, is now relegated by all enlightened minds to the limbo of superstition and fraud; yet, as Lecky says . . ., for more than fifteen hundred years it was universally believed that the Bible established, in the clearest manner, the

reality of the crime, and that an amount of evidence, so varied and so ample as to preclude the very possibility of doubt, attested its continuance and its prevalence. . . .

Exactly the same phenomenon is to be observed in tracing the development of political theories. Dominant political systems lose support and are supplanted by others as the chief thought of the times changes from matters military to matters industrial, or from belief in the beneficence of authority to confidence in the inherent goodness of freedom. . . . Doctrines of papal supremacy, of religious persecution, and of natural rights have each had their summer of prosperity, only to be blasted as the general intellectual climate has assumed toward them a wintry aspect.

Finally, the history of political theories has the same value that the history of any subject possesses; namely, as a means of more fully understanding the conceptions and problems dealt with than is otherwise possible. . . .

However abstract in form, political speculations are almost necessarily the outcome of existing objective political conditions, and have for their aim the solution of those problems that at the time seem most needful of determination. . . . Conversely, though not in equal degree, political theories have often been influential in bringing about in actual life political developments in conformity with the principles which they have stated.

II. Ancient Political Theory

69. Political ideas of the Hebrews. The following extracts from the Old Testament, dealing with the nature of the monarchy, the judiciary, and the law, show the theocratic nature of the Hebrew commonwealth:

4. Then all the elders of Israel gathered themselves together, and came to Samuel unto Ramah,

5. And said unto him, Behold, thou art old, and thy sons walk not in thy ways: now make us a king to judge us like all the nations.

6. But the thing displeased Samuel, when they said, Give us a king to judge us. And Samuel prayed unto the Lord. . . .

24. And Samuel said to all the people, See ye him whom the Lord hath chosen, that there is none like him among all the people? And all the people shouted, and said, God save the king. . . .

8. If there arise a matter too hard for thee in judgment, between blood and blood, between plea and plea, and between stroke and stroke, being matters of controversy within thy gates: then shalt thou arise, and get thee up into the place which the Lord thy God shall choose;

9. And thou shalt come unto the priests the Levites, and unto the judge that shall be in those days, and inquire; and they shall shew thee the sentence of judgment.

10. And thou shalt do according to the sentence, which they of that place which the Lord shall choose shall shew thee; and thou shalt observe to do according to all that they inform thee. . . .

15. And Moses turned, and went down from the mount, and the two tables of the testimony were in his hand: . . .

16. And the tables were the work of God, and the writing was the writing of God, graven upon the tables. . . .

2. And the king went up into the house of the Lord, and all the men of Judah, and all the inhabitants of Jerusalem with him, and all the priests, and the prophets, and all the people, both small and great: and he read in their ears all the words of the book of the covenant which was found in the house of the Lord.

3. And the king stood by a pillar, and made a covenant before the Lord, to walk after the Lord, and to keep his commandments and his testimonies and his statutes, with all their heart and all their soul, to perform the words of this covenant that were written in this book: and all the people stood to the covenant.

70. The "Republic" of Plato. The following extracts illustrate the philosophical ideal of the Greeks rather than a definite attempt to frame a political theory:

The formation of a city is due, as I imagine, to this fact, that we are not individually independent, but have many wants. . . .

Thus it is, then, that owing to our many wants, and because each seeks the aid of others to supply his various requirements, we gather many associates and helpers into one dwelling place, and give to this joint dwelling the name of city. . . .

You are doubtless all brethren, as many as inhabit the city, but the God who created you mixed gold in the composition of such of you as are qualified to rule, which gives them the highest value; while in the auxiliaries he made silver an ingredient, assigning iron and copper to the cultivators of the soil and the other workmen. Therefore, inasmuch as you are all related to one another, although your children will generally resemble their parents, yet sometimes a golden parent will produce a silver child, and a silver parent a golden child, and so on. . . . And if a child be born in their class with an alloy of copper or iron, they are to have no manner of pity upon it, but giving it the value that belongs to its nature, they are to thrust it away into the class of artisans or

agriculturists; and if again among these a child be born with any admixture of gold or silver, when they have assayed it, they are to raise it either to the class of guardians, or to that of auxiliaries: . . .

This then, I continued, will also serve as the best standard for our governors to adopt, in regulating the size of the state, and the amount of land which they should mark off for a state of the due size, leaving the rest alone. What is the standard? he asked. The following, I conceive; so long as the city can grow without abandoning its unity, up to that point it may be allowed to grow, but not beyond it. . . .

Then it is the knowledge residing in its smallest class or section, that is to say, in the predominant and ruling body, which entitles a state, organized agreeably to nature, to be called wise as a whole; and that class whose right and duty it is to partake of the knowledge which alone of all kinds of knowledge is properly called wisdom, is naturally, as it appears, the least numerous body in the state. . . .

I think that the remainder left in the state, after eliminating the qualities which we have considered, I mean temperance, and courage, and wisdom, must be that which made their entrance into it possible, and which preserves them there so long as they exist in it. Now we affirmed that the remaining quality, when three out of the four were found, would be justice. . . .

The constitutions to which I allude . . . are the following. First, we have the constitution of Crete and Sparta, which has the general voice in its favor. Second in order, as in estimation, stands oligarchy, as it is called, a commonwealth fraught with many evils. Then comes democracy, which is the adversary and successor of oligarchy; and, finally, that glorious thing, despotism, which differs from all the preceding, and constitutes the fourth and worst disease of a state. . . .

Then must we proceed to describe those inferior men, to wit, the contentious and ambitious man, answering to the Spartan constitution; and likewise the oligarchical, and the democratical, and the despotic man; in order that we may get a view of the most unjust man, and contrast him with the most just.

71. The "Politics" of Aristotle. Aristotle, basing his study on actual conditions and careful analysis, lays the foundation for political science proper:

Hence it is evident that the state is a creation of nature, and that man is by nature a political animal. . . . And it is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the association of living beings who have this sense makes a family and a state. . . .

If, however, there be some one person . . . whose virtue is so preeminent that the virtues or the political capacity of all the rest admit of no comparison with his, he can be no longer regarded as part of a state; for justice will not be done to the superior, if he is reckoned only as the equal of those who are so far inferior to him in virtue and in political capacity. . . . Hence we see that legislation is necessarily concerned only with those who are equal in birth and in power; and that for men of preëminent virtue there is no law — they are themselves a law. . . .

Now in all states there are three elements; one class is very rich, another very poor, and a third in a mean. It is admitted that moderation and the mean are best. . . . Thus it is manifest that the best political community is formed by citizens of the middle class, and that those states are likely to be well administered, in which the middle class is large. . . .

We have next to consider what means there are of preserving states in general, and also in particular cases. . . .

In all well-attempered governments there is nothing which should be more jealously maintained than the spirit of obedience to law. . . .

States are preserved when their destroyers are at a distance, and sometimes also because they are near, for the fear of them makes the government keep in hand the state. . . .

It is a principle common to democracy, oligarchy, and every other form of government not to allow the disproportionate increase of any citizen, but to give moderate honor for a long time rather than great honor for a short time. . . .

But above all every state should be so administered and so regulated by law that its magistrates cannot possibly make money. . . .

There are three qualifications required in those who have to fill the highest offices — (1) first of all, loyalty to the established constitution; (2) the greatest administrative capacity; (3) virtue and justice of the kind proper to each form of government. . . .

But of all the things which I have mentioned, that which most contributes to the permanence of constitutions is the adaptation of education to the form of government. . . .

Now it is evident that the form of government is best in which every man, whoever he is, can act for the best and live happily. . . .

Clearly, then, the best limit of the population of a state is the largest number which suffices for the purposes of life, and can be taken in at a single view. . . . In size and extent it should be such as may enable the inhabitants to live temperately and liberally in the enjoyment of leisure. . . .

Husbandmen, craftsmen, and laborers of all kinds are necessary to the existence of states, but the parts of the state are the warriors and councilors.

72. The "Commonwealth" of Cicero. Cicero handed down the current philosophy of the Greeks but added few new ideas. He praised the Roman constitution as combining the merits of all forms of government.

A commonwealth is a constitution of the entire people. But the people is not every association of men, however congregated, but the association of the entire number, bound together by the compact of justice, and the communication of utility. The first cause of this association is not so much the weakness of man, as a certain spirit of congregation which naturally belongs to him. . . .

When the direction of all depends on one person, we call this individual a king; and this form of political constitution, a kingdom. When it is in the power of privileged delegates, the state is said to be ruled by an aristocracy; and when the people are all in all, they call it a democracy, or popular constitution. . . . There is a fourth kind of government, therefore, which, in my opinion, is preferable to all these: it is that mixed and moderate government, which is composed of the three particular forms which I have already noticed. . . . But if I must confine myself to one of these particular forms simply and exclusively, I must confess I prefer the royal one, and praise that as the first and best. . . .

But it is itself inferior to that which is composed of an equal mixture of the three best forms of government, united and modified by one another. I wish to establish in a commonwealth a royal and preëminent chief. Another portion of power should be deposited in the hands of the aristocracy, and certain things should be reserved to the judgment and wish of the multitude. . . .

The laws are, therefore, based not on our sense of justice, but on our fear of punishment. There is, therefore, no natural justice; and hence it follows that men cannot be just by nature. . . .

True law is right reason conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. . . .

So this statesman of ours should have studied the science of jurisprudence and legislation; he should have investigated their original sources; but he should not embarrass himself in debating and arguing, reading and scribbling. He should rather employ himself in the actual administration of government, and become a sort of steward of it, being perfectly conversant with the principles of universal law and equity, without which no man can be just: not unfamiliar with the civil laws of states; but he will use them for practical purposes, even as a pilot uses astronomy, and a physician natural philosophy.

III. Medieval Political Theory

73. Political theory of the early Church. The following extracts from the New Testament show the unpolitical nature of the early Church:

21. . . . Then saith he unto them, Render therefore unto Cæsar the things which are Cæsar's, and unto God the things that are God's.

36. Jesus answered, My kingdom is not of this world: if my kingdom were of this world, then would my servants fight, that I should not be delivered to the Jews: but now is my kingdom not from hence.

1. Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God.

2. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation.

3. For rulers are not a terror to good works, but to the evil. . . .

6. For, for this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing.

7. Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honor to whom honor.

74. Political theory of the Popes. The *Dictatus Papae*, formulated about 1090, states the papal claims as to rights and prerogatives.

1. That the Roman church was established by God alone.

2. That the Roman pontiff alone is rightly called universal. . . .

8. That he alone may use the imperial insignia.

9. That all princes shall kiss the foot of the pope alone. . . .

12. That he has the power to depose emperors. . . .

24. That by his command or permission subjects may accuse their rulers.

27. That he has the power to absolve subjects from their oath of fidelity to wicked rulers.

In the deposition and excommunication of Henry IV, issued by Gregory VII in 1076, the claim that the Pope has temporal power derived from God is stated:

St. Peter, prince of the apostles . . . it is not by my efforts, but by thy grace, that I am set to rule over the Christian world which was specially intrusted to thee by Christ. It is by thy grace and as thy representative

that God has given to me the power to bind and to loose in heaven and in earth. Confident of my integrity and authority, I now declare in the name of omnipotent God, the Father, Son, and Holy Spirit, that Henry, son of the emperor Henry, is deprived of his kingdom of Germany and Italy.

The Pope's claim that the spiritual power is superior to the temporal is expressed, as early as 494 A.D., in the following letter of Gelasius I to the Emperor Anastasius:

There are two powers, august Emperor, by which this world is chiefly ruled, namely, the sacred authority of the priests and the royal power. Of these, that of the priests is the more weighty, since they have to render an account for even the kings of men in the divine judgment. You are also aware, dear son, that while you are permitted honorably to rule over human kind, yet in things divine you bow your head humbly before the leaders of the clergy and await from their hands the means of your salvation. In the reception and proper disposition of the heavenly mysteries you recognize that you should be subordinate rather than superior to the religious order, and that in these matters you depend on their judgment rather than wish to force them to follow your will.

The bull *Unam Sanctum*, issued by Boniface VIII in 1302, is the most noted assertion of papal supremacy.

In this Church and in its power are two swords, to wit, a spiritual and a temporal, and this we are taught by the words of the Gospel; for when the apostles said, "Behold, here are two swords" (in the Church, namely, since the apostles were speaking), the Lord did not reply that it was too many, but enough. And surely he who claims that the temporal sword is not in the power of Peter has but ill understood the word of our Lord when he said, "Put up again thy sword into his place." Both the spiritual and the material swords, therefore, are in the power of the Church, the latter indeed to be used for the Church, the former by the Church, the one by the priest, the other by the hand of kings and soldiers, but by the will and sufferance of the priest.

75. Dante's conception of the imperial power. In the following selection Dante maintains the independence of the empire, and urges universal monarchy as the ideal form of government:

The question pending investigation, then, concerns two great luminaries, the Roman Pontiff and the Roman Prince; and the point at issue

is whether the authority of the Roman monarch, who, as proved in the second book, is rightful monarch of the world, is derived from God directly, or from some vicar or minister of God, by whom I mean the successor of Peter, indisputable keeper of the keys of the kingdom of heaven. . . .

Those men . . . assert that the authority of the Empire depends on the authority of the Church. . . . They are drawn to this by divers opposing arguments, some of which they take from Holy Scripture, and some from certain acts performed by the chief pontiff, and by the Emperor himself. . . .

For, first, they maintain that, according to Genesis, God made two mighty luminaries, a greater and a lesser, the former to hold supremacy by day and the latter by night. These they interpret allegorically to be the two rulers — spiritual and temporal. Whence they argue that as the lesser luminary, the moon, has no light but that gained from the sun, so the temporal ruler has no authority but that gained from the spiritual ruler. . . .

I proceed to refute the above assumption that the two luminaries of the world typify its two ruling powers. The whole force of their argument lies in the interpretation; but this we can prove indefensible in two ways. First, since these ruling powers are, as it were, accidents necessitated by man himself, God would seem to have used a distorted order in creating first accidents, and then the subject necessitating them. It is absurd to speak thus of God, but it is evident from the Word that the two lights were created on the fourth day, and man on the sixth.

Secondly, the two ruling powers exist as the directors of men toward certain ends, as will be shown further on. But had man remained in the state of innocence in which God made him, he would have required no such direction. These ruling powers are therefore remedies against the infirmity of sin. Since on the fourth day man was not only not a sinner, but was not even existent, the creation of a remedy would have been purposeless, which is contrary to divine goodness. . . .

That ecclesiastical authority is not the source of imperial authority is thus verified. A thing nonexistent, or devoid of active force, cannot be the cause of active force in a thing possessing that quality in full measure. But before the Church existed, or while it lacked power to act, the Empire had active force in full measure. Hence the Church is the source, neither of acting power nor of authority in the Empire, where power to act and authority are identical. . . .

Omniscient Providence has thus designed two ends to be contemplated by man: first, the happiness of this life . . . and then the blessedness of life everlasting. . . .

Wherefore a twofold directive agent was necessary to man, in accordance with the twofold end; the Supreme Pontiff to lead the human race to life eternal by means of revelation, and the Emperor to guide it to temporal well-being by means of philosophic instruction. . . .

It is established, then, that the authority of temporal monarchy descends without mediation from the fountain of universal authority. . . .

But the truth of this final question must not be restricted to mean that the Roman Prince shall not be subject in some degree to the Roman Pontiff, for well-being that is mortal is ordered in a measure after well-being that is immortal. Wherefore let Cæsar honor Peter as a first-born son should honor his father, so that, brilliant with the light of paternal grace, he may illumine with greater radiance the earthly sphere over which he has been set by Him who alone is Ruler of all things spiritual and temporal.

76. The "Prince" of Machiavelli. Some of the attributes which, under the prevailing conditions in the Italian cities, a good ruler should possess, are thus stated by Machiavelli:

It remains now to see what ought to be the rules of conduct for a prince towards subject and friends. . . . Hence it is necessary for a prince wishing to hold his own to know how to do wrong, and to make use of it or not according to necessity. . . . And I know that every one will confess that it would be most praiseworthy in a prince to exhibit all the above qualities that are considered good; but because they can neither be entirely possessed nor observed, for human conditions do not permit it, it is necessary for him to be sufficiently prudent that he may know how to avoid the reproach of those vices which would lose him his state; and also to keep himself, if it be possible, from those which would not lose him it; but this not being possible, he may with less hesitation abandon himself to them. And again, he need not make himself uneasy at incurring a reproach for those vices without which the state can only be saved with difficulty, for if everything is considered carefully, it will be found that something which looks like virtue, if followed, would be his ruin; whilst something else, which looks like vice, yet followed brings him security and prosperity. . . .

Coming now to the other qualities mentioned above, I say that every prince ought to desire to be considered clement and not cruel. Nevertheless he ought to take care not to misuse this clemency. . . . Therefore a prince, so long as he keeps his subjects united and loyal, ought not to mind the reproach of cruelty; because with a few examples he will be more merciful than those who, through too much mercy, allow

disorders to arise, from which follow murder or robbery; for these are wont to injure the whole people, whilst those executions which originate with a prince offend the individual only. . . .

Upon this a question arises: whether it be better to be loved than feared or feared than loved? It may be answered that one should wish to be both, but, because it is difficult to unite them in one person, it is much safer to be feared than loved, when, of the two, either must be dispensed with. . . .

Every one admits how praiseworthy it is in a prince to keep faith, and to live with integrity and not with craft. Nevertheless our experience has been that those princes who have done great things have held good faith of little account, and have known how to circumvent the intellect of men by craft, and in the end have overcome those who have relied on their word. . . .

But it is necessary to know well how to disguise this characteristic, and to be a great pretender and dissembler; and men are so simple, and so subject to present necessities, that he who seeks to deceive will always find some one who will allow himself to be deceived.

77. Puritan principles of government. The doctrines of Calvin, as modified by his later followers, gave an impetus to revolution and democracy. The following extract indicates Calvin's attitude toward civil government:

Having already stated that man is the subject of two kinds of government, and having sufficiently discussed that which is situated in the soul, or the inner man, and relates to eternal life; we are, in this chapter, to say something of the other kind, which relates to civil justice, and the regulation of the external conduct. . . .

But the perspicuity of order will assist the readers to attain a clearer understanding of what sentiments ought to be entertained respecting the whole system of civil administration, if we enter on a discussion of each branch of it. . . . These are three: The Magistrate, who is the guardian and conservator of the laws: The Laws, according to which he governs: The People, who are governed by the laws, and obey the magistrate. Let us, therefore, examine, first, the function of a magistrate, whether it be a legitimate calling and approved by God, the nature of the duty, and the extent of the power: secondly, by what laws Christian government ought to be regulated: and lastly, what advantage the people derive from the laws, and what obedience they owe to the magistrate.

The Lord hath not only testified that the function of magistrates has his approbation and acceptance, but hath eminently commended it to us, by dignifying it with the most honorable titles. . . .

Indeed, if these three forms of government, which are stated by philosophers, be considered in themselves, I shall by no means deny, that either aristocracy or a mixture of aristocracy and democracy far excels all others. . . .

From the magistracy we next proceed to the laws, which are the strong nerves of civil polity. . . . No observation therefore can be more correct than this, that the law is a silent magistrate, and the magistrate a speaking law. . . .

The first duty of subjects towards their magistrates is to entertain the most honorable sentiments of their function, which they know to be a jurisdiction delegated to them from God, and on that account to esteem and reverence them as God's ministers and vicegerents. . . .

But it will be said that rulers owe mutual duties to their subjects. That I have already confessed. . . .

But in the obedience which we have shown to be due to the authority of governors, it is always necessary to make one exception, and that is entitled to our first attention, that it do not seduce us from obedience to him, to whose will the desires of all kings ought to be subject, to whose decrees all their commands ought to yield, to whose majesty all their scepters ought to submit.

IV. The Divine-Right Theory

78. Speech of James I of England. In a speech made before the Court of Star Chamber on June 20, 1601, the doctrine of divine right was thus stated by James I:

I am next to come to the limits wherein you are to bound yourselves, which likewise are three. First, encroach not upon the prerogative of the crown: if there falls out a question that concerns my prerogative or mystery of state, deal not with it, till you consult with the king or his council, or both; for they are transcendent matters and must not be deliberately carried out with overrash willfulness. . . . That which concerns the mystery of the king's power is not lawful to be disputed; for that is to wade into the weakness of princes, and to take away the mystical reverence that belongs unto them that sit on the throne of God. . . .

It is atheism and blasphemy to dispute what God can do: good Christians content themselves with his will revealed in his word, so it is

presumption and high contempt in a subject to dispute what a king can do, or say that a king cannot do this or that; but rest in that which is the king's revealed will in his law.

79. The theory of Louis XIV. The following extract is taken from a treatise prepared by Bossuet, the preceptor of the son of Louis XIV, for the purpose of giving him a proper idea of the position and responsibilities of kingship:

We have already seen that all power is of God. The ruler, adds St. Paul, "is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil."[1] Rulers then act as the ministers of God and as his lieutenants on earth. It is through them that God exercises his empire. Think ye "to withstand the kingdom of the Lord in the hand of the sons of David?"[2] Consequently, as we have seen, the royal throne is not the throne of a man, but the throne of God himself. . . .

Moreover, that no one may assume that the Israelites were peculiar in having kings over them who were established by God, note what is said in Ecclesiasticus: "God has given to every people its ruler, and Israel is manifestly reserved to him."[3] He therefore governs all peoples and gives them their kings, although he governed Israel in a more intimate and obvious manner.

It appears from all this that the person of the king is sacred, and that to attack him in any way is sacrilege. . . . Kings should be guarded as holy things, and whosoever neglects to protect them is worthy of death. . . .

The prince need render account of his acts to no one. "I counsel thee to keep the king's commandment, and that in regard of the oath of God. Be not hasty to go out of his sight: stand not on an evil thing, for he doeth whatsoever pleaseth him. Where the word of a king is, there is power: and who may say unto him, What doest thou? Whoso keepeth the commandment shall feel no evil thing."[4] Without this absolute authority the king could neither do good nor repress evil. . . .

Finally, let us put together the things so great and so august which we have said about royal authority. Behold an immense people united in a single person; behold this holy power, paternal and absolute; behold the secret cause which governs the whole body of the State, contained in a single head: you see the image of God in the king.

[1] Romans xiii, 1–7.
[2] Chronicles xiii, 8.
[3] Ecclesiasticus xvii, 14–15.
[4] Ecclesiasticus viii, 2–5.

V. The Social-Contract Theory

80. The "Leviathan" of Hobbes. The following extracts show Hobbes's idea as to the nature of the contract in which the state originated:

For the laws of nature, as *justice*, *equity*, *modesty*, *mercy*, and, in some, *doing to others*, *as we would be done to*, of themselves, without the terror of some power, to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like, and covenants, without the sword, are but words, and of no strength to secure a man at all. . . .

A *commonwealth* is said to be *instituted*, when a *multitude* of men do agree, and *covenant*, *every one*, *with every one*, that to whatsoever *man*, or *assembly of men*, shall be given by the major part, the *right* to *present* the person of them all, that is to say, to be their *representative;* every one, as well he that *voted for it*, as he that *voted against it*, shall *authorize* all the actions and judgments, of that man, or assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men. . . .

Because the right of bearing the person of them all, is given to him they make sovereign, by covenant only of one to another, and not of him to any of them; there can happen no breach of covenant on the part of the sovereign; and consequently none of his subjects, by any pretense of forfeiture, can be freed from his subjection.

81. The "Two Treatises of Government" of Locke. Locke, writing to confute Filmer's "Patriarcha," and to uphold the accession of William III, makes his theory the support of constitutional monarchy:

To understand political power aright, and derive it from its original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature; without asking leave, or depending upon the will of any other man. . . .

Whenever therefore any number of men are so united into one society, as to quit every one his executive power of the law of nature, and to resign it to the public, there and there only is a political, or civil society. . . .

Hence it is evident that absolute monarchy, which by some men is counted the only government in the world, is indeed inconsistent with civil society, and so can be no form of civil government at all. . . .

The majority having, as has been shown, upon men's first uniting into society, the whole power of the community naturally in them, may employ all that power in making laws for the community from time to time, and executing those laws by officers of their own appointing.

82. The "Social Contract" of Rousseau. The following extracts indicate Rousseau's idea of the social contract, of the nature of government, and of popular sovereignty:

Since no man has any natural authority over his fellow men, and since force is not the source of right, conventions remain as the basis of all lawful authority among men. . . .

Now, as men cannot create any new forces, but only combine and direct those that exist, they have no other means of self-preservation than to form by aggregation a sum of forces which may overcome the resistance, to put them in action by a single motive power, and to make them work in concert.

This sum of forces can be produced only by the combination of many. . . .

"To find a form of association which may defend and protect with the whole force of the community the person and property of every associate, and by means of which each, coalescing with all, may nevertheless obey only himself, and remain as free as before." Such is the fundamental problem of which the social contract furnishes the solution. . . .

If then we set aside what is not of the essence of the social contract, we shall find that it is reducible to the following terms: "Each of us puts in common his person and his whole power under the supreme direction of the general will, and in return we receive every member as an indivisible part of the whole." . . .

But the body politic or sovereign, deriving its existence only from the contract, can never bind itself, even to others, in anything that derogates from the original act, such as alienation of some portion of itself, or submission to another sovereign. To violate the act by which it exists would be to annihilate itself, and what is nothing produces nothing. . . .

It follows from what precedes, that the general will is always right and always tends to the public advantage. . . .

The public force, then, requires a suitable agent to concentrate it and put it in action according to the directions of the general will, to serve as a means of communication between the state and the sovereign, to effect in some manner in the public person what the union of soul and body effects in a man. This is, in the State, the function of government,

improperly confounded with the sovereign of which it is only the minister. . . .

It is not sufficient that the assembled people should have once fixed the constitution of the state by giving their sanction to a body of laws. . . . Besides the extraordinary assemblies which unforeseen events may require, it is necessary that there should be fixed and periodical ones which nothing can abolish or prorogue; so that, on the appointed day, the people are rightfully convoked by the law, without needing for that purpose any formal summons. . . .

So soon as the people are lawfully assembled as a sovereign body, the whole jurisdiction of the government ceases, the executive power is suspended, and the person of the meanest citizen is as sacred and inviolable as that of the first magistrate, because where the represented are, there is no longer any representative.

VI. The Organic Theory

83. Society as an organism. Spencer states the analogy between the organization and functions of society and of the living organism as follows:

The reasons for asserting that the permanent relations among the parts of a society are analogous to the permanent relations among the parts of a living body, we have now to consider. . . .

Compared with things we call inanimate, living bodies and societies so conspicuously exhibit augmentation of mass, that we may fairly regard this as characterizing them both. . . .

It is also a character of social bodies, as of living bodies, that while they increase in size they increase in structure. . . .

This community will be more fully appreciated on observing that progressive differentiation of structures is accompanied by progressive differentiation of functions. . . .

Evolution establishes in them both, not differences simply, but definitely-connected differences — differences such that each makes the others possible. . . .

How the combined actions of mutually-dependent parts constitute life of the whole, and how there hence results a parallelism between social life and animal life, we see still more clearly on learning that the life of every visible organism is constituted by the lives of units too minute to be seen by the unaided eye. . . .

The relation between the lives of the units and the life of the aggregate, has a further character common to the two cases. By a catastrophe

the life of the aggregate may be destroyed without immediately destroying the lives of all its units; while, on the other hand, if no catastrophe abridges it, the life of the aggregate is far longer than the lives of its units. . . .

In both cases, too, the mutually-dependent functions of the various divisions, being severally made up of the actions of many units, it results that these units dying one by one, are replaced without the function in which they share being sensibly affected. . . . Hence arises in the social organism, as in the individual organism, a life of the whole quite unlike the lives of the units; though it is a life produced by them. . . .

Societies, like living bodies, begin as germs — originate from masses which are extremely minute in comparison with the masses some of them eventually reach. . . .

The growths of individual and social organisms are allied in another respect. In each case size augments by two processes, which go on sometimes separately, sometimes together. There is increase by simple multiplication of units, causing enlargement of the group; there is increase by union of groups, and again by union of groups of groups. . . .

Thus the increasing mutual dependence of parts, which both kinds of organisms display as they evolve, necessitates a further series of remarkable parallelisms. Coöperation being in either case impossible without appliances by which the coöperating parts shall have their actions adjusted, it inevitably happens that in the body politic, as in the living body, there arises a regulating system; and within itself this differentiates as the sets of organs evolve.

The coöperation most urgent from the outset is that required for dealing with environing enemies and prey. Hence the first regulating center, individual and social, is initiated as a means to this coöperation; and its development progresses with the activity of this coöperation. . . .

To this chief regulating system, controlling the organs which carry on outer actions, there is, in either case, added during the progress of evolution, a regulating system for the inner organs carrying on sustentation; and this gradually establishes itself as independent. . . .

And then the third or distributing system, which, though necessarily arising after the others, is indispensable to the considerable development of them, eventually gets a regulating apparatus peculiar to itself.

84. The organic nature of the state. Bluntschli considers the state as an organism of a higher nature than that of other living beings.

The State is in no way a lifeless instrument, a dead machine: it is a living and therefore organized being. . . .

The State indeed is not a product of nature, and therefore it is not a natural organism; it is indirectly the work of man. . . .

In calling the State an organism we are not thinking of the activities by which plants and animals seek, consume and assimilate nourishment, and reproduce their species. We are thinking rather of the following characteristics of natural organisms: —

(a) Every organism is a union of soul and body, i.e. of material elements and vital forces.

(b) Although an organism is and remains a whole, yet in its parts it has members, which are animated by special motives and capacities, in order to satisfy in various ways the varying needs of the whole itself.

(c) The organism develops itself from within outwards, and has an external growth.

In all three respects the organic nature of the State is evident. . . .

Whilst history explains the organic nature of the State, we learn from it at the same time that the State does not stand on the same grade with the lower organisms of plants and animals, but is of a higher kind; we learned that it is a moral and spiritual organism, a great body which is capable of taking up into itself the feelings and thoughts of the nation, of uttering them in laws, and realizing them in acts; we are informed of moral qualities and of the character of each State. History ascribes to the State a personality which, having spirit and body, possesses and manifests a will of its own.

VII. Present Political Theory

85. English and continental political theory. Some of the leading differences in the attitude of mind of English and continental publicists are thus stated by Pollock:[1]

The Continental schools, or the two branches of the Continental school, may be described as ethical and historical. By the ethical school I mean . . . those authors who throw their main strength on investigating the universal moral and social conditions of government and laws, or at any rate civilized government and laws, and expounding what such government and laws are or ought to be, so far as determined by conformity to those conditions. . . .

Still there is no doubt that there is a certain mutual repulsion between the English and the Continental mode of treating these inquiries. . . .

[1] By permission of The Macmillan Company.

What is the explanation of this? The German or Germanizing philosopher is ready with an easy one. "It just means," he would say, "that you English have not taken the pains to understand modern philosophy. . . ." There are Englishmen on the other hand who would be no less ready with their answer. "We confess," they would say, "that we know very little of your transcendental philosophies, and care less. . . ."

The English student, in turn, is naturally repelled by this misunderstanding, and is prone to assume that no solid good is to be expected of philosophers who have not yet clearly separated in their minds the notion of things as they are from that of things as they ought to be. The German school seems to him to mix up the analytical with the practical aspect of politics, and politics in general with ethics, in a bewildering manner. . . .

The historical method in politics, as understood on the Continent, is not opposed to what I have called the deductive, but apart from it. Publicists of the historical school seek an explanation of what institutions are, and are tending to be, more in the knowledge of what they have been and how they came to be what they are, than in the analysis of them as they stand. . . . The general idea of the historical method may be summed up in the aphorism, now familiar enough, that institutions are not made, but grow.

86. Changes in political theory in the United States. Merriam outlines some of the significant changes that have taken place in the political thought of the United States as follows:[1]

Looking back over the development of the United States, a great growth in national spirit and sentiment is at once observed. In 1787, the general attitude toward the central government was that of suspicion and distrust, if not of open hostility. Liberty was regarded as local in character, and the states as the great champions of the individual. The greater the power of the central government, the greater the danger to the freedom of the citizen. "Consolidated" government was considered as equivalent to tyranny and oppression. A century of national development has reversed this attitude. The states are now looked upon with more suspicion than is the national government, and it is frequently considered a matter of congratulation when a given subject falls under federal administration. It is no longer generally feared that human liberty is menaced by the federal government, and protected only by the states. Denunciation of the United States as a "consolidated fabric" of "aristocratical tyranny" is seldom heard, but certain states are sometimes

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denominated as "rotten boroughs." The state has in fact in many cases become a less important unit, economically, politically, and socially, than the city, and, on the whole, the tendency of this time is overwhelmingly national, both in fact and in theory. . . .

In conclusion, it appears that recent political theory in the United States shows a decided tendency away from many doctrines that were held by the men of 1776. The same forces that have led to the general abandonment of the individualistic philosophy of the eighteenth century by political scientists elsewhere have been at work here and with the same result. The Revolutionary doctrines of an original state of nature, natural rights, the social contract, the idea that the function of the government is limited to the protection of person and property, — none of these finds wide acceptance among the leaders in the development of political science. The great service rendered by these doctrines, under other and earlier conditions, is fully recognized, and the presence of a certain element of truth in them is freely admitted, but they are no longer generally received as the best explanation for political phenomena. Nevertheless, it must be said that thus far the rejection of these doctrines is a scientific tendency rather than a popular movement. Probably these ideas continue to be articles of the popular creed, although just how far they are seriously adhered to it is difficult to ascertain. As far as the theory of the function of government is concerned, it would seem that the public has gone beyond the political scientists, and is ready for assumption of extensive powers by the political authorities. The public, or at least a large portion of it, is ready for the extension of the functions of government in almost any direction where the general welfare may be advanced, regardless of whether individuals as such are benefited thereby or not. But in regard to the conception of natural right and the social-contract theory, the precise condition of public opinion is, at the present time, not easy to estimate.

CHAPTER VIII

SOVEREIGNTY

I. Nature of Sovereignty

87. Meaning of the term *sovereignty*. The different meanings that have been given to the term *sovereignty* are thus stated by Merriam:

We may summarize as follows the different senses in which the term sovereignty has been and is employed:

I. Sovereignty may designate the position of privilege held by the monarch in a State. In the modern constitutional State, the sovereignty of the king either is merely titular, or at the most denotes a preëminent position in the hierarchy of the constitutional organs of the State. "Monarchical Sovereignty" is in its best estate a position of constitutional superiority, not of complete supremacy.

II. Sovereignty may have reference to the relation of the State to the individuals or associations on its territory. The State, as the organization for the purpose of social control, determines what ends it will follow out and what means it will devote to these purposes, and forcibly compels the execution of its plans. This power is the vital principle of a political society; it is universal, absolute, indivisible, continuous. This is sovereignty conceived as the supremacy of the State over the individuals or associations of individuals on the given territory.

Under this head are to be distinguished again several significations of the term: (a) Sovereignty may refer to that power which in a given government or constitutional order has no governmental or constitutional superior. Thus the English Parliament possesses a governmental sovereignty. (b) Sovereignty may refer to the power of the State in an ultimate organization, back of the ordinary government even. This is not the supreme power under any given *constitutional* organization, but the power that determines what this constitutional order shall be. Such a body is a Constitutional Convention in the United States. (c) Sovereignty may signify that power in the given State or society the will of which is ultimately obeyed, — that body which if not adequately organized in the ordinary government or in the extraordinary government will, when

occasion demands, create for itself means through which its supreme will may find expression. If the pressure of public opinion cannot accomplish this, then a way will be made by fire and sword.

III. Sovereignty has been regarded as the relation of a State to other States. In this sense, the term signifies the independence or self-sufficiency of a political society as against all other political societies. From this point of view, sovereignty might be termed international autonomy or independence.

88. Sovereignty as unlimited power. Burgess emphasizes the absolute nature of sovereign power and considers the national consciousness of modern states the highest expression of truth.

Power cannot be sovereign if it be limited; that which imposes the limitation is sovereign; and not until we reach the power which is unlimited, or only self-limited, have we attained the sovereignty. Those who hold to the idea of a limited sovereignty (which, I contend, is a *contradictio in adjecto*) do not, indeed, assert a real legal limitation, but a limitation by the laws of God, the laws of Nature, the laws of reason, the laws between nations. But who is to interpret, in last instance, these principles, . . . when they are invoked by anybody in justification of disobedience to a command of the state, or of the powers which the state authorizes? Is it not evident that this must be the state itself? It is conceivable, no doubt, that an individual may, upon some point or other, or at some time or other, interpret these principles more truly than does the state, but it is not at all probable, and not at all admissible in principle. It is conceivable, also, that a state may outgrow its form of organization, so that the old organization no longer contains the real sovereignty; and that an individual, or a number of individuals, may rouse the real sovereign to resist triumphantly the commands of the apparent sovereign as misinterpretations of the truths of God, nature, and reason. That would only prove that we have mistaken the point of sovereignty, and would teach the lesson that the state must always hold its form to accord with its substance. . . . The common consciousness is the purest light given to men by which to interpret truth in any direction; it is the safest adviser as to when principle shall take on the form of command; and the common consciousness is the state consciousness. In the modern national state we call it the national consciousness. The so-called laws of God, of nature, of reason, and between states are legally, and for the subject, what the state declares them to be; and these declarations and commands of the state are to be presumed to contain the most truthful interpretations of these

principles, which a fallible and developing human view can, at the given moment, discover. It is begging the question to appeal to the consciousness of the world or of humanity against the consciousness of the state; for the world has no form of organization for making such interpretation, or for intervening between the state and its citizens to nullify the state's interpretation. . . . At the present stage of the world's civilization, a nearer approximation to truth seems to be attainable from the standpoint of a national state consciousness than from the standpoint of what is termed the consciousness of mankind. An appeal to the consciousness of mankind, if it bring any reply at all, will receive an answer confused, contradictory, and unintelligible. . . . Contact between states may, and undoubtedly does, clarify and harmonize the consciousness of each; but it is still the state consciousness which is the sovereign interpreter, and the state power which is the sovereign transformer of these interpretations into laws. . . . The state must have the power to compel the subject against his will; otherwise it is no state; it is only an anarchic society. Now the power to compel obedience and to punish for disobedience, is, or originates in, sovereignty.

89. Characteristics of sovereignty. Bluntschli, while denying the possibility of absolute internal supremacy and of complete external independence in actual practice, summarizes the characteristics of sovereign power as follows:

The State is the embodiment and personification of the national power. This power, considered in its highest dignity and greatest force, is called Sovereignty. . . . Sovereignty implies: —

1. Independence of the authority of any other State. Yet this independence must be understood as only relative. International law, which binds all States together, no more contradicts the Sovereignty of States than constitutional law, which limits the exercise of public authority within. . . .

2. Supreme public dignity — what the Romans called *majestas*.

3. Plenitude of public power, as opposed to mere particular powers. Sovereignty is not a sum of particular isolated rights, but is a general or common right: it is a "central conception," and is as important in Public as that of property is in Private Law.

4. Further, it is the highest in the State. Thus there can be no political power above it. . . .

5. Unity, a necessary condition in every organism. The division of sovereignty paralyzes and dissolves a State, and is therefore incompatible with its healthy existence.

90. Sovereignty as supreme will. Willoughby considers sovereignty as the supreme will of a politically organized community. He also distinguishes between its internal and external aspects.[1]

Sovereignty is something more than a collection of powers. It is something more than a mechanical aggregate of separate and particular capacities. It does, indeed, include and necessitate the possession of certain powers, such as, for example, those of taxation, of contracting treaties, maintaining an armed force, etc.; but its content is not exhausted by an enumeration of these. It is an entity of itself, and represents the highest political power as embodied in the State. Sovereignty belongs to the State as a person, and represents the supremacy of its will.

Sovereignty, as thus expressing a supreme will, is necessarily a unity and indivisible, — unity being a necessary predicate of a supreme will. As Rousseau truly says: "Though Power may be divided, Will cannot." The logical impossibility of conceiving of a divided Sovereignty is apparent from the impossibility of predicating in the same body two powers each supreme. The will of the State may find its form of expression through different mouthpieces, and its activities may be exercised through a variety of organs, but the will itself, as thus variously expressed and performed, is a unity. In every political organization there must be one and only one source, whence all authority ultimately springs.

This leads us to the second view in which the Sovereignty of the State is to be considered: namely, that of the relation of a State to other States. Thus far, we have considered Sovereignty as expressing the supremacy of the State's will over that of all persons and public bodies within its own organization: as binding them all, and being bound by none. Viewing it outwardly, now, in its international aspects, Sovereignty denotes independence, or complete freedom from all external control of a legal character. The State can be legally bound only by its own will. If upon any one point, however insignificant, its own will be not conclusive, but is legally dependent upon the consent of another power, its Sovereignty is destroyed.

91. Sovereignty from a sociological standpoint. Giddings, in surveying social evolution, finds four modes of sovereignty.[2]

According to the accepted conception of sovereignty, any individual, group or class of coöperating individuals, or entire coöperating people, having the disposition and the power to exact, and, in fact, exacting

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[2] Copyright, 1906, by The Macmillan Company.

obedience from all individuals in the social population, is a sovereign; and all individuals who obey a sovereign — be that sovereign a person, a class, or a people — are subjects; while sovereign and subjects together in their normal relation of authority and obedience are a state.

This conception of sovereignty is demonstrably inadequate and even inaccurate. There has never yet existed in any human society any power that could, or continuously and under all circumstances did, compel the obedience of all individual members of that society, or even successfully punish all for disobedience. The accepted conception is an approximately true picture of sovereignty under one particular grouping of social conditions. Social psychology and the facts of history yield other conceptions, each approximately true for some given stage of social evolution.

What, for instance, is the true nature of sovereignty in a community where nearly all individuals most of the time actually yield loyal obedience to a supreme political person, a monarch, or a dictator? This supreme political person has no power to compel the obedience of his subjects if they choose to defy his commands. Yet he has a power that is real, and it is a development of one of the fundamental and universal phenomena of social psychology. He has the power to *command* obedience. This is from every point of view, psychological and practical, a wholly different thing from the power to compel. It is the power of impression rather than of physical force, but it achieves the same end: it secures the obedience. In most of the nations of the world, throughout the greater part of their history, sovereignty has been in fact a personal power to command obedience.

There is a form of political society in which the real sovereign is a superior class, an aristocracy. This class is descended from a group of conquerors that for a time retained and exercised an actual power to compel the obedience of the conquered. But it tends to become a relatively small minority until, presently, it could readily be overthrown if the people rose against it. Instead of rebelling, however, they continue to yield obedience. They yield to a power which dominates them through their deference to wealth, through their homage to superior mind, and through the assent of their minds to beliefs and dogmas, above all, to tradition. Fortified by religion and all the authority of tradition, the superior class *exacts* the obedience which it would be powerless, were resort made to physical force, to compel.

There have been occasions, recurring throughout history, when the masses of the people, aroused to opposition and compacted by revolutionary madness into infuriated mobs, have become, for the time being, a resistless physical power. These have been occasions and circumstances

under which, as after conquest, sovereignty has been in fact a power to *compel* obedience. No individual, class, or group has been able to resist or withstand it.

Finally, there have been in the past, and are now, political communities in which practically all men have contributed or contribute, through discussion and voluntary conduct, to the creation of a general purpose or policy; and in which practically all men yield or have yielded assent to a general will. This general will might command, exact, or compel a vast deal of individual obedience, but, actually, it does something different and higher. It *evokes* obedience. Appealing to reason and to conscience, it calls forth an obedience that is rendered freely and with full understanding that it is a reasonable and unforced service.

Instead, then, of one universal mode of sovereignty in political society, sociology, surveying past and existing societies comparatively, and guided by the facts of social psychology, discovers four distinct modes of sovereignty, presented by different stages of social evolution; namely, first, Personal Sovereignty, or the power of the strong personality to *command* obedience; second, Class Sovereignty, or the power of the mentally and morally superior, with the aid of religion and tradition, to *inspire* obedience or through control of wealth to *exact* obedience; third, Mass Sovereignty, or the power of an emotionally and fanatically solidified majority to *compel* obedience; and, fourth, General Sovereignty, or the power of an enlightened, deliberative community to *evoke* obedience through a rational appeal to intelligence and conscience.

92. The limits of sovereignty. Lowell, considering sovereignty as a question of fact, argues that its extent depends upon the amount of obedience actually rendered.[1]

If the extent of sovereign power is measured by the disposition to obedience on the part of the bulk of the society, it may be said that the power of no sovereign can be strictly unlimited, because commands can be imagined which no society would be disposed to obey. This may very well be true, and perhaps it would be proper to classify sovereigns, not according as their authority is absolute or not, but according as it is indefinite, or restrained within bounds more or less definitely fixed; for unless the limits of power are tolerably well determined, they tend to stretch farther and farther. Definite limits may be set to sovereign power in either one of two ways: they may result from the rivalry of two independent rulers, who settle by negotiation questions concerning the boundaries of their respective jurisdictions, and quarrel when they

[1] By permission of Houghton Mifflin Company.

cannot agree; or they may be established by some formal declaration, which by sufficient precision enables the bulk of the society to have a general opinion about the extent of legislative authority, and to distinguish between those commands which fall within the boundaries prescribed and those which do not.

II. Location of Sovereignty

93. Sovereignty of the people. A recent statement of the doctrine that sovereignty lies back of the government in the hands of the people is given by Hart.

The common phrases, "the people" and "consent of the governed," suggest the distinguishing mark of popular government which makes the legal constitutional depository of sovereignty nearly correspond to the physical possessor of ultimate power. Where nearly all adult men can vote, the majority which decides questions has presumably the preponderant strength necessary to carry out its will; hence sovereignty of the people avoids many of the shocks and revolutions which under other forms are necessary to enforce the truth that in the long run a minority cannot impose its will on a majority. Yet the government of the many must be carried out by the few; and for a time the majority may yield to a small number of determined men, better armed or better organized or simply in possession.

The long and bitter experience of mankind shows the necessity of protecting the minority, or the apathetic and disorganized majority, by such a formal statement of principles as may cause the powerful to hesitate before applying the ultimate test of sovereignty, namely, the possession of superior force. Tradition, law, and especially definite and written constitutions, compel usurpers to confront vested rights and prejudices which are immense social forces; hence the modern, and especially the American, practice of multiplying checks on the methods and extent to which the sovereign power shall be exercised.

One such check is the doctrine of the compact, — very familiar at the time of the Revolution, — which was in effect that government was founded on an agreement between those who exercised power and those on whom it was exercised, and that to violate the tenor of the agreement would justify resistance. Another form of stating the same thing is the doctrine of indefeasible personal rights, which cannot be destroyed by any act of sovereignty: the doctrine does not in itself save men from arbitrary imprisonment, but it causes their oppressors to be objects of suspicion and dislike. The doctrine of constitutional limitations on government is a way

of preventing occasions for dispute; and the doctrine of checks and balances attempts to provide an automatic machinery which shall sound an alarm at encroachments by members of the governing class on others of the same class. Underlying all these ideas is the fundamental doctrine of revolution, — that is, of the moral right of the governed to take arms and try to prove their power as a sovereign majority, if the impalpable restrictions on government are not observed.

This conception denies the sovereignty of those who exercise government, and puts it back on those who have the right, within legal forms, to create restrictions on sovereignty. If, therefore, we can discover who has the ultimate legal power to make and alter constitutions, we have found the ultimate depository of sovereignty. In England, such a power rests in the peers of the realm and the constituencies of the House of Commons. In France, it rests in the electors of the Chamber and the Senate, acting in a joint convention. In the United States, the ultimate sovereign is the body of persons who, acting through two thirds of the members voting in the two houses of Congress, and through majorities of members voting in the two houses of the legislatures of three fourths of the states, may amend the federal constitution.

94. Political sovereignty. Sidgwick locates sovereign power, either conscious or unconscious, in the mass of the people.[1]

I think we must admit that there is, therefore, a certain sense in which the mass of the people in any country may be said to be the ultimate depository of supreme political power. Still, to say without qualification that the people is everywhere sovereign would be altogether misleading; since the statement would ignore the fundamental distinction between power that is unconsciously possessed — and therefore cannot be exercised at will — and power consciously possessed. An aggregate of men do not become conscious of their power as a body, until they become confident of mutual coöperation for the realization of common wishes; and this confidence is, under ordinary circumstances, only acquired gradually by the habit of acting in concert. Accordingly, when the governed are without the habit of acting in concert, they are, as a body, unconscious that they possess the power of refusing obedience to their government. Even the knowledge that, if an overwhelming majority agreed to refuse obedience, it could not be enforced, and that an overwhelming majority would be glad to disobey if each could rely on the coöperation of the others, would not necessarily give a consciousness of power to disobey with impunity: since mutual communication sufficient to produce the requisite

[1] By permission of The Macmillan Company.

mutual reliance may be wanting; and in its absence, each and all may be effectually restrained from disobedience by fear of the penalties it would entail. So far as the Government is, for this reason, able to count on the obedience of the mass of the people, in spite of their dislike to what is commanded, though we may still attribute power to the latter, we must add the fundamentally important qualification that it is an unconscious and unexercised power. . . .

I hold that, in a modern constitutional State, political power that is not merely exercised at the discretion of a political superior,— and that must therefore be regarded as supreme or ultimate,— is usually distributed in a rather complex way among different bodies and individuals; though, as I have said, it is also important to bear in mind that from the mere form of government in any state we can only conjecture very incompletely the actual distribution of the power of producing political effects.

95. Ultimate political sovereignty. Ritchie makes an extreme statement of political sovereignty, including past influences and future tendencies as component parts of sovereign public opinion.

The ultimate political sovereignty is not the determinate number of persons now existing in the nation, but the opinions and feelings of these persons; and of these opinions and feelings the traditions of the past, the needs of the present, and the hopes of the future all form a part.

96. The legal sovereign. The theory that sovereignty lies in each state in the hands of those who may legally amend its constitution is clearly stated in the following:

As a state in the exercise of its sovereignty may have occasion from time to time to amend or even to revise entirely its constitution, so as to adapt its life to newer conditions, there must be in every state a person or body of persons recognized as having the legal right to perform such a function. This agency of the state voicing its will in the enunciation of its fundamental law, is the legal sovereign. The legal sovereign, then, in the exercise of its power decides the form of the organization of the state, assigns powers to the other departments of government, prohibits the exercise of some powers and designates the manner in which the several powers assigned must be exercised. It may even specify the manner in which it will exercise its own powers, but such specifications must be considered as constitutional guaranties, not as limitations on its activity. In other words, the legal sovereign voicing as it does the absolute sovereignty of the state cannot legally bind itself not to exercise any part of sovereignty. It may give a formal

pledge in the nature of a limitation of its powers, but the binding force is moral, not legal, for a legal sovereign unable to perform its sovereign function would be limited in its powers, and hence not the repository of the most fundamental of sovereign powers.

In exercising this great power the legal sovereign should represent the will of the nation, and, as a rule, will more or less fully voice the desires of the people as a whole. As, however, states are constantly changing the conditions that determine their development, a legal sovereign designed in one age to express the will of the body politic, may in a later age fail to represent correctly that will. In such a case if the legal sovereign of its own accord fails to modify its composition so as to suit newer conditions, a revolution will probably take place after a period of dissatisfaction and agitation. This is the so-called Right of Revolution, the right of a community which finds itself hindered in development by existing forms, to overthrow these and substitute others more in accordance with the will of the community. Such a right must of course be justified on moral grounds; legally speaking all revolutions are rebellions and in violation of law.

In old-fashioned monarchies the legal sovereignty will naturally be found vested absolutely in the king, or in the king and his council, under the theory that these truly represent the larger interests of the state. In such cases the king, or the king and his council, may alter at will the fundamental law of the land. The inertia of custom and the fear of revolution or assassination may deter the king from making unpopular alterations, but if any changes at all are legally to be made, he is the proper agency to decide on and to enunciate them. If in such a state a representative council or a legislature should develop, this body may gain the right to share in the exercise of this power, and the three bodies, king, council, and legislature would then form the legal sovereign, as in England. In a similar manner the powers of the legal sovereign may pass entirely from the head of the state to the lawmaking body, as in France, or to the lawmaking body and the electorate, as in Switzerland. If the state be completely democratic, the electorate alone would exercise that power. This stage has almost been reached in Switzerland, through the use of the initiative and the referendum, and in some of the commonwealths of the United States of America through the use of the constitutional convention. In a federative form of government, the federal lawmaking body, combined with the lawmaking bodies of the federated commonwealths, may constitute the legal sovereign, as in the national system of the United States.

In respect to legal sovereignties located in lawmaking bodies, as in Great Britain, France, and the United States, it might properly be

maintained that the electorate also should be considered as legally a part of the legal sovereign, so far as it has the right to determine by election the membership of the parliament or legislative body. This would certainly be true if the electorate had also the right of instruction and of recall. If, however, the lawmaking body, when elected, has full discretion in respect to its policy, irrespective of instructions from constituencies, it may be better, on the whole, to consider that body for all practical purposes as the legal sovereign.

In an absolute form of government the personal sovereign will also be the legal sovereign, but the double aspect of the sovereign under such conditions is clear. Similarly if a legislature happens to be also the legal sovereign, it is always possible to distinguish between the legislature as a constituent and as a legislative body. Likewise, in a democracy, the electorate is the legal sovereign only when it directly exercises the powers of the legal sovereign. In the national system of the United States of America, e.g., the electorate is not legally sovereign, for the constitution vests the power of amendment in the national congress and the legislatures of the commonwealths. The electorate may request these to pass amendments, but has no power to command them so to do. Theoretically, these lawmaking bodies might at their discretion change the republic into an empire or into a socialistic form of government, without consulting at all the wishes of the electorate. The same illustration might apply in the case of Great Britain. The legal sovereign is the king in parliament, and action taken by this body is legally final, irrespective of the wishes of the electorate.

97. Sovereignty as total lawmaking power. Considering the expression of the state's will as the manifestation of sovereign power, Willoughby locates sovereignty in the sum total of the organs that may legally express such will.[1]

Understanding now by Sovereignty a power which is capable of exercise only through existing governmental agencies, it necessarily follows that this supreme power is exhibited whenever the will of the State is expressed. In fact, it is almost correct to say that the sovereign will is the State, that the State exists only as a supreme controlling will, and that its life is only displayed in the declaration of binding commands, the enforcement of which is left to mere executive agents. These executive agents, while acting as such, have no will of their own, and are but implements for the performance of that will which gives to them a political and legal authority.

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This, then, locates the exercise of Sovereignty in the lawmaking bodies. By whomsoever, or whatsoever body, therefore, the will of the State is expressed, and law created, there we have Sovereignty exercised. If we distinguish between executive, judicial, and legislative departments of the State, it is in this last-named department that the exercise of Sovereignty rests. . . .

The only point that we must remember is that the term "legislative" must not be so narrowly construed as to limit its application to those bodies by which formal statutory enactments are made. In so far as the chief executive of the State has the ordinance power, he may express the sovereign will and therefore exercise Sovereignty. . . . Again, constitutional conventions, in so far as they have the direct power of creating constitutional law, exercise this sovereign power. Finally, in so far as courts are the organs of the State for the creation of law, they express the will of the State and hence exercise Sovereignty. In so far, however, as their work is merely interpretative of existing law, they of course do not exercise this power. . . .

As we have already said, the electorate is to be distinguished from the People. There are instances in which this former body may act as an organ of the State for the exercise of its sovereignty. This happens whenever there exists a provision according to which law may be created by a *referendum* or other method of *plebiscite*. When so called upon for its vote, the electorate is to be considered as *ad hoc* a legislative body. . . .

To repeat, then, in conclusion; all organs through which are expressed the volitions of the State, be they parliaments, courts, constitutional assemblies, or electorates, are to be considered as exercising sovereign power, and as constituting in the aggregate the depository in which the State's Sovereignty is located.

98. Divisibility of sovereignty. In the early history of the United States the theory prevailed that sovereignty was divided between the "States" and the Union. Expressions of this point of view follow:[1]

U. S. Supreme Court: — The United States are sovereign as to all powers of government actually surrendered. Each state in the Union is sovereign as to all the powers reserved.

U. S. Supreme Court: — The several states retained all *internal* sovereignty and . . . Congress properly possessed the great rights of *external* sovereignty.

[1] Quoted in Merriam, "American Political Theories," pp. 257–261.

James Madison: — It is difficult to argue intelligibly concerning the compound system of government in the United States without admitting the divisibility of sovereignty.

Nathaniel Chipman: — The opinion formerly entertained that the sovereignty of a state was a sort of indivisible essence, a power absolute, uncontrolled and uncontrollable, has been corrected in modern times. Experience has shown it capable of division.

99. Delegation of sovereignty. The exercise of extensive powers may be delegated to various governmental organs without affecting the location of sovereignty.

Having then established that the sovereign body, as such, is independent of law, and that the sovereign body lays down, as positive law, the rules which are to regulate the conduct of the political society which it governs, the inquiry into the relation of rulers and their subjects would, for legal purposes, seem to be complete. It would be a simple relation of governors and governed.

But, in fact, this simple state of things is nowhere known to exist. Not only does the sovereign body find it necessary to employ others to execute its commands, by enforcing obedience whenever particular individuals evince a disinclination to obey the law; but in almost every country authority is delegated by the sovereign body to some person or body of persons subordinate to itself, who are thereby empowered, not merely to carry out the sovereign commands in particular cases, but to exercise the sovereign power itself, in a far more general manner; sometimes extending even to the making of rules, which are law in the strictest sense of the term.

When the sovereign body thus substitutes for its own will the will of another person, or body of persons, it is said to delegate its sovereignty.

There is scarcely any authority, even to execute a specific command, which is conferred by the sovereign body in terms so precise as not to leave something to the discretion of the person on whom it is conferred. On the other hand, there is scarcely any delegation of sovereignty which is so general and extensive as to leave the exercise of it, at any time, completely uncontrolled. And it would be easy to construct out of the powers usually delegated to others by the sovereign body, a continuous series, advancing by insensible degrees, from the most precise order, where the discretion is scarcely perceptible, up to a viceregal authority, which is very nearly absolute. Any attempt, therefore, to divide these powers accurately into groups by a division founded on the extent of the authority conferred must necessarily fail.

III. Modern Concepts of Sovereignty

100. Present theory of sovereignty. Recent tendencies concerning the theory of the indivisibility and absoluteness of sovereignty are thus given by Merriam:

In regard to the *nature* of sovereignty, there are two points which have been particularly emphasized during the recent period. In the first place the indivisibility of sovereignty has been, with the exception of a short time in America and Germany, generally recognized. The writers during the reaction against the Revolutionary theory were inclined to emphasize the unity of the sovereignty as much as Rousseau had done. The conflict between king and people ended, not by a division of powers between them, but by a recognition of the essential unity of the ultimate power in the hands of people, nation or State. Modern constitutionalism has rated highly the utility of a division of governmental powers, but it has not tended to show that the sovereignty itself is capable of such a division. The legislative, administrative and judicial functions are not regarded as militating against the essential and ultimate unity of the principle from which they emanate. Not even in the haziness that has obscured the Federal State has the principle of a divided sovereignty been able to maintain the ground it won, but it has been driven out and replaced by the conception of the one and indivisible sovereignty resident in the State. In the United States the logic of Calhoun, in Germany that of Seydel — both particularists — so damaged the idea of divided sovereignty that it has not since recovered its lost prestige.

Again, as to the *absoluteness* of sovereignty. In this direction there has been a general tendency to admit the impossibility of placing limitations on the sovereign power, formally at least. There have been found various restrictions in the nature of the State, in the general principles of righteousness, in considerations of a utilitarian nature; but none of these can be regarded as political limitations. It is generally agreed that there is no other political power capable of limiting the sovereign, else by hypothesis that limiting power must itself be sovereign. And here again neither Constitutionalism nor Federalism has operated against the strength of the idea. The king is no longer absolute, the ordinary Government is no longer unrestrained, but, nevertheless, the power that organizes the constitution, that can add to or subtract from it, is as unlimited and irresistible as ever. And this fact has been generally recognized in political theory. Also in relation to the Federal State, the drift of opinion has been toward the denial of the

possibility of a relative or limited sovereignty. Despite the temptation to the recognition of a mere diminution of sovereign power on the entrance of a State into a Federal Union, the opposite principle has clearly triumphed. The State is "legally despotic."

101. Criticism of the theory of sovereignty. Leacock, in his recent book, states briefly the main objections urged against the theory of sovereignty of the analytic jurists.[1]

The objections raised against it are directed to show that it is only of a formal and abstract nature, that it is inadequate in that it does not really indicate the ultimate source of political authority, and that it presents an erroneous conception of the nature of law.

The first of these objections to the Austinian theory is especially urged in the criticism offered by the English jurist Sir Henry Maine in his Oxford lectures on the "Early History of Institutions." From his seven years' experience as legal member of the council for India, Maine was brought in contact with a civilization of an essentially different character from the environment of English legal institutions which had been the basis of Austin's work. In Eastern countries immemorial custom reigns supreme. The idea of deliberate statutory enactment is alien to the oriental mind, and the most ruthless of Eastern despots finds his power controlled by the barriers of ancient usage and religious awe. Maine was, therefore, led to question whether there is "in every independent political community some single person or combination of persons which has the power of compelling the other members of the community to do exactly as it pleases." . . . The inevitable conclusion seems to be that the conceptions of sovereignty, state, and law adopted in the Austinian jurisprudence are inapplicable to communities of this description. But it is not only in regard to oriental society that Maine finds Austin's analysis inadequate. Even in the world of Western civilization it is only true as the result of a process of abstraction which "throws aside all the characteristics and attributes of government and society except one," namely, the possession of force; this explanation of political power by reference solely to a single attribute disregards at the same time "the entire history of the community, . . . the mass of its historic antecedents, which in each community determines how the sovereign shall exercise, or forbear from exercising, his irresistible coercive power."

The nature of this objection had, indeed, been in some measure anticipated by Austin himself. In order to cover all those cases of

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usage in which not the direct command of the sovereign but dictates of customary procedure obtained sway, he laid down the maxim, "What the sovereign permits he commands." The application of this doctrine may be best seen in the case of the English common (or customary) law. This is a body of regulations never expressed in the form of statutes issued by the sovereign Parliament, but existing from ancient times, and constantly modified and expanded by the interpretation of the courts. It would be quite wrong, Austin argues, to hold that the existence and continuance of this body of law is any indication of a limitation of the sovereign power of Parliament. For since the latter is admittedly competent to alter or abrogate the common law as it sees fit, the continued existence thereof is to be viewed as virtually by command of Parliament. . . .

It may perhaps reasonably be held that Austin's analysis is applicable to modern civilized states, but inapplicable to half-organized or primitive communities. Even in the case of civilized states, it is true that the theory is in a certain sense an abstraction. "It is true," says Sir James Stephen, in speaking of the theory of sovereignty, "like the propositions of mathematics or political economy, in the abstract only. That is to say, the propositions which it states are propositions which are suggested to the imagination by facts, though no facts completely embody and exemplify them. As there is in nature no such thing as a perfect circle, . . . so there is in nature no such thing as an absolute sovereign."

102. International law and sovereignty. The necessity of modifying the conception of absolute sovereignty when considering international relations is brought out in the following:

By some writers it has been held that there are in reality two distinct sides to the problem of sovereignty, namely, the international or external and the purely internal. External sovereignty relates to the position of the State among other States: internal to the relation between the State and all other persons or associations within its territory. The essence of the external or international sovereignty is consequently independence in relation to sovereigns, while that of internal sovereignty is supremacy in relation to subjects. . . . From the standpoint of international law, the distinguishing characteristic of sovereignty is found in the independence of the will of other States, while the internal aspects of the case are almost wholly ignored. The two sides of the State's existence are distinguished, and its external and internal relations regarded as separable. Hence it may follow that a community may be sovereign internally, that

is, supreme over all persons and associations on its territory, but non-sovereign or semi-sovereign in relation to other political societies. Or on the other hand, a State may be sovereign externally and yet lack the internal sovereignty, as in the case of a confederacy. . . . Thus the State from one point of view is sovereign, and from another subordinate. Where independence in relation to other States is lost, there may remain control over internal affairs; or where complete control over internal affairs is wanting, there may be independence internationally. A complete sovereignty would, of course, include both the external and the internal sovereignty; but the absence of one does not necessarily work the destruction of the other, and the State may still live on, relatively or half-sovereign.

In international law, then, sovereignty is primarily the independence of a State among States. This independence is indicated by the possession of certain rights which afford a criterion of the existence or nonexistence of sovereign power. Sovereignty being equivalent to a sum of powers, the loss of a part of these does not destroy its existence, and there is consequently room for the recognition of a semi-sovereign State. The great authorities on international law have not failed to find in this division of sovereignty a logical contradiction, even an apparent absurdity, but in view of the perplexing conditions to be interpreted and construed, no other way of escape seems open. The half-sovereign State may be "almost a contradiction in terms," an anomaly, a passing phenomenon, even "a bastard political society"; but it persists in its troublesome existence. International relations, it is reasoned, must when presented be accounted for and explained; and in these nicely graded forms of transition from sovereignty to subjection, the doctrine of the half-sovereign State is of invaluable practical service.

103. Sovereignty in constitutional and international law. An attempt to reconcile the difficulty of applying the strict legal conception of absolute internal sovereignty to the apparently limited sovereignty found in international relations, is made in a recent monograph. Crane considers internal sovereignty as supreme will and external sovereignty as a collection of powers.

In regard to the term "sovereignty," in particular, there is a dispute so hardily sustained that no definition is even tolerably acceptable to over one half the students of politics. In fact, the absence of accord upon this fundamental question produces a schism in political philosophy so deep as to cleave it almost asunder, since it is as one of the immediate results of this dissension that the question of the divisibility or indivisibility of sovereignty has apparently separated political thinkers into two

groups so widely dissimilar in their views that it may almost be said that there are two political sciences. . . .

As has been said, the conflict between the two groups of thinkers revolves most heartily about the question of the divisibility of sovereignty. It is, of course, absurd to charge the semi-sovereigntists with lack of logic by alleging that they deem it possible to divide a supreme will; for they do not define sovereignty as supreme *will*, but as supreme *power*, and for that reason are able to assert the validity of their conception of a "semi-sovereignty." There really is no question, then, of the logical possibility of semi-sovereignty, as that question is usually understood. The real question grows out of the two different conceptions of sovereignty as will and as power. These two different ideas of sovereignty go hand in hand with two different conceptions of the state, for the ideas of state and sovereignty are too closely knit together to separate the one from the other. It is, therefore, these two pairs of concepts that are considered in this inquiry: that is to say, on the one hand that theory of state and sovereignty from which is deduced the indivisibility of the latter, and, on the other hand, that theory which leads to the assertion of a divisible sovereignty.

A brief survey of political writings shows that the former of these theories has been developed and is held mainly by those authors who are most interested in the state from the internal point of view; and the latter theory, that of divisibility, by those who are chiefly concerned in the external relations of the state. Although this classification may be subject to many exceptions, it is nevertheless fair to attach the theory of indivisibility to analytical jurisprudence, which deals with municipal, or constitutional, law, and to attach the theory of divisibility to international law. . . .

The expounders of each of these theories are thus seen to have a different original province of interest to which they have primarily directed their inquiries. Each school seeks, however, to apply its own theory throughout the entire range of political speculation; each regards its central concepts as of exclusive validity. To no question, from the status of the meanest subject to the most delicate relations of the great powers with one another, does either school deem its respective theory inapplicable. . . .

In consequence, the hypothesis is here advanced that each of these two theories has an exclusive sphere of utility and fundamental validity within the field of political phenomena. In order to restrict each theory to a limited sphere of operation it is necessary to discover elements inherent in the theory that properly negative its application within the sphere of the other. The endeavor is not to uphold either theory, even

within a given sphere, for each has ample authority behind it; but to exclude each from a given sphere which shall thus be left undisputed to the other. . . .

The result of this critical consideration of the two theories is to show that that theory which has in anticipation been denominated the "constitutional theory" must be logically confined to the constitutional, or municipal, law of the state, and the international theory in like manner is limited to the domain of international law. . . .

The preceding discussion of the two great political theories, in which is found asserted, in the one the indivisibility of sovereignty, in the other its divisibility, leads to the conclusion that the two theories are entirely congruous, in spite of their use of the same terms with different signification.

The applicability of the principles of each theory is confined to a distinct sphere. The analytical theory determines the nature of the internal organization of the state, of its municipal, including its constitutional, law; the international theory explains the nature of the mutual relations of states, the nature of international law. The analytical theory with its "sovereignty" and kindred concepts affords no explanation of international law, nor the international theory with its "independence" any explanation of constitutional law.

It is, of course, a fact that principles of international law have by statute been adopted into municipal law, and are thus in very large part to be found in the municipal law of most of the various nations; that is, applied in their municipal courts. The fact that the same principle is recognized by the nation both by way of international law and of constitutional law does not merge the two distinct natures of that principle in its separate capacities. The nation may enact into law a rule of conduct taken from any source it may choose, but it cannot thereby alter its own essential nature. To illustrate, international law recognizes a specific territory as belonging to a nation; that nation may or may not, as it sees fit, erect that international possession into constitutional possession, for the possession of land is inconsequential in the analytical theory. On the other hand, international law recognizes certain individuals as subjects of the nation, but, even if the definition by international law of "subject" be adopted into the municipal law, that adoption is incapable of operating to change the nature of the "subject" of municipal law, for that is immutably fixed.

Thus it is plainly necessary to keep distinct the concepts of each theory, and there are a number of minor concepts the significance of which for the one theory or the other, for international or constitutional law, or for both, it is essential to determine.

IV. Revolution

104. Moral right of revolution. The following paragraph argues a moral right of revolution, even in the most democratic states, and suggests certain conditions in which revolution is justifiable and desirable:[1]

A legal or constitutional right of insurrection is an absurdity, if not a contradiction in terms; but, in the present period of political thought, few would contest the moral right to resist and overthrow established rulers in extreme cases of misrule, under most forms of government. . . . Few, on the other hand, would deny that such attempts at resistance and revolution ought only to take place in extreme cases, when there appear to be no milder means available for remedying either grave practical misgovernment, or persistent deliberate violation of established and important guarantees for good government. . . .

I conceive, then, that a moral right of insurrection must be held to exist in the most popularly governed community. In saying this I do not mean to imply that this violent remedy ought to be frequently used, or that it is likely to be brought into operation frequently in a modern civilized society. In such a society, the interest of the citizens generally in the maintenance of order is so great, that the victims of democratic oppression will usually find resistance hopeless; they will have to submit or depart with the best terms that they can obtain from the triumphant majority. Still I think it important to dispel the illusion that any form of government can ever give a complete security against civil war. Such a security, if attained, must rest on a moral rather than a political basis; it must be maintained by the moderation and justice, the comprehensive sympathies and enlightened public spirit, of the better citizens, keeping within bounds the fanaticism of sects, the cupidities of classes, and the violence of victorious partisanship; it cannot be found in any supposed moral right of a numerical majority of persons inhabiting any part of the earth's surface, to be obeyed by the minority who live within the same district. . . .

I have already suggested that a democratic state will naturally be disposed to concede local autonomy to its parts, to the utmost extent compatible with the interests of the whole; and I conceive that there are cases in which the true interests of the whole may be promoted by disruption. For instance, where two portions of a state's territory are separated by a long interval of sea, or other physical obstacles, from any

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very active intercommunication, and when, from differences of race or religion, past history or present social conditions, their respective inhabitants have divergent needs and demands in respect of legislation and other governmental interference, it may easily be inexpedient that they should have a common government for internal affairs; while if, at the same time, their external relations, apart from their union, would be very different, it is quite possible that each part may lose more through the risk of implication in the other's quarrels, than it is likely to gain from the aid of its military force. Under such conditions as these, it is not to be desired that any sentiment of historical patriotism, or any pride in the national ownership of an extensive territory, should permanently prevent a peaceful dissolution of the incoherent whole into its natural parts.

105. Types of revolutions. Amos, considering a relocation of sovereignty from the internal standpoint only, distinguishes the following kinds of revolutions:

By way of preface, it is necessary to notice that revolution is of three kinds, each of which is usually strongly marked, so as to render it clearly distinguishable from either of the others.

A revolution may be, first, essentially anarchical, that is, it may proceed from a general undisciplined temper in the revolting population, and be directed to the upsetting of the existing government, or government and constitution combined, without those who conduct it having any views as to substitutes for one or the other, and being in fact other than indifferent as to the political prospect of the future. This form of revolution is likely to be chiefly manifested in a primitive stage of civilization, when the advantages of orderly and settled government have not been long experienced, and when these advantages, indeed, only exist in a moderate degree, from the political weakness of the government and from the imperfectly organized state of society.

A second form of revolution is when no thought is entertained of reverting to anarchy, but the object of those who take part in it is, primarily, either to change the personality of the government or to resist some legislative or executive measure. This measure may presumedly be in accordance with the constitution, in which case the movement is directed to bring about a new interpretation of constitutional rules, or a modification of the constitution, or a better use of discretionary powers on the part of the authorities complained of: or the measure complained of may be contrary to the rules or spirit of the constitution, in which case the object of the movement is to reënforce the constitution and establish it on surer foundations.

A third form of revolution is where the object, conscious or unconscious, is to change the constitution itself from its foundations and to introduce a new form of government.

106. The right of revolution. The current belief in the right of revolution inherent in the "natural rights" theory is thus stated in the Declaration of Independence issued by the American colonies:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes, and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

107. An ordinance of secession. On the basis of the theory that sovereignty lay in the component commonwealths of the United States, a convention, assembled at Columbia, South Carolina, on the 20th of December, 1860, adopted the following ordinance and declared South Carolina "an independent commonwealth":

We, the people of the State of South Carolina in convention assembled, do declare and ordain, and it is hereby declared and ordained, that the ordinance adopted by us in convention on the twenty-third day of May, in the year of our Lord one thousand seven hundred and eighty-eight, whereby the Constitution of the United States of America was ratified, and also all acts and parts of acts of the general assembly of this State ratifying amendments of the said Constitution, are hereby repealed; and that the union now subsisting between South Carolina and other States, under the name of the "United States of America," is hereby dissolved.

108. Decree for suspending Louis XVI. On August 10, 1792, after the storming of the Tuileries, the following decree was passed by the French Legislative Assembly:

The National Assembly, considering that the dangers of the fatherland have reached their height;

That it is for the Legislative Body the most sacred of duties to employ all means to save it;

That it is impossible to find efficacious ones, unless they shall occupy themselves with removing the source of its evils;

Considering that these evils spring principally from the misgivings which the conduct of the head of the executive power has inspired, in a war undertaken in his name against the constitution and the national independence;

That these misgivings have provoked from different parts of the Empire a desire tending to the revocation of the authority delegated to Louis XVI; . . . decrees as follows:

1. The French people are invited to form a National Convention; the extraordinary commission shall present to-morrow a proposal to indicate the method and the time of this convention.

2. The head of the executive power is provisionally suspended from his functions until the National Convention has pronounced upon the measures which it believes ought to be adopted in order to assure the sovereignty of the people and the reign of liberty and equality.

CHAPTER IX

INDIVIDUAL LIBERTY

I. Nature of Individual Liberty

109. Different meanings of liberty. Seeley points out the different meanings of the term "liberty" in ordinary usage.[1]

To sum up: it may be convenient to contrast briefly the three chief political meanings of the word liberty in popular usage: —

First, it stands for national independence. This is the case especially in ancient history and poetry, as when we connect it with Marathon, Thermopylæ, Morgarten, Bannockburn, and so on.

Secondly, for responsibility of government. This occurs not only in ancient history, in the classical stories of tyrannicide, but also in our own [England's] constitutional history, for the main object of our struggle in the seventeenth century was to establish the responsibility of government.

Thirdly, it stands for a limitation of the province of government. This meaning also is quite usual, but it has seldom been distinguished from the other.

I gave reasons for thinking that the word liberty is best applied when it bears this meaning, so that a people ought to be called free in proportion as its government has a restricted province.

Thus understood, liberty will appear to be a good or a bad thing according to circumstances. When it is complete it will be equivalent to utter anarchy, and that is not a condition which we have any reason to think desirable. Whatever in human history is great or admirable has been found in governed communities; in other words, has been the result of a certain restriction of liberty. On the other hand, when government is once established it easily becomes excessively strong. During a great part of their recorded history men have suffered from an excess of government. Accordingly they have learnt to sigh for liberty as one of the greatest of blessings, but in accustoming themselves to regard it so they have insensibly modified the meaning of the word. What poets and orators yearn for is not the destruction of government — though they are not

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careful to explain this, being accustomed to presuppose a government which is certain to be strong enough — but only a reasonable restriction of government.

110. Relation of sovereignty to liberty. Burgess shows that sovereignty and liberty are not contradictory, but that liberty becomes more extensive and secure as sovereignty becomes more definite and real.

The unlimited sovereignty of the state is not hostile to individual liberty, but is its source and support. Deprive the state, either wholly or in part, of the power to determine the elements and the scope of individual liberty, and the result must be that each individual will make such determination, wholly or in part, for himself; that the determinations of different individuals will come into conflict with each other; and that those individuals only who have power to help themselves will remain free, reducing the rest to personal subjection. It is true that the sovereign state may confer liberty upon some and not upon others, or more liberty upon some than upon others. But it is also true that no state has shown so little disposition to do this, and that no state has made liberty so full and general, as the modern national popular state. Now the modern national popular state is the most perfectly and undisputedly sovereign organization of the state which the world has yet attained. It exempts no class or person from its law, and no matter from its jurisdiction. It sets exact limits to the sphere in which it permits the individual to act freely. It is ever present to prevent the violation of those limits by any individual to the injury of the rights and liberties of another individual, or of the welfare of the community. It stands ever ready, if perchance the measures of prevention prove unsuccessful, to punish such violations. This fact surely indicates that the more completely and really sovereign the state is, the truer and securer is the liberty of the individual. If we go back an era in the history of political civilization, we shall find this view confirmed beyond dispute. The absolute monarchies of the fifteenth, sixteenth, and seventeenth centuries were, no one will gainsay, far more sovereign organizations of the state than the feudal system which they displaced; and yet they gave liberty to the common man at the same time that they subjected the nobles to the law of the state. In fact they gave liberty to the common man by subjecting the nobles to the law of the state. Should we continue to go backward from the absolute monarchic system to those systems in which the sovereignty of the state was less and less perfectly developed, we should find the liberty of the individual more and more uncertain and insecure, until at last the barbarism of individualism would begin to appear.

111. The idea and source of individual liberty. Burgess states clearly the nature of individual liberty and its source in the sovereignty of the state, as follows:

The idea. Individual liberty has a front and a reverse, a positive and a negative side. Regarded upon the negative side, it contains immunities, upon the positive, rights; *i.e.* viewed from the side of public law, it contains immunities, from the side of private law, rights. The whole idea is that of a domain in which the individual is referred to his own will and upon which government shall neither encroach itself, nor permit encroachments from any other quarter. Let the latter part of the definition be carefully remarked, I said it is a domain into which *government* shall not penetrate. It is not, however, shielded from the power of the *state*. . . .

There is no point in regard to which the modern state presents so marked a contrast to the antique and the mediæval as in the recognition of a province within whose limits government shall neither intrude itself not permit intrusion from any other quarter. This is entirely comprehensible from the standpoint of the reflection that the theocracy crushes the individual will at every point by the divine will, that the despotism confounds the state with the government, and vests the whole power of the state in the government; and that the feudal state confounds property in the soil with dominion over the inhabitants thereof, substituting thus the petty despotism for the grand. Not until the rise of the modern monarchic governments upon the ruins of feudalism do we become aware of the fact that a new constitutional principle had found lodgment in the consciousness of the age. To this period individual liberty had existed only in so far as the government allowed. It had no defense against the government itself. . . . In the so-called constitutional state, *i.e.* in the state which is organized back of the government, which limits the powers of the government, and which creates the means for restraining the government from violating these limitations, individual liberty finds its first real definer and its defender.

The source. Therefore we affirm that the state is the source of individual liberty. The revolutionists of the eighteenth century said that individual liberty was natural right; that it belonged to the individual as a human being, without regard to the state or society in which, or the government under which, he lived. But it is easy to see that this view is utterly impracticable and barren; for, if neither the state, nor the society nor the government defines the sphere of individual autonomy and constructs its boundaries, then the individual himself will be left to do these things, and that is anarchy pure and simple. The experiences of the French revolution, where this theory of natural rights was carried into practice,

showed the necessity of this result. These experiences drove the more pious minds of this period to formulate the proposition that God is the source of individual liberty. . . . But who shall interpret the will of God in regard to individual liberty? If the individual interprets it for himself, then the same anarchic result as before will follow. If the state, or the church, or the government interprets it, then the individual practically gives up the divine source of his liberty; for the question of the interpretation and legal formulation of individual rights and immunities is the only part of the question which has any practical value. . . .

The present moment is much more favorable to an exact and scientific statement of these relations. We may express the most modern principle as follows: The individual, both for his own highest development and the highest welfare of the society and state in which he lives, should act freely within a certain sphere; the impulse to such action is a universal quality of human nature; but the state, the ultimate sovereign, is alone able to define the elements of individual liberty, limit its scope and protect its enjoyment. The individual is thus defended in this sphere *against* the government, by the power that makes and maintains and can destroy the government; and by the same power, *through* the government, against encroachments from every other quarter. Against that power itself, however, he has no defense. . . . The ultimate sovereignty, the state, cannot be limited either by individual liberty or governmental powers; and this it would be if individual liberty had its source outside of the state.

112. The rise of individual liberty. Willoughby traces the development of the idea of individual liberty and distinguishes its two aspects, — political and civil freedom.[1]

The primary purpose of the State is undoubtedly that of keeping the peace between individuals, and, in the first stages of barbarism, this, together with that of offense and defense against other tribes, is almost its sole aim. As Bagehot has pointed out, in his *Physics and Politics*, in these early times the quantity of government is much more important than its quality. That which is wanted is a comprehensive rule that shall bind men together and make them act in accordance with some definite rule of conduct. "What this rule is does not matter so much. A good rule is better than a bad one, but any rule is better than none." Thus this urgent necessity for a public control of some sort or other leaves but little room for the freedom of the individual, — a freedom which, indeed, the individual has not yet learned to desire, or properly to exercise should

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he possess it. The variety of the powers that are exercised in this stage by the ruling authority is not, in actual practice, so great; but the rules that define the scope and manner of exercise of this authority are so general and indefinite in character that in almost no direction does the individual possess any guarantee against State molestation.

As civilization advances, however, not only does the orderly habit of the people increase, but their moral qualities become more developed. The distinction between right and wrong becomes more clearly recognized, and principles of justice are more frequently followed without reference to the sanction of the State. The feeling of self-dependence arises, the desire for a certain latitude of action uncontrolled by the powers of the State comes into being, and thus, by degrees, the arbitrary and extensive control of the State becomes irksome. Thus arises a struggle between authority and liberty — a struggle that has continued and will probably continue throughout all history.

This struggle, it is to be remarked, is of a twofold nature: First, to secure to the individual a certain field in which he shall be free to act as he will, without interference either by the political power or by private individuals. Secondly, to establish general rules according to which the functions that are given to government shall be exercised; that is, to substitute for the arbitrary and uncertain action of government a more or less certain and uniform regulation of public affairs. Neither one of these aims is necessarily bound up in the other. Each is separately obtainable. We thus distinguish between political freedom and individual freedom. The former refers to the extent to which the people participate generally in the management of the State, or at least dictate the manner in which its powers shall be exercised. The latter has to do with the extent to which private rights of life, liberty and property are secured.

113. The evolution of liberty. A brief summary of the contributions of various periods to the idea of modern liberty follows:

In the despotisms of the Orient personal liberty was entirely unknown, the life, actions, and property of the individual being completely at the mercy of the ruler.

The Greeks were familiar with the idea of liberty, but they confounded liberty with popular sovereignty. They possessed political liberty but lacked personal freedom in the modern sense. In the Greek city republics the citizens (excluding of course the slaves, who had no legal rights of any sort) made the laws, decided upon peace or war, elected magistrates, served as judges, and performed the duties resting upon them as partakers of the sovereignty of the State. But there was no sphere of life to which the interference of the government might not be extended.

The despotism of the State prevented the growth of private rights. The Greek was primarily a citizen. He existed for the State, not the State for him. The family life, the religion, the property, the time, yes, all actions of the individual, were under the control of the State. The Greek State ostracized Aristides and put Socrates to death.

To the Roman jurists we owe the distinction between public and private rights. "Public Right," they said, "serves the Roman State, Private Right, the interests of individuals."

But among the Romans as among the Greeks we notice the same despotism of the State, the same confusion of sovereignty with liberty, which left the individual at the mercy of the State. The Roman citizen could not choose his own religion, as the persecution of the Christians shows. His speech, dress, manners, and actions were regulated by the censors.

The feudal system of the Middle Ages obliterated the distinction between public and private rights by associating the possession of property with the exercise of sovereignty. Government was regarded, not as a public trust, but as private property. The possession of land carried with it jurisdiction over those dwelling upon the land. Each baron was lord over his domain. The State no longer existed. There were now only rights and duties between lord and vassal, which were based upon contract and were founded upon personal, not political, relations.

In modern times the distinction between private and public rights has again been emphasized. The results of this separation have been beneficial to both. While public rights and duties have become more majestic and authoritative on the one hand, private rights and duties on the other have become more sharply defined, and have been more widely extended and more effectively secured. . . .

The desire of personal freedom which is so characteristic of modern times is the product of two factors mainly; namely, of Christianity and of the nature of the modern, as distinguished from the ancient, State. While the religions of the ancient world were State religions, Christianity is the world religion. It appeals to the individual as a man, not as the member of a particular State or people. . . .

Then, also, the relation of the individual to the government is necessarily entirely different in the modern State — which comprises a large territory, often with many millions of inhabitants — from what it was in the ancient city state. In the latter a greater unity was possible and consequently the control of the community over the individual was greater. The immediate control of the State over its citizens is likely to diminish as the extent of territory increases. Since it is impossible in a large State that the people exercise their sovereign power directly in a popular assembly, as they did in the city state of antiquity, the powers of government must

be delegated to one or a few persons who represent the State. This makes the distinction between the government and the people more evident.

II. National Liberty

114. National independence. Lieber considers national autonomy essential to liberty in its fullest sense.

It is impossible to imagine liberty in its fullness, if the people as a totality, the country, the nation — whatever name may be preferred — or its government, is not independent of foreign interference. The country must have what the Greeks called autonomy. This implies that the country must have the right, and, of course, the power, of establishing that government which it considers best, without interference from without or pressure from above. No foreigner must dictate; no extra-governmental principle, no divine right or "principle of legitimacy," must act in the choice and foundation of the government; no claim superior to that of the people's, that is, national sovereignty, must be allowed. This independence or national self-government farther implies that, the civil government of free choice or free acquiescence being established, no influence from without, besides that of freely acknowledged justice, fairness, and morality, must be admitted. . . . On the other hand, it must be remembered that this unstinted autonomy is greatly endangered at home by interfering with the domestic affairs of foreigners.

115. The American Declaration of Independence. The national liberty of the United States of America was proclaimed in the following document:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. . . .

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of

Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our Sacred Honor.

116. The acknowledgment of American independence. In the opening speech before Parliament in December, 1782, the king of England, George III, acknowledged American independence in the following words:

My Lords and Gentlemen:

Since the close of the last session I have employed my whole time in that care and attention which the important and critical conjuncture of affairs required of me.

I lost no time in giving the necessary orders to prohibit the further prosecution of offensive war upon the continent of North America. Adopting, as my inclination will always lead me to do, with decision and effect, whatever I collect to be the sense of my parliament and my people, I have pointed all my views and measures, as well in Europe as in North America, to an entire and cordial reconciliation with those colonies.

Finding it indispensable to the attainment of this object, I did not hesitate to go the full length of the powers vested in me, and offered to declare them free and independent states, by an article to be inserted in the treaty of peace. Provisional articles are agreed upon, to take effect whenever terms of peace shall be finally settled with the court of France.

In thus admitting their separation from the crown of these kingdoms, I have sacrificed every consideration of my own to the wishes and opinion of my people. I make it my humble and earnest prayer to Almighty God that Great Britain may not feel the evils which might result from so great a dismemberment of the empire; and that America may be free from those calamities which have formerly proved in the mother country how essential monarchy is to the enjoyment of constitutional liberty. Religion, language, interest, affections may, and I hope will, yet prove a bond of permanent union between the two countries: to this end, neither attention nor disposition on my part shall be wanting.

117. Recognition by the powers of Greek independence. Because of the general disorder in southeastern Europe caused by the revolt of Greece against Turkey, intervention by England, France,

and Russia compelled the Sultan to acknowledge Greek independence. In 1832 the powers announced to Greece their selection of Prince Otto of Bavaria as king for the newly formed Greek state. The proclamation follows:

Greeks:

Your new destinies are about to be fulfilled! The courts of France, Great Britain, and Russia have decided upon the choice of a sovereign, whose election the Greek nation had committed to their charge. Their coöperation, equally active and disinterested, had contributed to the independence of Greece. By the choice which they have now made, that independence will be consolidated under the scepter of Prince Otto of Bavaria. Greece is raised to the dignity of a kingdom, and obtains the alliance of one of the most ancient and illustrious of the royal houses of Europe,—one which has supported Greece in her struggles, assisted her in her misfortunes, and encouraged her in her regeneration.

The king of Greece will hasten, in person, to bind himself to the nation by the most sacred ties. He brings with him the best founded hopes for territorial boundaries of increased extent and security, of great financial resources, every means of attaining gradually a high degree of civilization, all the elements of an enlightened administration, of a good military organization, and, consequently, every pledge for the peace and happiness of his new country. The three courts are persuaded that they would mistake the character of the Greek nation, if they could doubt the sentiments which the nation will, with one voice, proclaim on this event.

Greeks, indulge these feelings with confidence! Encircle your new sovereign with gratitude and affection. Faithful subjects! rally round his throne; aid him with true devotion in the work of giving to the State a definitive constitution, and of securing to it the double blessing of peace abroad, of tranquillity, the observance of the laws, and of order, at home. This is the only recompense which the three courts require of you for the services which they have had the means of rendering to you.

(Signed) TALLEYRAND
PALMERSTON
LIEVEN, MATUSZEWIC

118. Bulgarian proclamation of independence. Bulgaria announced her independence of Turkey in the following manifesto issued by Prince Ferdinand on October 5, 1908:

By the will of our never-to-be-forgotten liberator and the great kindred Russian nation, aided by our good friends and neighbors, the subjects

of the king of Roumania, and by the Bulgarian heroes, on February 18, 1878, the chains were broken which had for so many centuries enslaved Bulgaria, once a great and glorious power.

From that time until to-day, full thirty years, the Bulgarian nation, still cherishing the memory of those who had labored for its freedom, and inspired by its traditions, has worked incessantly for the development of its beautiful country, and, under my guidance and that of the late Prince Alexander, it has become a nation fit to take a place as an equal among the civilized States of the world, and has shown itself capable of progress in science, art, and industry. While advancing along this path nothing should arrest the progress of Bulgaria, nothing should hinder her success. Such is the desire of the nation, such is its will. Let that desire be fulfilled. The Bulgarian nation and its chief can have but one sentiment, one desire. Practically independent, the nation was impeded in its normal and peaceful development by certain illusory and formal limitations which resulted in a coldness in the relations of Turkey and Bulgaria. I and the nation desire to rejoice in the political development of Turkey. Turkey and Bulgaria free and entirely independent of each other may exist under conditions which will allow them to strengthen their amicable relations and devote themselves to peaceful internal development.

Inspired by the sacred purpose of satisfying national requirements and fulfilling national desires, I proclaim, with the blessing of the Almighty, Bulgaria, united since September 6, 1885, an independent kingdom.

In conjunction with the nation I believe that this act will meet the approbation of the great powers.

119. Recognition by the United States of the independence of Cuba. On April 20, 1898, after considerable debate, the following joint resolution was passed and approved. The vote in the House was 311 to 6; in the Senate, 42 to 35:

Joint Resolution for the recognition of the independence of the people of Cuba, demanding that the government of Spain relinquish its authority and government in the island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.

Whereas the abhorrent conditions which have existed for more than three years in the island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battleship, with two hundred and sixty-six of its officers

and crew, while on a friendly visit in the harbor of Havana, and cannot longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited: Therefore,

Resolved . . ., First. That the people of the Island of Cuba are, and of right ought to be, free and independent.

Second. That it is the duty of the United States to demand, and the government of the United States does hereby demand, that the government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people.

APPROVED, April 20, 1898

III. CIVIL LIBERTY

120. The meaning of civil liberty. Lieber explains civil liberty as protection against undue interference on the part of both individual and government.

Liberty, in its absolute sense, means the faculty of willing, and the power of doing what has been willed, without influence from any other source, or from without. It means self-determination, unrestrainedness of action.

In this absolute meaning, there is but one free Being, because there is but one Being whose will is absolutely independent upon any influence, but that which he wills himself, and whose power is adequate to his absolute will — who is Almighty. . . .

If we apply the idea of self-determination to the sphere of politics, or to the state, and the relations which subsist between it and the individual, and between different states, we must remember that the following points are necessarily involved in the comprehensive idea of the state: . . . The term state means a society of men, that is, of beings with individual

destinies and responsibilities, from which arise individual rights, that show themselves the clearer and become more important as man advances in political civilization. Since, then, he is obliged and destined to live in society, it is necessary to prevent these rights from being encroached upon by his associates. . . .

Lastly, the idea of the state involving the idea of government, that is, of a certain contrivance with coercing power superior to the power of the individual, the idea of self-determination necessarily implies protection of the individual against encroaching power of the government, or checks against government interference. . . .

We come thus to the conclusion, that liberty applied to political man practically means, in the main, protection or checks against undue interference, whether this be from individuals, from masses, or from government. The highest amount of liberty comes to signify the safest guarantees of undisturbed legitimate action, and the most efficient checks against undue interference.

121. Liberty and authority. Mill outlines the phases of the evolution of liberty and argues for a wide sphere of freedom against governmental encroachment.

The struggle between Liberty and Authority is the most conspicuous feature in the portions of history with which we are earliest familiar, particularly in that of Greece, Rome, and England. But in old times this contest was between subjects, or some classes of subjects, and the government. By liberty was meant protection against the tyranny of the political rulers. . . . The aim, therefore, of patriots was to set limits to the power which the ruler should be suffered to exercise over the community; and this limitation was what they meant by liberty. It was attempted in two ways. First, by obtaining a recognition of certain immunities, called political liberties or rights, which it was to be regarded as a breach of duty in the ruler to infringe, and which, if he did infringe, specific resistance, or general rebellion, was held to be justifiable. A second, and generally a later expedient, was the establishment of constitutional checks; by which the consent of the community, or of a body of some sort supposed to represent its interests, was made a necessary condition to some of the more important acts of the governing power. . . .

A time, however, came, in the progress of human affairs, when men ceased to think it a necessity of nature that their governors should be an independent power, opposed in interest to themselves. It appeared to them much better that the various magistrates of the State should be their tenants or delegates, revocable at their pleasure. In that way alone it

seemed, could they have complete security that the powers of government would never be abused to their disadvantage. By degrees, this new demand for elective and temporary rulers became the prominent object of the exertions of the popular party, wherever any such party existed; and superseded, to a considerable extent, the previous efforts to limit the power of rulers. . . .

It was now perceived that such phrases as "self-government," and "the power of the people over themselves," do not express the true state of the case. The "people" who exercise the power are not always the same people with those over whom it is exercised; and the "self-government" spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority: the people, consequently, *may* desire to oppress a part of their number; and precautions are as much needed against this, as against any other abuse of power. The limitation, therefore, of the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community, that is, to the strongest party therein. . . . There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism. . . .

The only part of the conduct of any one, for which he is amenable to society. is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. . . .

This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual follows the liberty,

within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others; the persons combining being supposed to be of full age, and not forced or deceived.

No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified.

122. Civil liberty in the United States. The following is a brief classification of the individual rights specially guaranteed and protected in the United States:

The guaranties found in the state and federal constitutions which are intended for the protection of the individual in his person, his liberty, and his property have not been the result of any theorizing as to what ought to be secured to the individual by way of enjoyment; they have been the result of experience, and they relate to the supposed respects in which it has been found necessary to limit the powers of government in order that the largest practicable measure of individual freedom and opportunity may be secured. Nearly all of them may be traced more or less directly to struggles on the part of the people against the unjust exercise of powers of government in England and in this country.

The guaranty of the right to "life" seems to be intended as a safeguard against inflicting death on persons who are regarded as obnoxious to the government, otherwise than as the result of a regular and orderly procedure for the punishment of crime; hence the provisions with reference to the method of accusation, trial, and punishment may be regarded as guaranties intended for the protection of the right to life.

But liberty is equally imperiled by criminal proceedings which are not in accordance with regular and orderly methods, and by imprisonment inflicted as a punishment for crime for which there has not been a proper conviction. Therefore, the provisions with reference to the methods of criminal procedure are guaranties both as to life and liberty. . . .

The enjoyment of the largest measure of liberty which can consistently be guaranteed by organized government to the individual involves, however, much more than protection against unlawful physical restraint. Liberty is a most comprehensive term. It suggests, not only freedom of action, but the unrestricted enjoyment of the result of beneficial activity so far as such freedom is not inconsistent with like freedom on the part of others. Civil liberty is therefore impaired when individuals are deprived of protection in the acquisition and enjoyment of property, for the accumulation of property is one of the most substantial results of the freedom of action, the desire for acquisition being one of the strongest

desires of human beings. Hence, proper guaranties of civil liberty involve guaranties of property rights and of rights to pursue profitable occupations, and to make and enforce contracts.

The social instincts involve a desire to communicate with others, either for the mere pleasure of social intercourse or for the purpose of persuading or inducing others to act in accordance with one's wishes or for his benefit. Therefore, civil liberty is unduly restricted if the privilege of writing and speaking one's views and sentiments, so far as the privilege may be exercised without involving injury to others, is impaired or taken away. Hence, the so-called freedom of speech and the press is among the rights protected by constitutional guaranties.

Among the privileges most highly prized are those involving the enjoyment of religious forms and observances according to the dictates of individual conscience. Therefore, among the provisions for securing civil liberty are those prohibiting the undue interference with religious beliefs and the expression thereof in suitable forms.

123. Civil liberty guaranteed in the Constitution of the United States. The first eight amendments to the Constitution form the American Bill of Rights.

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and petition the government for a redress of grievances.

ARTICLE II

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in active service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

124. Civil liberty in England. The following is an outline of the leading "liberties of the subject" in England:

It is always held to be a valuable characteristic of the English Constitution that, under it, the maintenance of what is called the "Liberty of the Subject" is treated as a matter of peculiar consideration and consequence. The expression "Liberty of the Subject" does not, of course, mean that there is any member of the State who can do everything he likes, or is exempt from the control of the Laws. It means that the Laws are (if the true principles of the Constitution be observed), or are intended to be, made and executed in such a way that no individual person's freedom is impaired to a greater extent than is absolutely needed in order to secure the largest possible amount of freedom and benefit for all. . . .

The chief safeguards of the Liberty of the Subject concern (I) the mode of making laws; (II) the judicial administration of laws, that is, the trial of accused persons; (III) the general prevention of illegal imprisonment; and (IV) the definition and circumscription of the duties of the police, especially in respect of subjecting suspected persons to a preliminary judicial examination.

I. The first class of safeguards is found in the existence and mode of composition of the House of Commons, the popular and representative branch of the Legislature. . . .

II. The second class of safeguards includes the provision for Trial by Jury in the more important criminal cases. . . . To the same class of safeguards belongs the protection accorded to jurymen by which they cannot be made civilly or criminally responsible for their verdicts. . . . To this same class also belongs the protection of the functions of jurymen against possible encroachment by Judges. . . . To this class of safeguards also belongs the independence of the Judges of the Superior Courts. . . .

III. The third class of safeguards are those which provide against illegal imprisonment or confinement. These safeguards either take the form of securing that any one whose liberty is restrained shall have an opportunity (such as that presented by the proceedings for obtaining the writ of *Habeas Corpus*) of having the ground of his restraint judicially investigated; of being speedily brought to trial if accused; and of the executive being restricted as to the place of his imprisonment: or they take the form of securing compensation in a civil action for illegal detention. The general principle that "excessive bail must not be required" is an acknowledged, if not very available, safeguard for the same end. . . .

IV. The fourth class of safeguards concerns the definition and circumscription of the duties of the police, especially in respect of subjecting suspected persons to a preliminary judicial examination. . . . The purpose of a *warrant* is to secure the responsible coöperation and assent of a judicial officer at the earliest stage of the proceedings. . . . It is a common maxim that an "Englishman's house is his castle": this means, however, no more than that an Englishman's house or private room cannot be forcibly entered by the police except for a few clearly defined purposes and for important public ends.

125. Magna Charta. This document forms the basis of all later English and American written statements of free institutions. Some of its most important provisions follow:

12. No scutage or aid shall be imposed in our kingdom, unless by the general council of our kingdom. . . .

14. And for holding the general council of the kingdom concerning the assessment of aids, except in the three cases aforesaid, and for the assessing of scutages, we shall cause to be summoned the archbishops, bishops, abbots, earls, and greater barons of the realm, singly by our letters. And furthermore, we shall cause to be summoned generally, by our sheriffs and bailiffs, all others who hold of us in chief, for a certain day, that is to say, forty days before their meeting at least, and to a certain place; and in all letters of such summons we will declare the cause of such summons. And, summons being thus made, the business shall proceed on the day appointed according to the advice of such as shall be present, although all that were summoned come not. . . .

36. Nothing from henceforth shall be given or taken for a writ of inquisition of life or limb, but it shall be granted freely, and not denied. . . .

39. No freeman shall be taken or imprisoned, or disseized, or outlawed, or banished, or anyways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.

40. We will sell to no man, we will not deny or delay to any man, either justice or right.

126. Declaration of the Rights of Man and Citizen. This is the most famous document of the early stages of the French Revolution. While it was probably suggested by the Bills of Rights attached to American state constitutions, it indicates the existing abuses in France at that time.

1. Men are born and remain free and equal in rights. Social distinctions can be based only upon public utility.

2. The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression. . . .

4. Liberty consists in the power to do anything that does not injure others; accordingly, the exercise of the natural rights of each man has for its only limits those that secure to the other members of society the enjoyment of these same rights. These limits can be determined only by law. . . .

6. Law is the expression of the general will. All citizens have the right to take part personally or by their representatives in its formation. It must be the same for all, whether it protects or punishes. All citizens being equal in its eyes, are equally eligible to all public dignities, places, and employments, according to their capacities, and without other distinction than that of their virtues and their talents.

7. No man can be accused, arrested, or detained except in the cases determined by the law and according to the forms that it has prescribed. Those who procure, expedite, execute, or cause to be executed arbitrary orders ought to be punished: but every citizen summoned or seized in virtue of the law ought to render instant obedience; he makes himself guilty by resistance.

8. The law ought to establish only penalties that are strictly and obviously necessary and no one can be punished except in virtue of a law established and promulgated prior to the offense and legally applied.

9. Every man being presumed innocent until he has been pronounced guilty, if it is thought indispensable to arrest him, all severity that may not be necessary to secure his person ought to be strictly suppressed by law.

10. No one ought to be disturbed on account of his opinions, even religious, provided their manifestation does not derange the public order established by law.

11. The free communication of ideas and opinions is one of the most precious of the rights of man; every citizen then can freely speak, write, and print, subject to responsibility for the abuse of this freedom in the cases determined by law. . . .

14. All the citizens have the right to ascertain, by themselves or by their representatives, the necessity of the public tax, to consent to it freely, to follow the employment of it, and to determine the quota; the assessment, the collection, and the duration of it. . . .

17. Property being a sacred and inviolable right, no one can be deprived of it unless a legally established public necessity evidently demands it, under the condition of a just and prior indemnity.

127. Civil liberty in Russia. Even the recently issued "Fundamental Laws of the Russian Empire" contains provisions for individual liberty.

30. No one shall be prosecuted for criminal offenses in any other manner than that established by law.

31. No one shall be arrested except in the cases determined by law.

32. No one shall be tried and punished except for criminal offenses provided by laws in force at the time they were committed, unless new laws exclude the actions committed by the culprit from the category of criminal offenses.

33. The domicile of every one is inviolable. Searches or sequestrations in a domicile without the consent of the owner shall take place only in the cases and in the manner provided by law.

34. Every Russian subject shall have the right to select his place of abode and his occupation, to buy and sell property, and to depart from the territory of the Empire without molestation; limitations upon these rights are established by law.

35. Property is inviolable. The forced taking of real property, when such is necessary for governmental or public interests, shall take place only for an equitable and adequate compensation.

36. Russian subjects shall have the right to assemble peacefully and without arms, for purposes allowed by the law. The law determines the conditions under which meetings may be held, the manner of closing them, and likewise the limitation as to the localities where they may take place.

37. Every one shall have the right, within the limits prescribed by law, to express his thoughts orally or in writing, and also to disseminate them through the press or by other means.

38. Russian subjects shall have the right to form societies and associations for purposes which are not forbidden by law. . . .

39. The Russian subjects shall enjoy liberty of conscience. The conditions under which this liberty is enjoyed shall be determined by law.

40. All foreigners residing in Russia shall enjoy the same rights as Russian subjects, within certain limitations established by law.

41. Exceptions from the provisions of this chapter, with regard to localities in a state of war or in other exceptional state, shall be determined by the law.

IV. Political Liberty

128. Political rights. The following are the most important aspects of the rights of citizens to share in government:

Rights, as already said, are based on the law of the land and secured through governmental agencies. But if the citizen body as a whole has no voice in the making of laws, and if the government is controlled by a comparatively small per cent of the citizens, there would be no real assurance that general rights of life and property would be safeguarded. Experience shows that a small class in control of the law and its administration too easily inclines to neglect general interests, especially when these are in conflict with its own private interests. For such reasons there have been from time immemorial demands such as these:

(1) That office be considered not a private right but a public trust, to be administered by responsible persons, who may be called to account for violations of law. (2) That the law be definite, and open to the

knowledge of all. (3) That the citizen body have a determining voice in the making of law, either directly or through representatives. (4) That the electorate or body of voters include the largest possible per cent of the entire citizen body. (5) That the judicial system be so administered as to secure to all citizens their rights.

These demands are now acknowledged in democracies and in consequence a large proportion of the citizen body have the political right of suffrage. This power has been wielded so effectively that other important political rights have been secured one by one.

In addition to the right of manhood suffrage, there is: (1) The right of every voter to aspire to any office in the state. (2) The right to fill offices through election or through elected representatives, and the right to hold all officials responsible for inefficiency and misconduct in office. (3) The right to determine directly or through representatives the fundamental law of the land, whether expressed in a written or unwritten constitution; and, in addition, the right to formulate all other legislation. (4) The right to discuss freely and to criticize openly governmental measures, policies and officials. (5) In English-speaking countries, the right to assist in the settlement of judicial cases by jury service.

In these rights the essential point is that the citizens themselves directly participate in the exercise of governmental functions, or name from their ranks those who shall perform these activities in the name and for the welfare of the people. President Lincoln ably voiced the democratic ideal in his famous Gettysburg speech, in expressing his determination that "government of the people, by the people, and for the people shall not perish from the earth." Naturally, the complete attainment of this ideal is possible only in high civilization, but all modern nations tend to enlarge more and more the political rights of their citizens.

These rights have sometimes been attained in advance of a general capacity to use them wisely, with the result that inefficiency and corruption become common. Experience, however, which is always the best teacher, brings home the lesson of misgovernment in heavy taxation, excessive death rates and economic disorders. Democracies, therefore, tend to emphasize at the present time character and intelligence as prerequisities for suffrage; with the proviso, however, that the state furnish free general education and further morality so as to develop its citizens into persons capable of an intelligent exercise of the suffrage. Compulsory education and an efficient system of schools are the safest guaranties of a democratic suffrage. Should these not be in evidence, a more aristocratic form is preferable until political intelligence becomes common.

129. Political liberty in Oklahoma. New communities are often most radical in political experiments. The following sections from the recently adopted constitution of Oklahoma indicate the popular control over government there established:

SECTION 1. The legislative authority of the State shall be vested in a legislature, consisting of a senate and a house of representatives; but the people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the legislature, and also reserve power at their own option to approve or reject at the polls any act of the legislature.

SEC. 2. The first power reserved by the people is the initiative, and eight per centum of the legal voters shall have the right to propose any legislative measure, and fifteen per centum of the legal voters shall have the right to propose amendments to the Constitution by petition, and every such petition shall include the full text of the measure so proposed. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by petition signed by five per centum of the legal voters or by the legislature as other bills are enacted. The ratio and per centum of legal voters hereinbefore stated shall be based upon the total number of votes cast at the last general election for the State office receiving the highest number of votes at such election.

SEC. 3. . . . The veto power of the Governor shall not extend to measures voted on by the people. . . . Any measure referred to the people by the initiative shall take effect and be in force when it shall have been approved by a majority of the votes cast in such election. Any measure referred to the people by the referendum shall take effect and be in force when it shall have been approved by a majority of the votes cast thereon and not otherwise.

The style of all bills shall be: "Be it Enacted by the People of the State of Oklahoma. . . ."

SEC. 4. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the legislature in the same manner in which such power may be exercised against a complete act. . . .

SEC. 5. The powers of the initiative and referendum reserved to the people by this Constitution for the State at large, are hereby further reserved to the legal voters of every county and district therein, as to all local legislation, or action, in the administration of county and district government in and for their respective counties and districts. . . .

130. Manifesto summoning the First Russian Duma. Terrible disturbances in Russia, together with her defeat at the hands of Japan, compelled the extension of certain political rights to the people. The following manifesto was issued in August, 1905:

The empire of Russia is formed and strengthened by the indestructible union of the Tsar with the people and the people with the Tsar. This concord and union of the Tsar and the people is the great moral force which has created Russia in the course of centuries by protecting her from all misfortunes and all attacks, and has constituted up to the present time a pledge of unity, independence, integrity, material well-being, and intellectual development in the present and in the future.

In our manifesto of February 26, 1903, we summoned all faithful sons of the fatherland in order to perfect, through mutual understanding, the organization of the State, founding it securely on public order and private welfare. We devoted ourselves to the task of coördinating local elective bodies (*zemstvos*) with the central authorities, and removing the disagreements existing between them, which so disturbed the normal course of the national life. Autocratic Tsars, our ancestors, have had this aim constantly in view, and the time has now come to follow out their good intentions and to summon elected representatives from the whole of Russia to take a constant and active part in the elaboration of laws, adding for this purpose to the higher State institutions a special consultative body intrusted with the preliminary elaboration and discussion of measures and with the examination of the State Budget. It is for this reason that, while preserving the fundamental law regarding autocratic power, we have deemed it well to form a *Gosoudarstvennaia Duma* (i.e. State Council) and to approve regulations for elections to this Duma, extending these laws to the whole territory of the empire, with such exceptions only as may be considered necessary in the case of some regions in which special conditions obtain. . . .

We have ordered the Minister of the Interior to submit immediately for our approbation regulations for election to the Duma, so that deputies from fifty governments, and the military province of the Don, may be able to assemble not later than the middle of January, 1906. We reserve to ourselves exclusively the care of perfecting the organization of the *Gosoudarstvennaia Duma*, and when the course of events has demonstrated the necessity of changes corresponding to the needs of the times and the welfare of the empire, we shall not fail to give the matter our attention at the proper moment.

We are convinced that those who are elected by the confidence of the whole people, and who are called upon to take part in the legislative

work of the government, will show themselves in the eyes of all Russia worthy of the imperial trust in virtue of which they have been invited to coöperate in this great work; and that in perfect harmony with the other institutions and authorities of the State, established by us, they will contribute profitably and zealously to our labors for the well-being of our common mother, Russia, and for the strengthening of the unity, security, and greatness of the empire, as well as for the tranquillity and prosperity of the people. . . .

Given at Peterhof on the nineteenth day of August, in the year of grace 1905, and the eleventh year of our reign.

NICHOLAS

131. Weakness of democracies. Bryce summarizes the accusations against states in which political liberty is extensive.[1]

The chief faults which philosophers . . . and popular writers repeating and caricaturing the dicta of philosophers, have attributed to democratic governments, are the following:

Weakness in emergencies, incapacity to act with promptitude and decision.

Fickleness and instability, frequent changes of opinion, consequent changes in the conduct of affairs and in executive officials.

Insubordination, internal dissensions, disregard of authority, a frequent resort to violence, bringing on an anarchy which ends in military tyranny.

A desire to level down, and intolerance of greatness.

Tyranny of a majority over the minority.

A love of novelty: a passion for changing customs and destroying old institutions.

Ignorance and folly, producing a liability to be deceived and misled; consequent growth of demagogues playing on the passions and selfishness of the masses.

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CHAPTER X

LAW

I. Nature of Law

132. The meaning of law. The following paragraph brings out the social origin of law and the transition from customary rule to politically enforced state will:

In any community there will develop set and customary ways of carrying on social activities. Persons soon realize that time is saved and friction avoided by conforming their actions to social standards and routine. Such customs develop in all ages and in all kinds of social life, whether economic, domestic, or religious. They form a sort of unwritten code, enforced by parental and ecclesiastical authority or by the pressure of public opinion. Some of these customs, however, may become so important for general welfare that stronger pressure than social authority or opinion must be brought to bear on those members of the community who incline to acts in violation of social standards. Whenever a community in its collective capacity, presumably acting through its body of elders, its government, undertakes to apply such pressure, by fixing penalty for violation, then such customs cease to be purely social and become political. In other words they become the *law of the land.* They are virtually commands, ordering or prohibiting certain actions, and disobedience is followed by the infliction of a penalty fixed by the governing body of the community. As the sphere of governmental activity widens, other social customs become of general importance, enforceable under penalty by the state. Throughout the entire history of the state, laws have developed in this manner from customs. These, arising from social intercourse, are at first largely personal and local; some in process of time develop general importance, and when really essential, are enforced through government for the sake of the general welfare. Law, therefore, may be defined as the formulated will of the state, enforced by the sovereign power of the state. This will may be formulated in customs having a legal sanction, or in commands written or unwritten.

133. The concept of law. Lee also emphasizes the essentially spontaneous origin and natural basis of law as follows:[1]

What, then, is law? It may be considered either as it has become by the evolution of thought, or as it was when it first became differentiated from closely related elements of the primitive human consciousness. The definition of the analytic jurists according to the former method is as follows: According to Austin and Bentham, a law may be resolved into a general command, one emanating from a sovereign or lawgiver and imposing an obligation upon citizens, which obligation is enforced by a sanction or penalty, threatened in the case of disobedience. This definition, never quite true, never quite applicable, is for all that not to be wholly rejected in its political sense. Yet it is too unsatisfactory, too impracticable, to be recognized as a complete definition of even the most modern concrete law, though therein lies its chief claim to authority. And certainly such a definition does not apply to the early law, or that from which modern law has been evolved. In the early forms of society there was, in place of the skillfully defined modern law, a body of custom, not attributable to any sovereign authority or lawgiver. This custom was regarded as binding upon the whole body of persons forming the primitive social group in which such custom obtained. Furthermore, that custom was enforced in a rude manner, either by permitting the person injured by its violation to avenge himself as best he could, or by depriving the offender of certain rights, such as the aid and society of members of the group. In such a state, law would be best defined as that body of customs regarded as binding upon the members of a group or class, and enforced by their authority. This is law as first discerned in all nations; it is the form in which it constantly appears in the course of history. Only with the rise of the abundant modern legislation has it been seen that law might be conceived as the command of a sovereign body. . . .

Possibly no great department of man's higher thought and activity is so closely connected with his actual life as is the law. Because law is that body of customs which are enforced by the community, it is that which regulates man's conduct toward his fellow men, which controls his gross passions and restrains his rude impulses. It renders possible common life. To a great degree, it takes its rise in the demands of trade, and it makes that trade practicable. Much of it arises spontaneously in connection with the possession of property, and it renders possession possible. In other words, it arises spontaneously in connection with man's social life, and its distinctiveness from custom lies only in the fact that law is

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so necessary to the existence of society and the common activity that it is enforced by an authority.

134. The nature of law. Wilson makes law include custom as well as definite enactment, and considers recognition and enforcement by the state its essential attributes.

Law is the will of the State concerning the civic conduct of those under its authority. This will may be more or less formally expressed: it may speak either in custom or in specific enactment. Law may, moreover, be the will either of a primitive family community such as we see in the earliest periods of history, or of a highly organized, fully self-conscious State such as those of our own day. But for the existence of Law there is needed in all cases alike (1) an organic community capable of having a will of its own, and (2) some clearly recognized body of rules to which that community has, whether by custom or enactment, given life, character, and effectiveness. Law is that portion of the established thought and habit which has gained distinct and formal recognition in the shape of uniform rules backed by the authority and power of Government. The nature of each State, therefore, will be reflected in its law; in its law, too, will appear the functions with which it charges itself; and in its law will it be possible to read its history.

135. Law as custom. The following illustration, used by Maine, shows a type of society in which the idea of *making* law is as yet absent:

At first sight there could be no more perfect embodiment than Runjett Singh of sovereignty as conceived by Austin. He was absolutely despotic. Except occasionally on his wild frontier he kept the most perfect order. He could have commanded anything: the smallest disobedience to his command would have been followed by death or mutilation, and this was perfectly well known to the enormous majority of his subjects. Yet I doubt whether once in all his life he issued a command which Austin would call a law. . . . He had all material of power and he exercised it in various ways. But he never made law. The rules which regulated the lives of his subjects were derived from their immemorial usages, and these rules were administered by domestic tribunals. . . .

136. Positive law. In final analysis the essence of law, in its political sense, is found to be its enforcement by the state. This is clearly brought out in the following:

The most essential idea connoted by the term *law* is that of order or uniformity. A law, in other words, using it in its most general meaning, states a rule or principle in accordance with which certain classes of natural phenomena are conceived to occur, or in conformity to which it is desired or expected that men shall shape their conduct. Analyzing the idea further than this, it is found that laws may be sharply distinguished from each other according to: (1) the source whence their binding authority is conceived to come, (2) the means by which their contents are made known to or are discoverable by men, (3) the character of the facts or acts to which they apply. As regards the source whence their authority is conceived to be derived, this may be ascribed to a god or gods, to great Nature as creative or legislative, to the reason of each individual man, or to the fiat of some human authority. As regards the means by which the contents, *i.e.* the specific prescriptions, of laws, are made known to men, this may be either by way of direct divine revelation, by the individual reason, by custom and tradition, or by the published will of human legislators. As regards the character of the facts or acts to which they are to apply, laws may be either statements of sequences of causes and effects as observed in the phenomenal world, or they may express canons for the guidance of men's conduct. In the latter case, they may have reference solely to the internal acts of the will, and for this reason are termed moral, or they may be regulative of outward acts, in which case they may be social or political according as they refer to conduct socially or politically significant. In the one case the sanction or coercive power is supplied by social disapprobation in the event of their violation, in the other by penalties determined and applied by the politically governing power. In this last case, laws are described as political or positive. By political or positive law, then, we understand a command issued by a political superior to a political inferior, — from a sovereign to a subject, — ordering that something be done or not done, as the case may be, and threatening a penalty in case of disobedience. To use the language of John Austin, "Law is the aggregate of rules set by men as politically superior, or sovereign, to men as politically subject."

137. Definition of law. Holland, after a process of exclusion, arrives at the following definition of law:

Leaving therefore on one side those rules which are set by God, we come to those which are set by a definite human authority, and here we draw the final distinction between the case when such authority is, and the case when it is not, a sovereign political authority. Rules set by such an authority are alone properly called "laws."

By a successive narrowing of the rules for human action, we have at length arrived at such of those rules as are laws. A law, in the proper sense of the term, is therefore a general rule of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities, is that which is paramount in a political society.

More briefly, a general rule of external human action enforced by a sovereign political authority.

All other rules for the guidance of human action are called laws merely by analogy; and any propositions which are not rules for human action are called laws by metaphor only.

138. Definition of law. Markby defines law as follows:

We thus arrive at a conception of the term law which may be summed up as follows. That it is the general body of rules which are addressed by the rulers of a political society to the members of that society and which are generally obeyed.

II. Sources and Development of Law

139. The sources of law. Holland, in his chapter on "The Sources of Law," states them as follows:

1. Custom or usage.
2. Religion.
3. Adjudication or judicial decision.
4. Scientific discussion.
5. Equity.
6. Legislation.

140. Present sources of law. The relative parts played by the various sources of law are stated by Willoughby as follows:[1]

In a general way, the sources of Law have now been indicated. Defining the law of the land, as we have thus far used the term, as that body of principles applied by the courts in the exercise of their jurisdictions, we have seen its sources to be custom, judicial construction and precedent, scientific commentary, and legislative enactment. As we have seen, the recent tendency has been, and will undoubtedly continue to be, for the last source to become relatively more and more important. At the same time, it is to be remembered that the other agencies will be ever present. Custom with its slow tread will render obsolete laws that have become anachronistic, and will create new principles that will force their recognition upon the legislatures and courts. Scientific commentaries

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and textbooks will continue their influence, and courts, too, of necessity, will never be freed from the task of producing judge-made law. All statutory law, from its formal and definite statement, is rigid in character, and, in its application to changing conditions, must be softened by the judge, if the sense of justice be not outraged.

In the development of law, custom is the conservative element, legislative enactment the radical. The task of the true statesman is to give to both of these elements their due importance. It was the great merit of the work of Savigny that he showed that the task of the legislator should be largely limited to the statutory confirmation of principles that common usage has already established, rather than the invention of laws according to individual caprice or judgment. As Count Portalis has expressed it, "the legislature should not invent law, but only write it."

At the same time, however, it is undoubtedly true that there should be, especially in these modern times, a more active principle than this in legislation. The opportunities enjoyed by legislatures should be used for the creation of rules that custom cannot supply. The necessity often arises, also, for the release of society from rules which custom has itself created, but which no longer comport with the best interests of all. . . .

In our day, however, the danger seems to be that our legislatures will go to the other extreme, and give expression to that spirit of innovation which, acting without reference to the past, or sufficient consideration for the future, seems to characterize popular bodies. The dictates of prudence and the feelings of personal responsibility that restrain the monarch from too hasty action are both wanting in a large representative assembly. The responsibility in case of ill success, when distributed among a large number, is reduced to a minimum, and, at the same time, the feeling on the part of such a body that it represents in itself the entire nation, gives to it a feeling of power that is necessarily intoxicating.

141. The beginnings of law. The origin of those customs which serve as law in primitive society is discussed by Jenks as follows:

So far back as records go, Law has always been the expression of social force. Whatever views men may have held as to the origin of those rules of conduct which they have felt themselves bound to follow, the force which has compelled their obedience has been the approval or disapproval of the community in which they have found themselves. That approval or disapproval may have assumed different forms; that community may have been based on one or other of many different principles, it may have been organized on one or other of many different plans. But, so far back as recorded history goes, the force at the back of law has always been a social force.

There is, however, not a little in the early history of legal ideas to raise a plausible conjecture that Law, at least in its rudimentary state, is older than society. The nongregarious animals are governed by a force to which we apply the name of Instinct, but which, in its results, is hardly to be distinguished from Law. We can predict with almost perfect certainty that such an animal will do certain acts, and will not do certain other acts, far more confidently indeed than we can make a similar assertion of human beings in the best ordered society. And yet, it is certainly not a social force of any kind which insures this regularity of conduct. It is, if we are to credit those who are best entitled to be heard on such a subject, the force of inherited experience. . . .

It may be freely admitted that we have no direct evidence of any pre-social condition of the human race, of any period in which isolated individuals, or even isolated pairs, represent the normal condition of mankind. But there is nothing inherently impossible in such a state of things, nothing at all inconsistent with the recorded stages of human history. Under such conditions Man may very well have acquired, in precisely the same way as the bear and the tiger, instinctive *habits*, which afterwards developed into deliberate conduct. . . .

But, whatever may have been the cause, it is quite clear that the effect of the association of men in groups was, ultimately, to transmute the habits of individuals into the customs of communities, and to sanctify these customs by a force wholly unknown to isolated individuals. The weakness of the individual habit is, that it gives way before caprice, before temptation, before mere curiosity. No one can really be a law unto himself; however firmly he may resolve to follow a certain rule, he will break it if he thinks fit. But if he is a member of a community, whose members all regard the rule as binding, the case will be different. If he then breaks the rule, he must be prepared to face the disapproval of his fellows. There may be no regular organization for expressing this disapproval; the form which it will take may be uncertain. But we have no reason to suppose that it will be ineffectual. At the very least, the offender will be "taboo." . . . A well-arranged "taboo" would probably mean speedy starvation for the victim.

It is evident, then, that from the association of men into groups we must date a new stage in the evolution of Law. As Man's logical faculties begin to develop, as Reason in its feebler forms takes the place of Instinct, we observe a new idea which is to give tremendous force to the influence of Law. Arguing from the seen to the unseen, unhappily familiar with disasters arising from human agency — with murder, theft, incendiarism — Man believes that the disasters for which no human agency will account must be the work of unseen beings, whose anger

has, by some means or another, been aroused. It may be only that they are hungry; hunger always looms largely before the consciousness of primitive Man. And so, propitiatory sacrifices are offered, that the wrath of the Unseen Powers may be appeased, as their hunger abates. But it is equally likely to be that some breach of habit or custom has aroused their indignation. Man is aware that such breaches are a frequent source of calamities arising from human anger; he draws an obvious inference when he attributes to a similar cause the anger of the Unseen Powers.

It is in this connection that social force begins to work so powerfully on rudimentary notions of Law, that from henceforth the history of Law becomes inseparable from the history of Society. Breach of habit by the member of a social group is believed to be a source of danger, not only to the individual who commits it, but to the group of which he is a member; for the Unseen Powers cannot be expected to discriminate very accurately. The group which harbors an accursed man is itself accursed. The offender must be got rid of. He will be lucky if he is not sacrificed to propitiate the angry gods; lucky if he gets off with "taboo."

142. The development of law in modern Europe. Markby traces the development of law in modern Europe, showing the difference between the Roman-law origin of the jurisprudence of the continent and the customary-law origin of the legal system of England.

None of the great nations founded on the continent of Western Europe after the fall of the Roman Empire have constructed an independent legal system of their own. France, Italy, Austria, Germany, Holland, and Spain have every one of them adopted the Roman law as their general or common law, and have only departed from it so far as particular occasions might require. Every gap not filled up by special legislation, or specially recognized custom, has been supplied from the Roman law, and even their modern codes to a very large extent only contain the ideas of the Corpus Juris in a nineteenth-century dress.

The history of the process by which the Roman law became the common law of the Western portion of the European continent can only be referred to here with extreme brevity and in its broadest features. It commences, of course, when the Goths, the Burgundians, the Franks, and the Lombards began to found new kingdoms upon the ruins of the Roman Empire. In none of these were the Roman citizens deprived of the enjoyment of their own laws. The conquering invaders and the conquered inhabitants lived side by side each under their own system, just as the natives of India and Europeans do at the present day; and when the German races began to conquer each other, especially when several of

them were united by Charlemagne under one Empire, the same forbearance was exercised. Each person retained the law indicated by his birth, so that you could find side by side not only two systems, a Roman and a barbarian, but several systems, a Roman, a Gothic, a Burgundian, a Lombardic, and so forth. . . .

At this period law was personal; that is, a man took the law of his parents simply by reason of his descent, and not because he or they were domiciled on any particular spot or owed allegiance to any particular ruler. Subsequently law became territorial; that is to say, a given body of law was made applicable to a district marked out by geographical limits, and applicable generally within those limits, because of their inhabitancy and their consequent allegiance to a single government. The influence under which a territorial law and territorial sovereignty were arrived at was, I conceive, feudalism. Wherever feudalism prevailed the tenant began to take his law from the land and not from his descent.

But we have still to see how the several barbarian laws became welded together with the Roman law and with that which we call the feudal system into one compact body of law for each country. How did the descendant of the Roman citizen and the descendant of his barbarian conqueror come each to lose his distinctive rights? Of this we know but little. But the amalgamation probably commenced at a very early period after the barbarian conquest: and this amalgamation would be greatly facilitated by the circumstance that even the barbarian laws consisted of something more than the rude customs which these tribes had brought with them from their native forests. The leges barbarorum all bear obvious traces of having been themselves influenced by the Roman law.

Language, literature, education, and above all, commerce, were on the side of the Roman lawyers. Still it is not without astonishment that we find the law of the conquered silently displacing the law of the conquerors, and the Roman law adopted everywhere as the law of the land. This adoption of the Roman law took place rapidly after the twelfth century. A flourishing school of Roman law arose at Bologna, and another at Paris immediately after; and the Corpus Juris became the general source of law throughout the continent of Western Europe.

In England alone we find the overwhelming influence of the Roman law successfully resisted. True it is that not a few maxims of the Roman law have been transferred to English law and, avowedly or unavowedly (for the most part unavowedly), the doctrines of the Roman law have largely influenced the opinions of English lawyers; but no one has ever been able to quote a text of the Roman law as *authority* either in the courts of common law or in the courts of chancery. It was only within the very narrow jurisdiction which the ecclesiastical courts managed to secure, and

in the comparatively insignificant affairs of the admiralty courts (which dealing with foreigners felt the want of a universal law), that the Roman law was accepted. . . .

The resource of the English lawyers when called on to fill the gap which was elsewhere supplied by the Roman law was custom, usually called by us the common law. Of this custom the judges were themselves, in the last resort, the repository. . . .

It is, however, always as indicating the custom of England, and not as authority, that the decisions of earlier judges were cited during all this period and even afterwards. . . . These decisions were at first evidence only of what the practice had been, guiding, but not compelling, those who consulted them to a conclusion. But when Blackstone wrote, each single decision standing by itself had already become an authority which no succeeding judge was at liberty to disregard. This important change was very gradual, and the practice was very likely not altogether uniform. As the judges became conscious of it they became much more careful of their expression, and gave much more elaborate explanations of their reasons. They also betrayed greater diffidence in dealing with new cases to which no rule was applicable, cases of first impression as they were called; and they introduced the curious practice of occasionally appending to a decision an expression of desire that it was not to be drawn into a precedent.

Thus it comes to pass that English case law does for us what the Roman law does for the rest of Western Europe. And this difference between our common law and the common law of continental Europe has produced a marked difference between our own and foreign legal systems. Where the principles of the Roman law are adopted the advance must always be made on certain lines. An English or American judge can go wherever his good sense leads him. The result has been, that whilst the law of continental Europe is formally correct it is not always easily adapted to the changing wants of those amongst whom it is administered. On the other hand, the English law, whilst it is cumbrous, ill-arranged, and barren of principles, whilst it is obscure and not unfrequently in conflict with itself, is yet a system under which justice can be done.

143. The spread of Roman and English law. Bryce traces the remarkable extension of Roman and English principles into all parts of the world, and considers them of comparatively equal strength and importance.

European law means, as we have seen, either Roman law or English law, so the last question is: Will either, and if so which, of these great rival systems prevail over the other?

They are not unequally matched. The Roman jurists, if we include Russian as a sort of modified Roman law, influence at present a larger part of the world's population, but Bracton and Coke and Mansfield might rejoice to perceive that the doctrines which they expounded are being diffused even more swiftly, with the swift diffusion of the English tongue, over the globe. It is an interesting question, this competitive advance of legal systems, and one which would have engaged the attention of historians and geographers, were not law a subject which lies so much outside the thoughts of the lay world that few care to study its historical bearings. It furnishes a remarkable instance of the tendency of strong types to supplant and extinguish weak ones in the domain of social development. The world is, or will shortly be, practically divided between two sets of legal conception of rules, and two only. The elder had its birth in a small Italian city, and though it has undergone endless changes and now appears in a variety of forms, it retains its distinctive character, and all these forms still show an underlying unity. The younger has sprung from the union of the rude customs of a group of Low German tribes with rules worked out by the subtle, acute, and eminently disputatious intellect of the Gallicized Norsemen who came to England in the eleventh century. It has been much affected by the elder system, yet it has retained its distinctive features and spirit, a spirit specially contrasted with that of the imperial law in everything that pertains to the rights of the individual and the means of asserting them. And it has communicated something of this spirit to the more advanced forms of the Roman law in constitutional countries.

At this moment the law whose foundations were laid in the Roman Forum commands a wider area of the earth's surface, and determines the relations of a larger mass of mankind. But that which looks back to Westminster Hall sees its subjects increase more rapidly, through the growth of the United States and the British Colonies, and has a prospect of ultimately overspreading India also. Neither is likely to overpower or absorb the other. But it is possible that they may draw nearer, and that out of them there may be developed, in the course of ages, a system of rules of private law which shall be practically identical as regards contracts and property and civil wrongs, possibly as regards offenses also. Already the commercial law of all civilized countries is in substance the same everywhere, that is to say, it guarantees rights and provides remedies which afford equivalent securities to men in their dealings with one another and bring them to the same goal by slightly different paths.

The more any department of law lies within the domain of economic interest, the more do the rules that belong to it tend to become the same in all countries, for in the domain of economic interest Reason and Science

have full play. But the more the element of human emotion enters any department of law, as for instance that which deals with the relations of husband and wife, or of parent and child, or that which defines the freedom of the individual as against the State, the greater becomes the probability that existing divergences between the laws of different countries may in that department continue, or even that new divergences may appear.

Still, on the whole, the progress of the world is towards uniformity in law, and towards a more evident uniformity than is discoverable either in the sphere of religious beliefs or in that of political institutions.

144. The diffusion of law. The leading influences that cause the spread of legal principles may be summarized as follows:[1]

It is the duty of Historical Jurisprudence not merely to point out the contribution which each nation and race has made to the common product, but also to show how and why the law of one nation has been adopted by another. Again and again the laws of the conquered nation are seen to prevail over the conquerors, because the law of the conquered alone rendered possible the life and activity which made the conquest valuable, and appreciation and enjoyment of the conquest was possible only through maintenance of the laws. On the other hand, the laws of the conquerors are seen to be imposed upon the conquered, and adopted because the new life brought about by the conquest was in this way best stimulated to spring up and flourish wherever favorable conditions were present.

Yet more important than conquest for the diffusion of law was commerce, the peaceful intercourse of one nation with others. It was this that transformed the law of Rome from the law of a small Italian city to the law suited to the whole world — a law which has actually passed into the jurisprudence of every modern civilized state. With the decline of commerce, and the increasing crudeness and retrogression of life, law is seen to decline and the transactions of men to become limited to a few simple forms which could suggest but few legal principles.

145. Universality of legal conception. Wilson points out the fact that certain legal ideas are universal.

The correspondence of law with national character, its basis in national habit, does not deprive it of all universal characteristics. Many common features it does wear among all civilized peoples. As the Romans found it possible to put together, from the diversified systems of law existing

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among the subject peoples of the Mediterranean basin, a certain number of general maxims of justice out of which to construct the foundations of their *jus gentium*, so may jurists to-day discover in all systems of law alike certain common moral judgments, a certain evidence of unity of thought regarding the greater principles of equity. There is a common legal conscience in mankind.

Thus, for example, the sacredness of human life; among all Aryan nations at least, the sanctity of the nearer family relationships; in all systems at all developed, the plainer principles of "mine" and "thine"; the obligation of promises; many obvious duties of man to man suggested by the universal moral consciousness of the race, receive recognition under all systems alike. Sometimes resemblances between systems the most widely separated in time and space run even into ceremonial details, such as the emblematic transfer of property, and into many items of personal right and obligation.

146. Scientific legislation. Dealey notes the growing tendency to legislate on a rational basis, and indicates certain lines for future improvement as follows:

These several tendencies in legislation point to a time when legislation will be far more scientific than it is at present. American lawmaking bodies formulate entirely too many rules for petty and routine matters, which might more wisely be left to administrative bodies. Much hasty legislation could be vastly improved if legislators were more familiar with the experiments and experiences of other lawmaking bodies. Bureaus for the study of comparative legislation, like that of New York, the legislative reference bureau developed by Wisconsin, and commissions appointed for the special study of important topics are steps in this direction.

But really scientific legislation is as yet an ideal to be attained. The fault found with legislatures is chiefly due to their failure to satisfy the ideals aroused by the optimistic democracy of the eighteenth century. We all have to admit the truth of Spencer's denunciation of the "Sins of Legislators" and of the perennial criticisms of American legislation. There is a vigorous demand that legislation be wiser, and that it emphasize permanent general interests through a knowledge of the laws of human nature and social development. Jeremy Bentham (1748–1832) voiced this demand for the nineteenth century in his "Theory of Legislation." Sociological studies will make possible for the twentieth century a still wiser theory.[1]

[1] See Ward's Applied Sociology, pp. 337–339.

Legislation is too largely prohibitive in kind, aiming to suppress by threats certain supposed evil tendencies in human nature. The doctrine of human depravity is not so popular as formerly, and the question arises whether threats of punishment are really efficacious in preventing crime. Men are more easily influenced to do right than intimidated from wrong. The principles used in horticulture and stirpiculture indicate the method to be followed in scientific legislation; we should assume that there is much potential perfectibility in human nature. Social conditions should be so adjusted as to assist in the development of this; evil tendencies will thereby atrophy from disuse. Preventive, probative, and reformative methods are cheaper and wiser in the long run than punitive. The principle of self-interest can be appealed to in such a way as to foster respect for law, not disregard of it. The beginnings of such legislation may already be seen in laws already formulated, and illustrations are not hard to find. The necessity of raising taxes without too much friction has sharpened legislative ingenuity so that there are many scientific elaborations of laws in regard to taxation. The taxation of luxuries as against necessities, for example, or a slight discount for prompt payment illustrate this. The probation system for petty offenses and the reduction of terms of imprisonment for good behavior prove efficacious in reducing crime. If illegitimacy is common through the heavy expense of a formal religious marriage, the legalization of a civil marriage at nominal cost largely reduces the per cent.[1] A wise divorce law proves a great aid to social morality, and the Gothenburg license system, through the elimination of private profits, considerably reduces intemperance. The American device of reducing the cost and difficulty of securing a patent powerfully stimulates invention. The reduction of the cost of postage is a well-known instance of an aid to commercial and industrial expansion. Many governments stimulate local administrative efficiency by offering to pay part of the expense if a set standard is maintained. Other illustrations will readily suggest themselves.

The success already achieved along such lines gives hope that legislatures may in time become intelligent enough to formulate such legislation regularly. Plato said that perfect government would come when wise men legislate or legislators become wise. An unintelligent democracy is like a rudderless ship, for scientific government above all things requires an intelligent public opinion; but this condition depends on the growth of general scientific knowledge, political intelligence, and civic patriotism.

[1] This finds many illustrations in the experience of Latin-American governments.

III. Divisions of Law

147. Classification of law. On the basis of their manner of statement, laws may be classified as follows:[1]

First of all, there are those principles which are to be found embodied in the formal legislative acts of the State, and termed Statutes. *Secondly*, there is that large body of legal principles that are enforced by the judicial tribunals of a country, but whose origin it is impossible to discover in any formal declarations of the will of the State, and whose validity is commonly considered to rest upon custom. *Thirdly*, there is in every State that body of fundamental principles, written or unwritten, that controls the organization of the State itself and the scope and manner of exercise of its governmental powers. These principles are termed constitutional laws, and though not, as a rule, when written, enunciated through the ordinary legislative mouthpiece of the State, are considered as expressing the highest will of the State. They differ from statutory and customary law, not only as to their formal source, but also as to their prevailing power when in apparent contradiction to them. *Fourthly*, and finally, there is that aggregate of rules that control the relations of a State to other States, commonly known as International Law. These last differ from the three preceding classes of principles not only as to their source, but as to their manner of enforcement. It will be necessary, indeed, to consider whether they may be properly termed laws at all.

148. Divisions of law. On the basis of the nature of the persons concerned, Holland classifies law as follows:

A very radical division of Rights is based upon a broad distinction between the public or private character of the persons with whom the Right is connected. By a "Public person" we mean either the State, or the sovereign part of it, or a body or individual holding delegated authority under it.

By a "Private person" we mean an individual, or collection of individuals however large, who, or each one of whom, is of course a unit of the State, but in no sense represents it, even for a special purpose.

When both of the persons with whom a right is connected are private persons, the right also is private. When one of the persons is the State, while the other is a private person, the right is public.

From this division of rights there results a division of Law, as the definer and protector of Rights, which, when they subsist —

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(1) Between subject and subject, are regulated by Private law.

(2) When between State and subject, by Public law. . . .

Private law, as thus treated, is either "substantive" or "adjective," that is to say, it either defines the rights of individuals, or indicates the procedure by which they are to be enforced.

The rights dealt with by substantive law may be either "normal" or "abnormal," as the persons with whom they are connected are of the ordinary type, or deviate from it.

Both classes of rights are either "antecedent" or "remedial." A right of the former kind, it will be remembered, is one which exists irrespectively of any wrong having been committed. . . . A right of the latter kind is one which is given by way of compensation when an "antecedent" right has been violated. Antecedent rights are either "in rem" or "in personam"; that is to say, they are available either against the whole world or only against a definite individual. Thus the proprietary right of the owner of a house is good against all the world, while the right of a landlord to his rent is good only against his tenant. . . .

The correlation of the parts of public law one to another is indeed far from being settled. It never attracted the attention of the Roman lawyers, and has been very variously, and somewhat loosely, treated by the jurists of modern Europe. The subject is, indeed, one which lends itself but reluctantly to systematic exposition, and it is with some hesitation that we propose to consider it under the heads of — I. Constitutional law; II. Administrative law, III. Criminal law; IV. Criminal procedure; V. the law of the State considered in its quasi-private personality; VI. the procedure relating to the State as so considered.

The first four of these heads contain the topics which are most properly comprised in Public law. It would be possible, though not convenient, to arrange these topics in accordance with the classification adopted in Private law. If the attempt were made, antecedent rights would have to be sought for in Constitutional, in Administrative and also in Criminal law; remedial rights in Criminal and also in Administrative law; adjective law mainly in Criminal procedure; and abnormal law mainly in Constitutional and Criminal law.

149. Nature of administrative law. The nature of administrative law and the distinctions between it and the other forms of law are given by Goodnow as follows:

Adopting the system of legal classification now generally admitted to be the most desirable, *viz.*, according to relations governed, we find that administrative law is that part of the law which governs the relations of

the executive and administrative authorities of the government. It is therefore a part of the public law, but it is only a part. All such rules of law as concern the function of administration, and only such rules of law, belong to administrative law. Further, since the function of administration depends for its discharge upon the existence of administrative authorities, whose totality is called the administration, administrative law is concerned not alone with the relations of the administrative authorities but also with their organization. Administrative law at the same time fixes the offices which shall form part of the administration and determines the relations into which the holders of these offices shall enter.

In so far as it fixes the organization of the administrative authorities, administrative law is the necessary supplement to constitutional law. While constitutional law gives the general plan of governmental organization, administrative law carries out this plan in its minutest details. But administrative law not only supplements constitutional law, in so far as it regulates the administrative organization of the government; it also complements constitutional law, in so far as it determines the rules of law relative to the activity of the administrative authorities. For while constitutional law treats the relations of the government with the individual from the standpoint of the rights of the individual, administrative law treats them from the standpoint of the powers of the government. Constitutional law, it has been said, lays stress upon rights; administrative law emphasizes duties. But while administrative law emphasizes the powers of the government and the duties of the citizen, it is nevertheless to the administrative law that the individual must have recourse when his rights are violated. For just so far as administrative law delimits the sphere of action of the administration, it indicates what are the rights of the individual which the administration must respect; and, in order to prevent the administration from violating them, offers to the individual remedies for the violation of these rights.

Administrative law is therefore that part of the public law which fixes the organization and determines the competence of the administrative authorities, and indicates to the individual remedies for the violation of his rights. . . .

While administrative law has a sufficiently distinctive character to justify its assignment to a separate position in a scheme of legal classification, there are many cases in which it is extremely difficult to distinguish it from other branches of the law, many cases also where practical considerations have such weight as to overbalance any desire for logical exactness. This is especially true of some of the points where the domain of administrative law seems to touch upon that of private law.

We find many rules of law which, if we abide by the definition that has been given of administrative law, *viz.*, as that portion of the law which governs the relations of the administration, must be regarded as falling within its borders, but which at the same time have been enacted mainly with the idea of founding or strengthening purely private rights. . . . On account of their character the usual practice is, notwithstanding the fact that they at the same time govern the relations of the administration, to regard them as a part of the private law. That is, all rules of law whose immediate purpose is the promotion of the rights of individuals are parts of the private law whether they govern at the same time the relations of the administration or not. . . .

The endeavor must also be made to distinguish administrative law from the other branches of public law. The distinction between administrative and constitutional law has already been indicated. While constitutional law defines the general plan of state organization and action, administrative law carries out this plan in its minutest details, supplements, and complements it. . . . The distinction between the two is thus one more of degree than of kind. . . . The distinction between administrative and international law also is quite clear. While administrative law lays down the rules which shall guide the officers of the administration in their action as agents of the government, international law consists of that body of usage which it is supposed that a state will follow in its relations with other states. . . .

The usual method of legal classification assigns to the criminal law a place in the public law. If this method is correct it becomes necessary to distinguish the administrative law from the criminal law. Any attempt to make such a distinction, as indeed to distinguish the criminal law from any of the clearly defined branches of the law, will be found, however, to present almost insurmountable difficulties. The conclusion is irresistible that from the scientific point of view the criminal law does not occupy any well-defined position in the legal system separated in kind from the distinct branches of the law. It consists really of a body of penal sanctions which are applied to all the branches of the law.

150. The application of law. Several important questions arise concerning the application of law to specific facts.

So long as law is regarded as a body of abstract principles, its interest is merely speculative. Its practical importance begins when these principles are brought to bear upon actual combinations of circumstances.

Many questions may be raised as to the extent and mode in which this takes place, and, for their solution, rules have been laid down which, like

other legal rules, are susceptible of analysis and classification. They make up that department of Jurisprudence which we propose to call "the Application of law." When a set of facts has to be regulated in accordance with law, two questions of capital importance present themselves. First, what State has jurisdiction to apply the law to the facts? And secondly, what law will it apply? The former of these questions is said to relate to the appropriate "Forum," the latter to the appropriate "Lex."

A third question, which, for the purpose of our present inquiry, is of less importance than these two, and may be dismissed in a few words, relates to "Interpretation."

IV. Law and Ethics

151. Distinctions between law and morality. Wilson points out the line of demarcation between the spheres of law and ethics as follows:

Ethics concerns the whole walk and conversation of the individual; it touches the rectitude of each man's life, the truth of his dealings with his own conscience, the whole substance of character and conduct, righteousness both of act and of mental habit. Law, on the other hand, concerns only man's life in society. It not only confines itself to controlling the outward acts of men; it limits itself to those particular acts of man to man which can be regulated by the public authority, which it has proved practicable to regulate in accordance with uniform rules applicable to all alike and in an equal degree. . . . It does not assume to be the guardian of men's characters, it only stands with a whip for those who give overt proof of bad character in their dealings with their fellow men. Its limitations are thus limitations both of kind and of degree. It addresses itself to the regulation of outward conduct only: that is its limitation of kind; and it regulates outward conduct only so far as workable and uniform rules can be found for its regulation: that is its limitation of degree.

Law thus plays the rôle neither of conscience nor of Providence. More than this, it follows standards of policy only, not absolute standards of right and wrong. Many things that are wrong, even within the sphere of social conduct, it does not prohibit; many things not wrong in themselves it does prohibit. It thus creates, as it were, a new class of wrongs, relative to itself alone: *mala prohibita*, things wrong because forbidden. In keeping the commands of the state regarding things fairly to be called morally indifferent in themselves men are guided by their *legal* conscience. Society rests upon obedience to the laws: laws determine the rules of social convenience as well as of social right and wrong; and it is as necessary for

the perfecting of social relationships that the rules of convenience be obeyed as it is that obedience be rendered to those which touch more vital matters of conduct. . . .

In all civilized states law has long since abandoned attempts to regulate conscience or opinion; it would find it, too, both fruitless and unwise to essay any regulation of conduct, however reprehensible in itself, which did not issue in definite and tangible acts of injury to others. But it does seek to command the outward conduct of men in their palpable dealings with each other in society. Law is the mirror of active, organic political life. It may be and is instructed by the ethical judgments of the community, but its own province is not distinctively ethical; it may regard religious principle, but it is not a code of religion. Ethics has been called the science of the well-being of man, law the science of his right civil conduct. Ethics concerns the development of character; religion, the development of man's relation with God; law, the development of men's relations to each other in society. Ethics, says Mr. Sidgwick, "is connected with politics so far as the well-being of any individual man is bound up with the well-being of his society."

152. Moral and legal norms. Wundt shows the close connection between law and morality.[1]

In all these respects the case of law is similar to that of morality itself; the two are here, as elsewhere, directly connected. The only universal moral norms that ethics can reach are such as indicate, from the point of view of existing moral conceptions, the road towards the realization of those ends which lie in the direction of the moral ideal, itself never to be attained. And so no legal principles can do more than furnish, whether directly or by implication, a broad outline of those more external ends which are necessary for the protection of society, and which express the conception of morality. . . .

From this intimate connection of law with ethics, which, though sometimes frankly explicit, is often unconscious, we may infer that theories about the significance and basis of law are usually direct reflections of the corresponding ethical theories. The older conception of law, which still numbers many adherents among juristic savants, by reason of the conservative character which legal science owes to certain well-known historical conditions, was thoroughly individualistic in its point of view. In this respect it is a faithful mirror of the individualistic ethics. . . .

The broader conception of social life and historical relations that began to be current in later times necessarily influenced the conception of law

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as well. . . . But as this department of law, with its positive social problems, has come into prominence through the increasing activity of public life in modern times and the increasing claims of the State on individual functions, a twofold need has arisen. On the one hand, the concept of law must be made broad enough to include all these forms; and, on the other hand, it must be defined with sufficient precision and assigned its proper place in the general sphere of social and ethical concepts. . . .

Bearing in mind the ultimate moral purpose of all law, we may describe objective right, or law, as the sum total of all those various subjective rights and duties which the moral will of society, the creator of law, insures as rights to itself and its subordinate individual wills, in order to the fulfillment of certain purposes; and imposes as duties, in order to the protection of the rights in question.

This formula does not restrict the nature of law to the protection of certain goods, or, what amounts to the same thing, the maintenance of the conditions necessary to the life of society. Besides protective rights and duties, the system of law embraces many institutions which may be termed promotive rights and duties. The superintendence of instruction, together with certain positive regulations for the advancement of material welfare and of the most important interests of culture, are duties of equal weight with the protection of persons and property, insured by political legislation; and they are directed only in part towards the protection of the existing conditions of life. Their aim is in equal measure the improvement of those conditions. For social life, like all life, is change and development. Law would be neglecting one of its most important functions if it refused to meet the demands of this ceaseless evolution. Hence constitutional law makes comprehensive provisions for the alteration of existing law to suit new needs. But in addition to these arrangements for the origin and abolition of laws, the progressive factor can never be wholly absent from law as it actually exists. Only it will assume various forms according to the current way of regarding the function of the legal order. In an age that ascribes the prime importance to individual rights, the chief task of the system of law will be to remove the hindrances that obstruct the free development of personal activities. On the other hand, when the social functions of the State are given a higher rank, the system of public law will contain a number of positive and promotive regulations.

CHAPTER XI

RELATION OF STATE TO STATE

I. International Relations

153. The world powers. A summary of the development of great powers and of their influence in foreign affairs follows:[1]

Twenty years ago the expression "world power" was unknown in most languages; to-day it is a political commonplace, bandied about in wide discussion. . . . The idea that one people should control the known world is ancient enough, its most salient expression being found in imperial Rome and equally imperial China; and it is not extinct even now. . . . As there have been in the past, so there will always be, certain leading states which, when they are agreed, will find some way of imposing their decisions upon the rest, and by their mutual jealousies will tend to establish a balance of power among themselves.

Without stopping to trace the working of these principles in earlier days, we note that, by the close of the fifteenth century, certain states had assumed a position which entitles them to the modern designation of "great European powers." The Holy Roman Empire, still first in dignity; France, after she had recovered from the Hundred Years' War and had broken the might of her great feudal nobles; England, in the firm hand of Henry VII; the newly formed kingdom of Spain, which had finally ended Moorish rule in the peninsula, — all these held a position unlike that of their neighbors. The difference between them and such powers as Denmark, the Swiss Confederation, and Venice was one of rank as well as of strength. Politically they were on another plane: they were not merely the leaders, they were the spokesmen, the directors, of the whole community.

As time went on, changes took place in their membership. In the course of the sixteenth century, when the Empire became so dislocated that it was hardly a power at all, its place was taken by Austria, a strangely conglomerate formation, which protected the eastern frontier of Christendom against the Turks. Spain was for a while a real world

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power, overshadowing all the others, dominant in Europe, supreme in America, and dreaded even in remote Japan. The seventeenth century witnessed the decline of Spain, the primacy of France, and the temporary rise of Sweden and the Netherlands; but the greatness of these last rested on too small a material foundation to support it after the countries themselves had outlived their heroic period. The eighteenth century saw them subside into relative insignificance, and in their stead two newcomers step to the forefront of European affairs. The huge semi-Asiatic empire of Russia was now, by the genius of Peter the Great, transformed into the outward semblance of a European state; and the little military kingdom of Prussia, the representative of northern Germany, won for itself a position which its resources hardly warranted, but which, thanks to the extraordinary ability of its rulers and the sense of discipline of its people, it succeeded in maintaining.

After the violent episode of the French Revolution and the Napoleonic wars, the European continent settled down to what seemed to be a stable organization with five great powers,—Russia, England, Austria, Prussia, and France, for the skill of Talleyrand at Vienna prevented France from being even temporarily excluded after her disasters. The Ottoman Empire was still, in spite of Metternich, held to be not quite European; and the weaker countries were consulted but little on general questions. It was not the formal meetings of all the representatives of the nations assembled that decided the affairs of Europe at the Congress of Vienna in 1814; it was a small committee of the leading states. What they, after much wrangling, agreed upon among themselves, the others had to accept.

This arrangement lasted for two generations, although the relative positions of the several states changed not a little. In the seventies, the German Empire, with a mighty development, inherited the international place formerly held by the Prussian kingdom, and a new member was added to the oligarchy by the formation of United Italy. Since then there have been six great European powers instead of five. This does not mean that they are equal in size and strength: there is, for instance, less difference between Italy, which is recognized as a great power, and Spain or the Ottoman Empire, which technically is not, than between Italy and Germany or Russia; but the line, however artificial, has been clearly drawn by political usage.

In the last quarter of the nineteenth century a new situation, with a far wider horizon, gradually attracted the attention of writers and statesmen. Great Britain, France, Spain, Portugal, and Holland had long owned extensive territories in many climes; but the last three countries had ceased to be of the first rank. . . .

Suddenly, almost without warning, the nations entered upon a wild scramble for land wherever it was not strongly held or protected by competing interests. . . . The circumstances, the pretexts, the excuses, have differed in the case of each state which has taken part in the movement of expansion; but the fundamental reasons have been the same. . . .

It was in course of the discussions provoked by this succession of startling events that political writers, in formulating the principles of the new state of affairs, began to employ an expression which has now passed into common use, — "world powers"; that is to say, powers which are directly interested in all parts of the world and whose voices must be listened to everywhere.

154. Advantages of international relations. The desirability of international rivalries, even at the expense of occasional disputes, in contrast to the stagnation of world unity is urged in the following:[1]

It is, however, very doubtful whether political world unity is in any case desirable. Our imagination instinctively shrinks from the thought of a régime of dead uniformity throughout all the countries of the globe: whether it be imposed by the harsh will of a despotic, conquering race, or reached by the gradual assimilation of all nationalities, such a prospect is equally uninviting. We should ponder this well before we express a wish even for the gradually increased paramountcy of our own civilization; for even that would mean in the end a deadening uniformity.

Far preferable is the present state of international equilibrium, with the intense rivalry among peoples that brings out their strongest characteristics. Even with its occasional discords, the present general harmony of the concert of nations is to be preferred to the dead monotone of a world state. Each nationality is in this competition given an opportunity to develop its characteristics freely, and to enrich the general life of the civilized world with its distinctive literature, art, music, and moral ideals. The rapid social progress since the Renaissance is certainly due in great measure to this rivalry of independent nations, constantly invited to self-criticism by the successes and failures of their neighbors. At present, civilization has the benefit of the constant mutual criticisms among nations, by which an intelligent and real public opinion of the world is created; in this manner the individual bent of a particular nation is restrained from becoming exaggerated into a vice or engendering a danger to the general welfare.

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The rivalry among nations is sharp, and calls for the constant exercise of all their intellectual, moral, and physical powers, in order to avoid the decadence that would lose them their position in the family of nations. So fierce does this struggle at times become that to men of pessimistic mood a great world warfare seems inevitable within the near future. We should, however, avoid the temper of mind that constantly engenders suspicions and exaggerated fears. Thus far, happily, no nation has acquired enough preponderance to threaten really and effectively the political existence of its neighbors. Most of the mutual fear and mistrust that mar the harmony of nations is founded on misunderstanding. There is, it is true, a great danger to civilization in this constant misinterpretation of motives; and it were well if people would set about it to study seriously the political ideals, motives, and aims of other nations, rather than seize upon every pretext to scent a trace of bitter enmity. . . . It is in the interest of civilization that nations should watch each other carefully, and that they should not permit any one power to obtain undue advantages over others; it is equally important that this be done in a spirit of mutual understanding and amity, without sowing the seed of hatred and unending dissensions.

155. Scope of international interests. The effect of colonial expansion and world-wide commerce in revising former ideas of international relations is well stated by Coolidge as follows:[1]

One effect of the present international evolution has been to modify certain long-accepted formulas. Among these is the idea of a continent as a group of states, each of which has, besides historical traditions of its own, particular ties and interests common to them all, but not shared by the rest of mankind. This has in the past been more or less true of Europe, and as a sentimental bond it deserves respect. In actual politics, however, it is becoming a mere figure of speech. Are we to regard Imperial Britain as a European power, when the greater part of her external interests and difficulties are connected with her situation on other continents? Are not the vast majority of Englishmen more in touch in every way with Australians, Canadians, Americans, than they are with Portuguese, Italians, or Austrians of one sort or another? What strictly European interests does England represent, she who is now joined in close alliance with the Asiatic empire of Japan? Or is Russia European? Although the majority of her inhabitants live on the western side of the open range of hills we call the Urals, much the larger portion of her territory is on the other, and in Europe itself she has

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many Asiatic elements. In character and population, there is indeed hardly more real separation between European Russia and Siberia than there is between the eastern and western parts of the United States. Of late Russia's foreign policy has been chiefly concerned with Asiatic questions, and it is likely so to continue. As for France, although her national life is, and will remain, centered in the European continent, her many colonies are scattered over the globe. Already some of them are represented in her chambers, and as time goes on they will become, more and more, parts of one organic dominion. A Frenchman born in Algeria regards himself as a European, and with good right; but he is no more so than is the white Australian or the Canadian, or, except in the matter of allegiance, than the American. Under these circumstances, when people abroad talk about a union of the European powers against "the Asiatic peril" or "the American commercial invasion," they are appealing to a community of interests which does not exist.

156. Scope of international law. The general field of international law may be outlined as follows:

International law is usually divided into:

(a) Public international law, which treats of the rules and principles which are generally observed in interstate action, and

(b) Private international law, which treats of the rules and principles which are observed in cases of conflict of jurisdiction in regard to private rights. These cases are not properly international, and a better term for this branch of knowledge is that given by Judge Story, "The Conflict of Laws." International law, in the true sense, deals only with state affairs.

International law is generally observed by civilized states; some states, even before they were fully opened to western civilization, professed to observe its rules. The expansion of commerce and trade, the introduction of new and rapid means of communication, the diffusion of knowledge through books and travel, the establishment of permanent embassies, the making of many treaties containing the same general provisions, and the whole movement of modern civilization toward unifying the interests of states, has rapidly enlarged the range of international action and the scope of international law. Civilized states, so far as possible, observe the rules of international law in their dealings with uncivilized communities which have not yet attained to statehood. International law covers all the relations into which civilized states may come, both peaceful and hostile. In general, its scope should not be extended so as to interfere with domestic affairs or to limit domestic jurisdiction, though it does often limit the economic and commercial action of a given state, and determine to some extent its policy.

II. History of International Law

157. Development of the theory of international law. Woolsey traces the main phases through which the theories of international law have developed.

In tracing the progress of international law, that is of views or theories concerning it, we may notice several stages, more or less clearly defined, through which it has passed. 1. Among the ancients we have a recognition of right and wrong in the intercourse of states together with some rules regulating intercourse and some rules of humanity in war, — placed chiefly under the sanction of religion, — but no separation of this branch of law from the rest, as a distinct department. This period continued until after the revival of learning. In the Middle Ages the science was still undeveloped, but religious institutions and antipathies modified the practice of Christian states. During the revival of learning, a spirit arose in Italy, which made light of all obligations between states, and almost deified successful wickedness. Soon after this, we perceive that the forerunners of Grotius, as Suarez, Ayala, and above all, Albericus Gentilis, are aware that a system of international law ought to be evolved, and are working out particular titles of it.

2. With Grotius a new era begins. His great aim was practical, not scientific, — it was to bring the practice of nations, especially in war, into conformity with justice. He held firmly to a system of natural justice between states, without, however, very accurately defining it. To positive law, also, originated by states, he conceded an obligatory force, unless it contravened this justice of nature. In setting forth his views, he adduces in rich abundance the opinions of the ancients, and illustrations from Greek and Roman history. The nobleness of his aim, and his claim to respect as the father of the science, have given to the treatise "De Jure Belli et Pacis" an enduring influence.

3. After Grotius there appear two tendencies. One is to disregard all that is positive and actual in the arrangements between nations, and to construct a system on the principles of natural law; in which way a law for states, differing from ethics and natural justice, is in fact denied. This tendency is represented by Puffendorf. The other tendency was a reaction against this writer, and satisfied itself with representing the actual state of international law, as it exists by usage and treaty, without setting up or recognizing a standard of natural justice by its side. Bynkershoek and Moser, with Martens and others in more recent times, are examples here. Many writers, however, treading in the steps of Grotius, regard natural justice as a source of right, with which the practice of states must

be compared and brought into conformity, and which may not be neglected in a scientific system.

There has been a general progress in the views of text writers since the age of Grotius, and a substantial agreement between those of all nationalities at the same era. And yet minor differences are very observable. Some of the most striking of these are the differences between the English and the Continental doctrine, arising from the insular position of Great Britain, from her commercial interests, and her power on the sea. Thus we find her behind the Continent in respecting the sanctity of ambassadors until into the eighteenth century. Thus also while her practice in land wars has been humane, her sea rules and the decisions of her courts have in several ways borne hardly upon neutrals. It is worthy of notice that our [American] courts have followed English precedents, while our Government, as that of a nation generally neutral, has for the most part leaned in its doctrines and treaties towards Continental views.

158. The formation of international law. The influences which, during the ancient and medieval periods, paved the way for modern international law, may be summarized as follows:

The history of the development of those rules and principles now considered in international law naturally falls into three periods, early, middle and modern.

The early period dates from the development of early European civilization, and extends to the beginning of the Christian Era. During this period the germs of the present system appear.

(a) The dispersion of the Greeks in many colonies which became practically independent communities gave rise to systems of intercourse involving the recognition of general obligations. The maritime law of Rhodes is an instance of the general acceptance of common principles. . . . The recognition by Greece of the existence of other independent states, and the relations into which the states entered, developed crude forms of international comity, as in the sending and receiving of ambassadors and the formation of alliances.

(b) Rome made many contributions to the principles of international law in the way of the extension of her own laws to wider spheres, and in the attempt to adapt Roman laws to conditions in remote territories. . . . Wherever Rome extended her political rule, she adapted her laws to the peoples brought under her sway. . . .

The varied struggles of the middle period — from the beginning of the Christian Era to the middle of the seventeenth century — had a decided influence upon the body and form of international law.

(a) The growth of the Roman Empire, as the single world power and sole source of political authority, left small need of international standards. The appeal in case of disagreement was not to such standards, but to Cæsar. The idea of one common supremacy was deep-rooted. Political assimilation followed the expansion of political privileges.

(b) A similar unifying influence was found in the growth of the Christian Church which knew no distinction — bond or free, Jew or Gentile. Christianity, called to be the state religion early in the fourth century, modeled its organization on that of the Roman Empire; and from the sixth century, with the decay of the Empire, the Church became the great power. . . .

(c) By the eleventh century feudalism had enmeshed both the temporal and spiritual authorities. This system, closely related to the possession of land and gradation of classes, discouraged the development of the ideas of equality of state powers necessary for the development of international law, though it did emphasize the doctrine of sovereignty as based on land in distinction from the personal sovereignty of earlier days.

(d) The Crusades, uniting Christendom against the Saracen for foreign intervention, awakening Europe to a new civilization, expanding the study and practice of the Roman law which feudal courts had checked, weakening many feudal overlords, enfranchising towns, freeing the third estate, spreading the use of the Latin language, enlarging and diversifying commerce, and teaching the possible unity of national interests, led to the apprehension of a broader basis in comity which hastened the growth of interstate relations.

(e) The code of chivalry and the respect for honor which it enjoined introduced a basis of equitable dealing which on account of the international character of the orders of chivalry reacted upon state practice throughout Christian Europe.

(f) The expansion of commerce, especially maritime, emphasized the duties and rights of nations. The old Rhodian laws of commerce, which had in part been incorporated in and expanded by the Roman code during the days before the overthrow of the Empire, formed a basis for maritime intercourse.

(g) Closely connected with the development of maritime law during the latter part of the middle period was the establishment of the office of consul. The consuls, . . . resident in foreign countries, assisted by advice and information the merchants of their own countries, and endeavored to secure to their countrymen such rights and privileges as possible. Consuls seem to have been sent by Pisa early in the eleventh century, and were for some time mainly sent by the Mediterranean countries to the East.

(h) The discovery of America marked a new epoch in territorial and mercantile expansion, and introduced new problems among those handed down from an age of political chaos.

(i) The middle period, with all its inconsistencies in theory and practice, had nevertheless taught men some lessons. The world empire of Rome showed a common political sovereignty by which the acts of remote territories might be regulated; the world religion of the Church of the middle period added the idea of a common bond of humanity. Both of these conceptions imbued men's minds with the possibility of a unity, but a unity in which all other powers should be subordinate to a single power, and not a unity of several sovereign powers acting on established principles. The feudal system emphasized the territorial basis of sovereignty. The Crusades gave to the Christian peoples of Europe a knowledge and tolerance of one another which the honor of the code of chivalry made more beneficent, while the growth of the free cities opposed the dominance of classes, feudal or religious. The fluctuations and uncertainties in theory and practice of international intercourse, both in peace and war, made men ready to hear the voice of Grotius (1583–1645), whose work marks the beginning of the modern period.

159. Importance of the conception of territorial sovereignty. The idea of territorial sovereignty, introduced by feudalism, fundamentally affected the conception of the external obligations of states.

Foremost among the secondary influences which determined the ideas of the Middle Ages upon international relations was the conception of territorial sovereignty due to feudalism. When the political rights and duties of individuals within the state came to be associated with the possession of land, it was an easy inference that the sovereign of the community, whose political functions were far larger than those of any other member of it, must have a corresponding extension given to his rights over the soil on which his people were settled. Formerly, if he could not be universal ruler, he was lord of his people. Now, in the absence of the former alternative, he claimed to be lord of his people's lands. Thus sovereignty became territorial, a character it still retains.

160. Influence of Grotius on international law. The conditions that made possible the enormous influence of the work of Grotius are explained in the following:[1]

At a most opportune moment in the history of the science, there appeared the first authoritative treatise upon the law of nations, as that term is

[1] Copyright, 1900 and 1908, by George B. Davis.

now understood. It was prepared by Hugo Grotius, a native of Delft, in Holland. He was a man of great learning, of considerable experience in public affairs, and a profound student of the Roman law; and his treatise, which was published early in the seventeenth century, is, in substance, an application of its principles to the external relations of states. It was at once perceived to be a work of standard and permanent value, of the first authority upon the subject of which it treats. . . .

Great as were the inherent merits of Grotius's work, however, it could never have exercised so decisive an influence upon state affairs as it did, had it not appeared at a time when the existing political conditions were especially favorable for its reception. The Thirty Years' War, then in progress, had been marked during its course by a refinement of barbarous cruelty, and by acts of atrocity perpetrated upon the unarmed and unoffending inhabitants of the valley of the Rhine, which stand without a parallel in the history of ancient or modern war. Many of the military operations had been undertaken rather with a view to the chance of pillage than from a desire to injure or defeat the enemy. Population had diminished, great tracts of territory had been laid waste, and commerce and manufactures had well-nigh disappeared. With an experience of the horrors of war so bitter and long continued as that which Europe was then undergoing, it is not remarkable that men should have been willing to listen to any scheme which promised to mitigate the severity of war, or to lighten in any degree its terrible burdens.

But, great as the losses had been in men and material wealth, it may be doubted whether a desire to ameliorate the existing usages of war would have been, of itself, an agency sufficiently potent to bring about a reform of international law, had not another and a more powerful factor contributed directly to the same end. During the continuance of the Thirty Years' War, the purposes for which the war was carried on had undergone a complete change. The contest had originated in an attempt on the part of the Protestant princes of Germany to achieve their political and religious independence. In its later stages it had been transformed into a struggle for preponderance between France and Austria, and it had terminated, in 1648, to the complete advantage of the former power. In the course of the war the old idea of papal and imperial supremacy had finally disappeared. The ancient standard of international obligation had ceased to exist, and a newer and more enduring standard had to be erected in its place. As the idea of a common earthly superior was no longer recognized, it became necessary to invent a theory which, while conforming to existing political conditions, should furnish a safe and practicable rule for the conduct of interstate relations.

Such a scheme was that proposed by Grotius. The materials for his work were drawn from two principal sources, the law of nature — the *jus gentium* of the Romans — and the tacit or express consent of nations. The last of these sources of authority was believed by him to be nearly supplemental to the first, and could ordain nothing contrary to it. States, like men, were, from his point of view, controlled in their actions and relations by the operation of a law of nature as ancient as the universe itself. This law could be added to, but not modified. He believed it to constitute a standard by which the conduct of states and the actions of individuals could be finally judged; and he imagined that the Roman Empire afforded an historical example of its successful application in international affairs.

We now know that Grotius's theory of international obligation was in the main correct, however erroneous may have been his conception of its origin and sanction; and it is a remarkable tribute to the intrinsic excellence of his work that it has endured so successfully, for more than two centuries and a half, the assaults of destructive criticism and the crucial test of practical experience. None of the many ingenious theories which have been advanced in opposition to his have received even transient recognition, and upon the foundations so deeply and solemnly laid by its immortal founder the fabric of the science securely rests.

161. International law since 1648. That the development of international law since the time of Grotius has been a process of expansion rather than of fundamental change is stated by Lawrence.

Since 1648 modern International Law has had no rival system to contend with. It has been enriched by many new rules, and some of its original precepts have given place to others generalized from the changed practice of modern times. But the continuity of its life has never been broken, and there seems no prospect of any revolutionary change passing over it. Perhaps the most important chapter that has been added to it is one which deals with the rights and duties of neutrals. Grotius left that portion of his subject very incompletely worked out, and for a long time the practice of nations showed conclusively that they felt themselves bound in the matter by no clearly defined rules. Even now, though the rise of a neutral state can be formulated with tolerable precision, its duties are very difficult to define. . . . The great fundamental principles of national independence and state sovereignty still meet with universal acceptance; and, though the theory of a Law of Nature has been discredited owing to the attacks of

historical and analytical jurists, the system of Grotius rests secure upon the alternative foundation of general consent. Slowly, and almost imperceptibly, additions are made to it, as the public opinion of the civilized world decides new cases, or grows to greater heights of humanity and justice.

162. Influence of the United States on the development of international law. Some of the contributions of the United States to the principles of international law are as follows:

The United States of America for many years after 1776 occupied a position to a considerable extent apart from European influences. It developed, therefore, ideas in regard to international relations which showed the influence of general principles rather than the influence of national policy.

(a) The regulations in regard to neutrality issued in 1793 set forth the principles which have subsequently become generally recognized. . . .

(b) The United States has also consistently advocated the freedom of commerce and navigation. Many claims for exclusive rights over rivers, gulfs, and other bodies of water were resisted by the United States from the time of the acquisition of statehood. . . .

(c) The United States has also uniformly striven for the largest possible freedom of trade routes as in the maintenance of the policy of the "open door" in the Far East.

(d) It has protected its citizens in their legitimate rights and has opposed oppression and arbitrary measures. . . .

(e) The United States has also contributed toward the establishing of the laws of war both upon the land and upon the sea. The Instructions for the Government of Armies of the United States in the Field, prepared by Dr. Lieber in 1863, have served as the basis for the modern rules for warfare on land. The United States has advocated some of the most advanced positions upon the customs of war upon the sea. At the Hague Convention of 1907 an earnest attempt was made to secure the exemption from capture of private property at sea, in accord with the traditional attitude of the United States. . . .

(f) In the United States there have always been many advocates of the peaceful methods of settlement of international disputes. Such method was provided for the settlement of differences among the states of the United States by the Articles of Confederation in 1778. Commissions were frequently appointed by the United States for settlement of difficulties with foreign states. . . . At the various strictly American conferences, and at The Hague in 1899 and in 1907, the United

States representatives gave cordial support to the extension of arbitration to the fullest practicable extent.

(g) The isolation of the United States during the early period of its existence made it possible to pay more regard to principle because less influenced by policy. These principles showed the general attitude of the United States and have had increasing weight in the councils of the nations as the United States has gained in power. The advocacy of the principle of freedom of navigation and commerce, the observance of neutrality, the establishment of just rules for war, and the support of arbitration as a means of settling international differences show the direction in which the United States has influenced the development of international law in the remarkable progress of recent years.

163. Present tendencies in international relations. Willoughby traces some of the leading influences affecting present international relations.[1]

Beginning first with the relation of States to each other, the most obvious fact is the increasing internationality of interests that attends advancing civilization. Improved means of transportation and communication hasten this movement upon the economic side; higher ideals of humanity promote it upon the ethical and intellectual side. Already these interstate relations have become both numerous and definite. The principles of international conduct that are generally accepted by all civilized peoples already constitute a very considerable body of procedure. In numberless ways States are united by treaties, not only for purposes of mutual military offense and defense, but for the regulation of common political and economic interests. In many cases common administrative organs have been established, as, for example, for the regulation of navigation of rivers, for postal, telegraph, and railway services, etc. The State protects its citizens beyond its own limits, and with the acquiescence and assistance of friendly powers apprehends and brings back from foreign lands the fleeing criminal, and through its consular and diplomatic agents exercises, especially among the less advanced peoples, many judicial and administrative functions. . . . In the field of international politics proper, the present century has seen the peaceful settlement by arbitration of many international difficulties that in former times would have been submitted to the arbitrament of the sword. And there is evident an increasing disposition on the part of civilized States to resort to this peaceful means of settlement. . . .

But it is not to be denied that there exist, in Europe at least, factors

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that operate in the other direction. The chief of these are the two principles of "balance of power" and "rights of nationality"; the one giving rise to the maintenance of enormous standing armies, . . . and the other to the demand for autonomy of nations now joined by political ties to alien races. . . .

What will be the outcome of these conflicting conditions, it would be a rash prophet who would predict. Whether as the result of some great war a condition will be reached in which disarmament will be practically possible; whether . . . the present demand for a coincidence of nationality and political individuality will be a passing phase rather than a permanent product of civilization, we cannot foresee. . . .

As time goes on the association of States will undoubtedly grow closer, and the rules of international morality will increase both in force and number, but that a genuine World State, or a State embracing the civilized nations of the world, will ever be established, does not seem possible.

III. Sources of International Law

164. Meaning of the phrase, "sources of international law." The sources of international law refer to the origin of its rules, regardless of the reasons for their adoption or of the nature of the sanction that supports them.

By the sources of International Law we mean the places where its rules are first found. An inquiry into them is therefore historical in its nature. It has nothing to do with the reason why the rules were originally invented or accepted. Whether those who first set them forth or obeyed them did so because of their conformity with a supposed Law of Nature or because of their obvious utility, whether they were actuated by motives of benevolence or by motives of self-interest, are questions foreign to the present inquiry. Doubtless considerations of very various degrees of respectability have presided over the making of the complex mass of rules we call International Law. But our object here is to trace the process of formation, not to enter into the mental and moral predilections of those who took part in it. We must also remember that no rule can have authority as law unless it has been generally accepted by civilized states. Its source does not give its validity. Custom is, as it were, the filter bed through which all that comes from the fountains must pass before it reaches the main stream. We have to take the rules we find in operation to-day and trace them back to the places where they have their origin.

165. Sources of international law. A clear outline of the various sources from which international law has drawn its content follows:

Practice and Usage: If for a time international intercourse follows certain methods, these methods are regarded as binding in later intercourse, and departure from this procedure is held a violation of international right.

Precedent and Decisions: The domestic courts of those states within the family of nations, may by their decisions furnish precedents which become the basis of international practice.

(a) Prize and admiralty courts decisions form in themselves a large body of law. . . .

(b) The decisions of domestic courts upon such matters as extradition, diplomatic privileges, piracy, etc., tend to become a source of international law.

(c) The decisions of courts of arbitration and other mixed courts are usually upon broad principles. Some of the principles involved may become established precedents. . . .

Treaties and State Papers: Treaties and state papers of whatever form indicate the state of opinion, at a given time, in regard to the matters of which they speak. Since they are binding upon the parties to them, treaties may be regarded as evidence of what the states, bound by their terms, accept as law. When the same terms are generally accepted among nations, treaties become a valuable evidence of concrete facts of practice and proper sources of international law. . . .

(a) Treaties and state papers may lay down new rules or outline the operation of old rules. . . .

(b) Treaties and state papers may enunciate established rules as understood by the parties to the treaty. . . .

(c) Treaties and state papers may agree as to rules which shall be held as binding upon the parties to the treaty or paper. . . .

(d) Most treaties and state papers, however, deal with matters of interstate politics, and are not in any sense sources of international law. . . .

Text Writers: During the seventeenth and the first half of the eighteenth century, the writings of the great publicists were regarded as the highest source of authority upon matters now in the domain of international law. These writings not only laid down the principles which should govern cases similar to those which had arisen, but from the broad basis given the law of nations deduced the principles for such cases as might arise. . . .

Diplomatic Papers: The diplomatic papers, as distinct from the state papers to which more than one state becomes a party, are simply papers issued by a state for the guidance of its own representatives in international intercourse. . . . These papers, showing the opinions of various states from time to time upon certain subjects which may not come up for formal state action, afford a valuable source of information upon the attitude of states towards questions still formally unsettled.

166. Legal bases of international law. The nature and sanction of international law are affected by the following legal influences:

(a) The Roman law was the most potent influence in determining the early development, particularly in respect to dominion and acquisition of territory. . . .

(b) The canon law, as the law of the ecclesiastics who were supposed to recognize the broadest principles of human unity, gave an ethical element to early international law. . . . The canon law gave a quasi-religious sanction to its observance, and in so far as international law embodied its principles, gave the same sanction to the observance of international equity. . . .

(c) The common law, itself international as according to tradition, derived by Edward the Confessor from three systems, and subsequently modified by custom, furnished a practical element in determining the nature of international law.

(d) Equity promoted the development of the recognition of principles in international law. . . .

(e) Admiralty law may be defined as in one sense the law of the sea. Anterior to and during the Middle Ages, the maritime relations of states gave rise to sea laws, many of which are to-day well-recognized principles of international law.

167. Influence of Roman law on international law. Morey points out several ways in which the ideas of Roman law have influenced the general principles of international law.

Not only has the Roman law been preserved in the municipal and ecclesiastical jurisprudence of modern Europe; it has also exercised a marked influence on the growth of that body of rules by which the states of Europe are bound together in one moral commonwealth. . . . A few examples only of this influence can be noticed here.

(1) The most fundamental point of contact between Roman and modern international law is to be found in the idea of natural law embodied in the *jus gentium*. The *jus gentium* was not, it is true, conceived by the Romans as applying to the relations between independent

states. It was, nevertheless, so interpreted by the early publicists of modern times; and the ambiguity thus attaching to the term, *jus gentium*, led, in fact, to the most important and beneficent results. It came to be regarded, not simply as a law common to all states, nor even as a natural law universally binding upon individuals, — the earlier and later ideas of the Romans, — but as a universal law morally binding upon all nations *inter se*. . . . States were looked upon as moral persons — subjects of the natural law, and as equal to each other in their moral rights and obligations.

(2) The contact between Roman and international jurisprudence may be seen more specifically in the law relating to national dominion. Mr. Maine has clearly shown how the application of the Roman law of ownership was favored by the association of political sovereignty with territory. The old medieval idea that a king was merely the chief of his tribe, or people, was gradually superseded by the idea that he was the owner of the soil occupied by his people. Hence it became possible to look upon the sovereigns of Europe as "a group of Roman proprietors." Their respective rights over their own lands, and their territorial relations to each other, could be justly determined upon principles derived from the Roman law of *dominium*, or ownership. . . .

(3) Furthermore, the law relating to treaties is, to a great extent, founded upon principles derived from the Roman law of contracts. As states are moral persons, the obligations which they establish by mutual agreement are binding in so far as a recession from the agreement would be injurious to either party. The Roman law of contract was largely derived from the *jus gentium*, and was liberally interpreted according to the principles of natural equity. It thus furnished a broad basis for the law relating to those obligations which grow out of national agreements.

IV. Nature of International Law

168. Meaning of the term "international law." Holland discusses the nature of international law as follows:

It is plain that if Law be defined as we have defined it, a political arbiter by which it can be enforced is of its essence, and law without an arbiter is a contradiction in terms. Convenient therefore as is on many accounts the phrase "International Law," to express those rules of conduct in accordance with which, either in consequence of their express consent, or in pursuance of the usage of the civilized world, nations are expected to act, it is impossible to regard these rules as being in reality anything more than the moral code of nations. . . .

International Law differs from ordinary law in being unsupported by the authority of a State. It differs from ordinary morality in being a rule for States and not for individuals.

It is the vanishing point of Jurisprudence; since it lacks any arbiter of disputed questions, save public opinion, beyond and above the disputant parties themselves, and since, in proportion as it tends to become assimilated to true law by the aggregate of States into a larger society, it ceases to be itself, and is transmuted into the public law of a federal government.

169. The nature and origin of international law. Hall points out two leading views of the nature and origin of international law.

International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.

Two principal views may be held as to the nature and origin of these rules. They may be considered to be an imperfect attempt to give effect to an absolute right which is assumed to exist and to be capable of being discovered; or they may be looked upon simply as a reflection of the moral development and the external life of the particular nations which are governed by them.

170. Nature of international rights. Willoughby shows that, in the strict legal sense, "international rights" are impossible.[1]

The term "law," when applied to the rules and principles that prevail between independent nations, is misleading because such rules depend for their entire validity upon the forbearance and consent of the parties to whom they apply, and are not and cannot be legally enforced by any common superior. In a command there is the necessary idea of superior and inferior, while in international relations the fundamental postulate is that of the theoretical equality of the parties, however much they may differ in actual strength. Finally, there exist no tribunals wherein these principles may be interpreted and applied to particular cases. The uniformity with which these principles are followed, and the practical necessity under which, at least, the smaller States are to obey them, does not alter the case. The sanction to most of these rules may be, as a matter of fact, very strong and effective, but it is not a legal sanction. Regulations which depend upon the consent of the parties to whom they apply, not only for

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their interpretation and application, but for their enforcement, certainly partake insufficiently of those qualities which would cause them to be designated, *in sensu strictiore*, laws. International regulations thus resemble in this respect many of the agreements that are daily entered into between individuals, by which moral obligations are incurred, but for the enforcement of which, in case of violation, there are no legal means provided. . . .

In the absence, then, of a common superior, the only rational view in which States are to be regarded in their relations to each other is that of freedom from all possible legal control; and with their mutual interests subject only to such regulations as the considerations of justice and expediency shall dictate. International "rights," strictly speaking, do not exist.

171. International law not strictly law. Wilson, after quoting Bluntschli and Bulmerincq, distinguishes as follows the law of nations from law proper:

The province of International Law may be described as a province halfway between the province of morals and the province of positive law. . . . "The law of nations," says Bluntschli, "is that recognized universal Law of Nature which binds different states together in a humane jural society, and which also secures to the members of different states a common protection of law for their general human and international rights.". . . International Law, says Dr. Bulmerincq, "is the totality of legal rules and institutions which have developed themselves touching the relations of states to one another."

International Law is, therefore, not law at all in the strictest sense of the term. It is not, as a whole, the will of any state: there is no authority set above the nations whose command it is. In one aspect, the aspect of Bluntschli's definition, it is simply the body of rules, developed out of the common moral judgments of the race, which *ought* to govern nations in their dealings with each other. Looked at from another, from Dr. Bulmerincq's, point of view, it is nothing more than a generalized statement of the rules which nations have actually recognized in their treaties with one another, made from time to time, and which by reason of such precedents are coming more and more into matter-of-course acceptance.

172. Municipal law and international law. Municipal law and international law may be distinguished as follows:[1]

Municipal law may therefore be defined as comprising those rules of human conduct which are established or sanctioned by a state, in virtue

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of its sovereign authority, for the guidance and direction of its citizens or subjects. The municipal law of a state applies, as will subsequently appear, not only to citizens, properly so called, but to all persons, whatever their nationality, who come within its territorial limits as travelers or sojourners. As such persons are protected by the local municipal law, it is their duty to conform to its requirements during the period of their residence within its borders.

International law, or, as it is sometimes called, the "law of nations," may therefore be defined as that body of rules and limitations which the sovereign states of the civilized world agree to observe in their intercourse and relations with each other. The agreement or consent, which is essential to the validity of a rule of international law, is said to be *express*, or *positive*, when it is embodied in treaties, or formal declarations of public policy, or in statutes which are enacted in support, or recognition of the accepted usages of nations; it is said to be *tacit* when it takes the form of conformity to the approved practice of states in their international relations.

The essential difference between the two systems of law will be found to consist in the extent and character of the binding force of each. The sovereign authority of a state sanctions its municipal laws and, within its territorial limits, enforces obedience to their provisions. As sovereign states acknowledge no common superior, it is obvious that there is no authority above a state, or outside of it, which can effectively coerce it into obedience to the provisions of international law. An individual who suffers an injury, or whose personal or property rights are invaded, seeks and obtains redress in the courts of his country, which are authorized to hear and decide his case, and are given power to enforce their judgments and decrees. If, on the other hand, a nation be injured or invaded by another, or have a cause of difference with a foreign state, it cannot appeal to an international tribunal of any kind to remedy its wrong or to adjust its difference, but must seek redress by remonstrance or negotiation, or, as a last resort, by war, when all peaceable methods of adjustment have failed.

173. International law and morality. Sidgwick gives reasons for considering international law as occupying an intermediate position between law proper and morality.[1]

There are, however, considerations on the other side, leading us to assign to international law, in respect of the normal process of changing it, an intermediate position between ordinary law and ordinary morality,

[1] By permission of The Macmillan Company.

as they exist in a modern State. Changes in ordinary law are, as we have seen, mainly introduced in modern States by the formal agreement of the persons and bodies that compose the supreme legislature, acting collectively after debate. Changes in Positive Morality, on the other hand, can only be brought about gradually by the unconcerted agreement of a number of individuals, judging of others and acting towards them as individuals, in the exercise of their legal freedom of choice in social relations. Now in the case of international law, though there is no regular organ of legislative innovation, the concerted action of States, in the way of treaties and conventions, plays an important part in the introduction of changes, to which there is no counterpart in the development of positive morality. . . .

Further, the concerted action of which I have been speaking is not the only method by which the rules of international law have been modified; it is undeniable that international law, like civil law, has been gradually made more definite and coherent by a series of arguments of the ordinary legal kind, terminated in some cases by judicial or quasi-judicial decisions; and it is conceivable that this process might be continued until international law should reach something like the systematic precision which parts of our own common law have attained through judicial interpretation alone. . . .

In these various ways a body of definite rules of international conduct has gradually been formed, which certainly bears, regarded as an intelligible system, a closer resemblance to the positive law than it does to the positive morality of a modern state.

174. International law as law. Leacock summarizes as follows the arguments that may be brought forward in support of the position that international law is properly "law":[1]

As against the point of view adopted in such criticisms of the propriety of the term "international law," various arguments may be adduced. In the first place, the objection urged by many writers adopting a restricted connotation of the term "law" may also be applied here. We have seen that law in its strict sense is not applicable to a state of society in which life is regulated to a large extent by custom, and to which the idea of deliberate enactment is altogether alien. Nor is the term in its strict sense applicable to a community in which imperfect political organization or chronic anarchy renders the general obedience to regulative control spasmodic and uncertain. Many writers have therefore preferred to expand the sense of the term "law" in order to make its use extend

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to societies of this character, and recognize the existence of "law in the making," as well as of law. Viewed in this light, international law may be considered as truly law, although as yet only in an inchoative stage; it becomes analogous, as Sir Frederick Pollock expresses it, "to those customs and observances in an imperfectly organized society, which have not yet fully acquired the character of law but are on the way to become law."

Even at the present stage of its development international law is not so much devoid of a binding sanction as might at first appear. Where its precepts are definite and their meaning obvious, the general presumption of civilized opinion — a potent factor in the world politics of our day — is against any power acting in violation of them. A flagrant disregard of international law would involve a decided loss of national prestige, and offer a perhaps tempting chance for intervention on the part of an outside power.

175. The sanction of international law. In his presidential address delivered before the second annual meeting of the American Society of International Law, in 1908, Elihu Root discussed the sanction of international law as follows:

In former times, each isolated nation, satisfied with its own opinion of itself and indifferent to the opinion of others, separated from all others by mutual ignorance and misjudgment, regarded only the physical power of other nations. . . . Now, however, there may be seen plainly the effects of a long-continued process which is breaking down the isolation of nations, permeating every country with better knowledge and understanding of every other country, spreading throughout the world a knowledge of each government's conduct to serve as a basis for criticism and judgment, and gradually creating a community of nations, in which standards of conduct are being established, and a world-wide public opinion is holding nations to conformity or condemning them for disregard of the established standards. The improved facilities for travel and transportation, the enormous increase of production and commerce, the revival of colonization and the growth of colonies on a gigantic scale, the severance of the laborer from the soil, accomplished by cheap steamship and railway transportation and the emigration agent, the flow and the return of millions of emigrants across national lines, the amazing development of telegraphy and of the press, conveying and spreading instant information of every interesting event that happens in regions however remote — all have played their part in this change.

Pari passu with the breaking down of isolation, that makes a common public opinion possible, the building up of standards of conduct is

being accomplished by the formulation and establishment of rules that are being gradually taken out of the domain of discussion into that of general acceptance — a process in which the recent conferences at The Hague have played a great and honorable part. There is no civilized country now which is not sensitive to this general opinion, none that is willing to subject itself to the discredit of standing brutally on its power to deny to other countries the benefit of recognized rules of right conduct. The deference shown to this international public opinion is in due proportion to a nation's greatness and advance in civilization. The nearest approach to defiance will be found among the most isolated and least civilized of countries, whose ignorance of the world prevents the effect of the world's opinion; and in every such country internal disorder, oppression, poverty, and wretchedness mark the penalties which warn mankind that the laws established by civilization for the guidance of national conduct cannot be ignored with impunity.

National regard for international opinion is not caused by *amour propre* alone — not merely by desire for the approval and good opinion of mankind. Underlying the desire for approval and the aversion to general condemnation with nations as with the individual, there is a deep sense of interest, based partly upon the knowledge that mankind backs its opinions by its conduct and that nonconformity to the standard of nations means condemnation and isolation, and partly upon the knowledge that in the give and take of international affairs it is better for every nation to secure the protection of the law by complying with it than to forfeit the law's benefits by ignoring it.

Beyond all this there is a consciousness that in the most important affairs of nations, in their political status, the success of their undertakings and their processes of development, there is an indefinite and almost mysterious influence exercised by the general opinion of the world regarding the nation's character and conduct. The greatest and strongest governments recognize this influence and act with reference to it. They dread the moral isolation created by general adverse opinion and the unfriendly feeling that accompanies it, and they desire general approval and the kindly feeling that goes with it. . . .

These are the considerations which determine the course of national conduct regarding the vast majority of questions to which are to be applied the rules of international law. The real sanction which enforces those rules is the injury which inevitably follows nonconformity to public opinion; while, for the occasional and violent or persistent lawbreaker, there always stands behind discussion the ultimate possibility of war, as the sheriff and the policeman await the occasional and comparatively rare violators of municipal law.

CHAPTER XII

CONTENT OF INTERNATIONAL LAW

I. Independence and Equality

176. Nature of intervention. In opposition to the general principle that states are independent and equal, and hence free from external interference, the nature of "intervention" may be noted.

Intervention takes place when a state interferes in the relations of two other states without the consent of both or either of them, or when it interferes in the domestic affairs of another state irrespectively of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it. *Prima facie* intervention is a hostile act, because it constitutes an attack upon the independence of the state subjected to it. Nevertheless its position in law is somewhat equivocal. Regarded from the point of view of the state intruded upon, it must always remain an act which, if not consented to, is an act of war. But from the point of view of the intervening power it is not a means of obtaining redress for a wrong done, but a measure of prevention or of police, undertaken sometimes for the express purpose of avoiding war. . . .

The grounds upon which intervention has taken place, or upon which it is said with more or less of authority that it is permitted, may be referred to the right of self-preservation, to a right of opposing wrongdoing, to the duty of fulfilling engagements, and to friendship for one of two parties in a state.

177. Intervention of the powers in behalf of Greek independence. In 1821 Greece revolted against the oppressive government of the Turks. After terrible massacres the Greeks aroused the sympathy of western Europe, and the intervention of England, Russia, and France forced the Sultan to recognize their independence in 1829.

Of the intervention of Great Britain, France, and Russia, Mr. Abdy in his edition of Kent, thus speaks: "The intervention . . . was based on three grounds. First, in order to comply with the request of one of

the parties; secondly, on the ground of humanity, in order to stay the effusion of blood; and, thirdly, in order to put a stop to piracy and anarchy."

The treaty between France, Great Britain, and Russia, signed at London July 6, 1827, for the pacification of Greece, sets forth the specific grounds on which the three powers intervened. In the preamble the contracting parties declare that, "penetrated with the necessity of putting an end to the sanguinary struggle which, while it abandons the Greek provinces and the islands of the archipelago to all the disorders of anarchy, daily causes fresh impediments to the commerce of the states of Europe, and gives opportunity for acts of piracy which not only expose the subjects of the high contracting parties to grievous losses, but also render necessary measures which are burdensome for their observation and suppression"; and that two of the high contracting parties (France and Great Britain) having besides "received from the Greeks an earnest invitation to interpose their Mediation with the Ottoman Porte," and being, together with the Emperor of Russia, "animated with the desire of putting a stop to the effusion of blood, and of preventing the evils of every kind which the continuance of such a state of affairs may produce," they had all resolved to combine and regulate their efforts by a formal treaty with a view to reestablish peace between the contending parties by means of an arrangement demanded "no less by sentiments of humanity, than by interests for the tranquillity of Europe."

178. Reply of Japan to the intervention of Russia, Germany, and France. In 1895, after the treaty of peace between China and Japan had ceded territory to the latter, Russia, Germany, and France sent a joint note to Japan politely commanding her to return the territory gained. The following extract is taken from Japan's diplomatic reply:

We recently complied with the request of China, and in consequence appointed plenipotentiaries and caused them to confer with the plenipotentiaries appointed by China and to conclude a Treaty of Peace between the two Empires.

Since then the governments of their Majesties the Emperors of Russia and Germany and of the Republic of France have united in a recommendation to our government not to permanently possess the peninsula of Feng-t'ien, our newly acquired territory, on the ground that such permanent possession would be detrimental to the lasting peace of the Orient.

Devoted as we unalterably are and ever have been to the principles of peace, we were constrained to take up arms against China for no other reason than our desire to secure for the Orient an enduring peace.

Now the friendly recommendation of the three powers was equally prompted by the same desire. Consulting, therefore, the best interests of peace and animated by a desire not to bring upon our people added hardship or to impede the progress of national destiny by creating new complications and thereby making the situation difficult and retarding the restoration of peace, we do not hesitate to accept such recommendation.

179. American statements of policy regarding nonintervention. The following extracts from the writings of leading American statesmen indicate the traditional foreign policy of the United States. Significant changes are shown in the attitude of Roosevelt.

Washington (1796)—Europe has a set of primary interests which to us have none or a very remote relation. Hence, she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities.

Jefferson (1823)—I have ever deemed it fundamental for the United States never to take an active part in the quarrels of Europe. Their political interests are entirely distinct from ours. Their mutual jealousies, their balance of power, their complicated alliances, their forms and principles of government, are all foreign to us.

Monroe (1824)—Separated as we are from Europe by the Great Atlantic Ocean, we can have no concern in the wars of the European governments nor in the causes which produce them. The balance of power between them, into whichever scale it may turn in its various vibrations, cannot affect us. It is the interest of the United States to preserve the most friendly relations with every power and on conditions fair, equal, and applicable to all.

Webster (1842)—The great communities of the world are regarded as wholly independent, each entitled to maintain its own system of law and government, while all in their mutual intercourse are understood to submit to the established rules and principles governing such intercourse. And the perfecting of this system of communication among nations, requires the strictest application of the doctrine of nonintervention of any with the domestic concerns of others.

Seward (1864)—Whatever may be thought by other nations of this policy, it seems to the undersigned to be in strict conformity with those prudential principles of international law — that nations are equal in their independence and sovereignty, and that each individual state is bound to do unto all other states just what it reasonably expects those states to do unto itself.

Day (1898)—The rule of this government is to observe the most absolute impartiality in respect to questions arising between its neighbors; to refrain from forming a judgment upon the merits of the mutual recriminations which may attend such disputes; to abstain from advising either party to the difference; and to exert mediatorial offices only when acceptable to both parties.

Roosevelt (1904)—In asserting the Monroe doctrine, in taking such steps as we have taken in regard to Cuba, Venezuela, and Panama, and in endeavoring to circumscribe the theater of war in the Far East, and to secure the open door in China, we have acted in our own interest as well as in the interest of humanity at large. There are, however, cases in which, while our own interests are not greatly involved, strong appeal is made to our sympathies. Ordinarily it is very much wiser and more useful for us to concern ourselves with striving for our own moral and material betterment here at home than to concern ourselves with trying to better the condition of things in other nations. . . . Nevertheless there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavor at least to show our disapproval of the deed and our sympathy with those who have suffered by it. The cases must be extreme in which such a course is justifiable. . . . But in extreme cases action may be justifiable and proper.

180. Intervention of the United States in Cuba. The following extract from President McKinley's special message to Congress, April 11, 1898, gives the grounds on which the United States undertook forcible intervention in Cuban affairs.

First. In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. It is no answer to say this is all in another country, belonging to another nation, and is therefore none of our business. It is specially our duty, for it is right at our door.

Second. We owe it to our citizens in Cuba to afford them that protection and indemnity for life and property which no government there

can or will afford, and to that end to terminate the conditions that deprive them of legal protection.

Third. The right to intervene may be justified by the very serious injury to the commerce, trade, and the business of our people, and by the wanton destruction of property and devastation of the island.

Fourth, and which is of the utmost importance. The present condition of affairs in Cuba is a constant menace to our peace, and entails upon this government an enormous expense. With such a conflict waged for years in an island so near us and with which our people have such trade and business relations; when the lives and liberty of our citizens are in constant danger and their property destroyed and themselves ruined; where our trading vessels are liable to seizure and are seized at our very door by warships of a foreign nation, the expeditions of filibustering that we are powerless to prevent altogether, and the irritating questions and entanglements thus arising—all these and others that I need not mention, with the resulting strained relations, are a constant menace to our peace, and compel us to keep on a semi-war footing with a nation with which we are at peace.

181. The Monroe Doctrine. The essential clauses of President Monroe's message, stating the policies of "noncolonization" and "nonintervention," follow:

. . . the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers. . . .

In the wars of the European powers, in matters relating to themselves, we have never taken any part, nor does it comport with our policy so to do. . . . The political system of the allied powers is essentially different, in this respect, from that of America. . . . We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers, to declare, that we should consider any attempt on their part to extend their system to any portion of this hemisphere, as dangerous to our peace and safety. With the existing colonies or dependencies of any European power, we have not interfered, and shall not interfere.

182. The Olney Doctrine. In 1895, at the time of the boundary dispute between Venezuela and British Guiana, Secretary of State Olney, in a letter to the United States ambassador to Great Britain,

interpreted the Monroe Doctrine so broadly that his point of view has often been called the Olney Doctrine.

Is it true, then, that the safety and welfare of the United States are so concerned with the maintenance of the independence of every American state as against any European power as to justify and require the interposition of the United States whenever that independence is endangered? The question can be candidly answered in but one way. The states of America, South as well as North, by geographical proximity, by natural sympathy, by similarity of governmental constitutions, are friends and allies, commercially and politically, of the United States. To allow the subjugation of any of them by an European power is, of course, to completely reverse that situation and signifies the loss of all the advantages incident to their natural relations to us. . . .

To-day the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition. Why? . . . It is because, in addition to all other grounds, its infinite resources combined with its isolated position render it master of the situation and practically invulnerable as against any or all other powers.

183. The Drago Doctrine. December 29, 1902, the Argentine minister at Washington was instructed to present to the United States certain views with reference to the forcible collection of public debts. From the name of their author, these principles are usually called the Drago Doctrine.

Among the fundamental principles of public international law which humanity has consecrated, one of the most precious is that which decrees that all states, whatever be the force at their disposal, are entities in law, perfectly equal one to another, and mutually entitled by virtue thereof to the same consideration and respect. . . .

"Contracts between a nation and private individuals are obligatory according to the conscience of the sovereign, and may not be the object of compelling force," said the illustrious Hamilton. "They confer no right of action contrary to the sovereign will." . . .

This is in no wise a defense for bad faith, disorder, and deliberate and voluntary insolvency. It is intended merely to preserve the dignity of the public international entity which may not thus be dragged into war with detriment to those high ends which determine the existence and liberty of nations. . . .

The collection of loans by military means implies territorial occupation to make them effective, and territorial occupation signifies the suppression or subordination of the governments of the countries on which it is imposed.

184. The theory of the balance of power. Lawrence explains the nature of the "balance of power" theory, and shows its present status in world politics.

From the middle of the seventeenth century till recent times, it was an undoubted maxim of European diplomacy that what was called the Balance of Power must be preserved at all risks. The courts and cabinets of the Old World were dominated by the idea that the chief states of Europe ought to possess such a nicely proportioned share of power that no one of them should be able to greatly outweigh the others in influence and authority. It was held that a sort of international equilibrium of forces had been established, and that any state which attempted to destroy its nice adjustments might be attacked by others whose relative importance would be diminished if it were permitted to carry out its projects. For a long time this doctrine was accounted axiomatic. . . . But of late years it has fallen into disrepute, and those who still maintain it set it forth in a greatly modified form. They are content to argue that civilized states have duties to perform to the great society of which they are all members, and that they should act in concert against any aggressive member of it whose unsocial conduct endangers the welfare of the whole.

II. Property and Jurisdiction

185. Territorial waters of a state. The extent to which waters form part of the territory of a state is thus given by Wheaton:

The territory of the state includes the lakes, seas, and rivers, entirely inclosed within its limits. The rivers which flow through the territory also form a part of the domain from their sources to their mouths, or as far as they flow within the territory, including the bays or estuaries formed by their junction with the sea. . . .

Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called an *innocent use*. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one state through the territory of another into the sea, or into the territory of a third state. The right of navigating, for commercial purposes, a river which flows

through the territory of different states, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text writers call an *imperfect right*, its exercise is necessarily modified by the safety and convenience of the state affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.

186. The three-mile limit. In consequence of the case of the *Franconia*,[1] the English Parliament, in 1878, passed the following act:

The territorial waters of Her Majesty's dominions, in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offense declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions.

187. River boundaries. In 1856 Attorney-General Caleb Cushing gave the following opinion of the nature of a river boundary between states:

When a river is the dividing limit of arcifinious territories, the natural changes to which itself is liable, or which its action may produce on the face of the country, give rise to various questions, according to the physical events which occur, and the previous relation of the river to the respective territories. The most simple of all the original conditions of the inquiry is where the river appertains by convention equally to both countries, their rights being on either side to the *filum aquae*, or middle of the channel of the stream. . . .

With such conditions, whatever changes happen to either bank of the river by accretion on the one or degradation of the other; that is, by the gradual and, as it were, insensible accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. . . . And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences even to the injured party. . . .

[1] J. B. Scott, "Cases on International Law," p. 154.

But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory the river thus breaks its way, suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed.

188. Acquisition of territory by discovery. The principle that discovery gives a valid title to land occupied by uncivilized peoples is stated in the following opinion of the United States Supreme Court:

On the discovery of this immense continent the nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all, and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the rights of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. . . .

On the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded, but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion, but their rights to complete sovereignty, as independent nations, were necessarily diminished and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

189. Annexation of the Hawaiian Islands. The following joint resolution, approved July 7, 1898, illustrates one method of acquiring territory:

WHEREAS the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

Resolved, . . ., That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

190. The determination of nationality. The following opinion of Sir A. Cockburn indicates the methods by which nationality may be acquired, and the differences between the laws of the Continent as compared with those of England and the United States.

Nationality by birth or origin depends, according to the law of some nations, on the place of birth; according to that of others on the nationality of the parents. In many countries both elements exist, one or other, however, predominating. . . .

By the common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning in the country, was an English subject; save only the children of foreign ambassadors . . ., or a child born to a foreigner during the hostile occupation of any part of the territories of England. No effect appears to have been given to descent as a source of nationality. . . .

The law of the United States of America agrees with our own. The law of England as to the effect of the place of birth in the matter of nationality became the law of America as part of the law of the mother country, which the original settlers carried with them. . . .

By the law of France, anterior to the revolution, a child born on French soil, though of foreign parents, was a Frenchman, as it was termed, *jure soli;* a child born of French parents out of French territory, was a Frenchman *jure sanguinis.* The framers of the Code Napoléon,

adopting a sounder principle, excluded the place of birth as the source of nationality in itself; but compromising, as it were, with the old rule, they allowed the place of birth to have effect so far as to give to the offspring of an alien the right of claiming French nationality on attaining full age. The example set by the framers of the French Code has been followed by the nations by which that Code has been adopted, as also by others in remodeling their Constitutions or Codes. The result has been that, throughout the European States generally, descent, and not the place of birth, has been adopted as the primary criterion of nationality, though with a reservation in some, of a right to persons born within the territory to claim nationality within a fixed period.

191. Extradition for political offenses. In general, states refuse to extradite persons accused of "political offenses." Considerable difficulty arises in properly defining such cases.

Most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the *government* and acts against the *oppressions of the government*. The latter are virtues, yet have furnished more victims to the executioner than the former. . . . The unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries. . . . Treasons, then, taking the *simulated* with the *real*, are sufficiently punished by exile. . . .

By the treaties between the United States on the one hand, and Belgium and Luxemburg on the other, which were respectively concluded in 1882 and 1883, when the memory of the assassination of President Garfield was still fresh, it was provided that an attempt against the life of the head of the government or against that of any member of his family, when such attempt "comprises the act either of murder or assassination, or of poisoning, shall not be considered a political offense or an act connected with such an offense. . . .

Although anarchists profess political motives for their acts, yet in June, 1894, the British government, after full consideration of the question by the court of Queen's Bench, delivered up to France a fugitive from justice, who was charged with causing the explosion at the Café Véry in Paris, as well as another explosion at certain government barracks. The court held "that, in order to constitute an offense of a political character, there must be two or more parties in the state, each seeking to impose the government of their own choice on the other"; and that the offense must be "committed by one side or the other in pursuance of that object." . . .

192. Immunities of diplomatic agents. The exemption of foreign ministers from the jurisdiction of the states to which they are sent is brought out in the following case:

A case of homicide having occurred at Washington, in 1856, in the presence of the Dutch minister, whose testimony was deemed altogether material for the trial, "and inasmuch as he was exempt from the ordinary process to compel the attendance of witnesses," an application was made by the district attorney, through the Secretary of State, to Mr. Dubois to appear and testify. The minister having refused, by the unanimous advice of his colleagues, in a note of the 11th of May, 1856, to the Secretary of State, to appear as a witness, Mr. Marcy, Secretary of State, instructed, May 15, 1856, Mr. Belmont, minister of the United States at The Hague, to bring the matter to the attention of the Netherlands Government.

Mr. Marcy says, that "it is not doubted that both by the usage of nations and the laws of the United States, Mr. Dubois has the legal right to decline to give his testimony; but he is at perfect liberty to exercise the privilege to the extent requested, and by doing so he does not subject himself to the jurisdiction of the country. The circumstances of this case are such as to appeal strongly to the universal sense of justice."

III. Diplomacy

193. Importance of the diplomatic service. A special committee of the English Parliament some years ago considered the question of the value of the diplomatic service. Many of the most experienced statesmen of the day were examined.

Mr. Cobden asked the following question: "If you go back two or three hundred years, when there were no newspapers, when there was scarcely such a thing as international postal communication, when affairs of state turned upon a court intrigue, or the caprice of a mistress, or a Pope's bull, or a marriage, was it not of a great deal more consequence at that time to have ministers at foreign courts . . . than it is in these constitutional times, when affairs of state are discussed in the public newspapers and in the legislative assemblies . . . under these circumstances are not the functions of an ambassador less important now than they were two or three hundred years ago?"

In reply, Lord Palmerston said: "I should humbly conceive that they are more important on account of the very circumstances which have just been stated. . . . I should think that the change which has taken

place with regard to the transaction of public affairs in Europe tends to make diplomatic agents of more importance rather than of less importance."

194. Rank of diplomatic agents. The rank of diplomatic agents, settled at the Congress of Vienna in 1815, was formerly a subject of fierce controversy.

Four centuries ago the Pope of Rome, by virtue of his conceded preëminence and ecclesiastical authority, sought to settle the vexed question by issuing an order fixing the relative rank of the then existing nations of Christendom. It illustrates the intensity of feeling which the question had aroused to state that, notwithstanding the high papal authority of that day, this arbitrary settlement was not accepted generally, and was observed in Rome only, and even there merely for a brief period. It also illustrates the evanescent character of the honor and the changes of the governments of the world to note that, of the score and a half of nations enumerated in the papal order, only three (England, Spain, and Portugal) exist to-day with the royal titles then accorded them. It is also curious to note that in this table of precedence England stood eighth in order, and Russia does not appear in the list.

195. Reception of envoys. The ceremonial attending diplomatic relations varies in different countries.

The American diplomatic representative goes to his post with no display, and much as a private gentleman makes a visit abroad. In this respect a great change has taken place in modern times. When Sully, the minister of King Henry of Navarre, went on his mission to Queen Elizabeth, he took to England a retinue of two hundred gentlemen. Ambassador Bassompierre speaks of an "equipage of five hundred" returning with him to France. When Sully reached London, he was saluted with three thousand guns from the Tower. D'Estrades, ambassador of Louis XIV, reports that he was met at Ryswick by the deputies of Holland with a train of threescore coaches-and-six.

While this extravagant display has given place in the western nations to more official simplicity, the old diplomatic order of things still lingers in the Far East. When the Viceroy Li Hung Chang went to Japan in 1895 to sue for peace, two merchant steamers were chartered to carry his suite of one hundred and thirty-five persons and their paraphernalia. The Japanese embassy which visited Peking in 1905, to negotiate for an adjustment of the questions growing out of the Russo-Japanese war, was attended with great state. The ambassador and his suite, whenever

they moved about, were accompanied by a large and imposing escort, and the ceremonial observed was studiously planned to impress the Chinese. On their departure they bestowed liberal gifts of money upon various local institutions, and traveled by special railway train with a military guard.

196. Refusal to receive diplomatic agents. The following case is an example of reasons for which a diplomatic agent may be *persona non grata:*

In 1885 the Italian Government objected to receiving as minister from the United States Mr. A. M. Keiley. Its objection was based upon a speech made by Mr. Keiley at a public meeting of Roman Catholics, held in Richmond, Va., January 12, 1871, in support of certain resolutions prepared by the bishops of the diocese, one of which protested "against the invasion and spoliation of the states of the church by King Victor Emmanuel as a crime against solemn treaties and against the independence of the head of the church on earth, which must always be imperiled while he is the subject of any temporal prince or government." When the objection of the Italian Government was brought to Mr. Keiley's attention he resigned his commission. The Government of the United States, in the correspondence with the Italian Government, recognized "the full and independent right" of the King of Italy to decide the question of the "personal acceptability to him" of an envoy from another government.

197. Privileges and immunities of consuls in eastern countries. The consular regulations of the United States outline the following rights of consuls in non-Christian countries:

In non-Christian countries the rights of exterritoriality have been largely preserved, and have generally been confirmed by treaties to consular officers. To a great degree they enjoy the immunities of diplomatic representatives, together with certain prerogatives of jurisdiction, the right of worship, and, to some extent, the right of asylum. These immunities extend to exemption from both the civil and criminal jurisdiction of the country to which they are sent, and protect their households and the effects covered by the consular residence. Their personal property is exempt from taxation, though it may be otherwise with real estate or movables not connected with the consulate. Generally, they are exempt from all personal impositions that arise from the character or quality of a subject or citizen of the country.

198. Exchange of gifts on the ratification of treaties. The practice of exchanging gifts when treaties are ratified, formerly common, has now fallen into disuse.[1]

After the treaty with Persia of 1866 was concluded, . . . the American minister to Turkey, who signed it, wrote the Secretary of State as follows: "You are aware of the fact that the Ottoman and Persian Governments always expect to receive presents from the Christian powers with whom they negotiate treaties, when the ratifications of such treaties are exchanged. The treaty made with Turkey cost the United States some fifty thousand dollars. A much less sum would, in my opinion, suffice to satisfy the Persian officials. I learn that Spain, upon the exchange of ratifications of a treaty made by her with Persia, gave presents to the amount of twelve thousand dollars. I do not think that our Government should give less.

"I would suggest the following present: a diamond snuffbox of the value of four thousand dollars, for the Shah, and a few good specimens of improved American firearms, he being very fond of hunting; to Mirza Agbra Khan, the Grand Vizier, a diamond snuffbox to the value of three thousand dollars; to Farrukh Khan, with whom the treaty was negotiated, another of the same value. . . . To Melkhom Khan, who was also engaged in the negotiation of the treaty and was instrumental in forming it, a present of the value of one thousand dollars, besides baksheeshes to the different attachés of the Persian legation, who all expect them. A less amount than fifteen thousand dollars will not suffice."

199. The open door. In a letter from Secretary of State John Hay to the United States ambassador at St. Petersburg, the principles which the United States desired to see applied in China are thus stated:

The principles which this Government is particularly desirous of seeing formally declared by His Imperial Majesty and by all the great Powers interested in China, and which will be eminently beneficial to the commercial interests of the whole world, are:

First. The recognition that no Power will in any way interfere with any treaty port or any vested interest within any leased territory or within any so-called "sphere of interest" it may have in China.

Second. That the Chinese treaty tariff of the time being shall apply to all merchandise landed or shipped to all such ports as are within said "sphere of interest" (unless they be "free ports"), no matter to what

[1] By permission of Houghton Mifflin Company.

nationality it may belong, and that duties so leviable shall be collected by the Chinese Government.

Third. That it will levy no higher harbor dues on vessels of another nationality frequenting any port in such "sphere" than shall be levied on vessels of its own nationality, and no higher railroad charges over lines built, controlled, or operated within its "sphere" on merchandise belonging to citizens or subjects of other nationalities transported through such "sphere" than shall be levied on similar merchandise belonging to its own nationals transported over equal distances.

200. The call of the first peace conference. In August, 1898, the following letter was issued by the Russian foreign minister:

The maintenance of general peace, and a possible reduction of the excessive armaments which weigh upon all nations, present themselves in the existing condition of the whole world, as the ideal towards which the endeavors of all governments should be directed.

The humanitarian and magnanimous ideas of His Majesty the Emperor, my august master, have been won over to this view. In the conviction that this lofty aim is in conformity with the most essential interests and the legitimate views of all powers, the Imperial Government thinks that the present moment would be very favorable for seeking, by means of international discussion, the most effectual means of insuring to all peoples the benefits of a real and durable peace, and, above all, of putting an end to the progressive development of the present armaments. . . .

Filled with this idea, His Majesty has been pleased to order me to propose to all the governments whose representatives are accredited to the Imperial Court, the meeting of a conference which should occupy itself with this grave problem.

201. The work of the Second Hague Conference. Dr. J. B. Scott, a technical delegate representing the United States at the Second Hague Conference (1907), sums up its work as follows:

The work of the Second Conference, for which the year 1907 will be memorable, was twofold. First, it revised and enlarged the conventions of 1899 in the light of experience, in the light of practice as well as of theory, and put them forth to the world in a new and modified form. In the next place, the Conference did not limit itself to these subjects. To the three conventions of 1899, revised in 1907, were added ten new conventions. . . . Tried by the standards of results, the Conference clearly justified its existence, but it would have been a success

had it demonstrated nothing more than the possibility of the representatives of forty-four nations to live in peace and quiet during four months. . . .

Leaving out minor matters, this Conference did four things of fundamental importance:

1. It provided for a meeting of the Third Conference within an analogous period, namely eight years, to be under the control of the powers generally, instead of the control of any one of them.

2. It adopted a convention for the nonforcible collection of contract debts, substituting arbitration and an appeal to reason for force and an appeal to arms.

3. It established a prize court to safeguard neutrals.

4. It laid the foundations of, if it did not put the finishing stone to, a great court of arbitration.

IV. War

202. Reprisals. The following cases are examples of reprisals, or measures involving force that falls short of war:

A convention was signed at London on October 31, 1861, between Great Britain, France, and Spain for the purpose of taking forcible measures with a view to obtain redress from Mexico for injuries done to their subjects in that country. The United States was advised to accede to the arrangement, but declined to do so. After the three Governments had adopted certain measures of force, the British and Spanish Governments withdrew, while France entered upon that course of intervention which resulted in the attempt to establish an empire in Mexico. . . .

In November, 1901, France seized the customhouse at Mytilene in order to enforce compliance by the Turkish Government with demands for the settlement of the Lorando claim, the rebuilding of French schools and institutions destroyed in 1895–96, the official recognition of existing schools and institutions, and the recognition of the Chaldean patriarch.

203. Kinds of war. Distinctions may be drawn between "general" and "limited" wars; and various degrees of internal disturbance admit of classification.

Wheaton and other writers speak of "perfect" and "imperfect" wars, the former being one in which it is said the whole nation is at war with another nation and all the members of each are authorized to commit

hostilities against all the members of the other in every case permitted by the laws of war; the latter, a war limited as to places, persons, and things. It may be suggested that it would be more nearly correct to speak of wars in this sense as *general* and *limited*. . . .

Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions of provinces of the same who seek to throw off their allegiance to it and set up a government of their own.

204. Residence in case of war. The duties of American citizens resident in foreign states at a time when their country is engaged in war are thus stated by the Supreme Court:

The duty of a citizen when war breaks out, if it be a foreign war, and he is abroad, is to return without delay, and if it be a civil war, and he is a resident in the rebellious section, he should leave it as soon as practicable and adhere to the regular established government. . . .

Personal property, except such as is the product of the hostile soil, follows as a general rule the rights of the proprietor; but if suffered to remain in the hostile country after war breaks out, it becomes impressed with the national character of the belligerent where it is situated. Promptitude is therefore justly required of citizens resident in the enemy country, or having personal property there, in changing their domicile, severing those business relations, or disposing of their effects, as matter of duty to their own government, and as tending to weaken the enemy. Presumption of the law of nations is against one who lingers in the enemy's country, and if he continues there for much length of time, without satisfactory explanations, he is liable to be considered as remorant, or guilty of culpable delay, and an enemy.

205. Conquest and private ownership of land. The general principle that conquest works no change in private titles to land is laid down in the following opinion of Chief Justice Swayne (1863):

California belonged to Spain by the rights of discovery and conquest. The government of that country established regulations for transfers of the public domain to individuals. When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations upon the same subject. These two sovereignties are the springheads of all the land titles in California, existing at the time of the cession of that country to the United States by the treaty of Guadalupe Hidalgo. That cession did not impair the rights of private property. They were consecrated by the law of nations, and protected by the treaty.

206. Treatment of prisoners of war. The following extracts from letters written by Secretary of State Webster (1842) indicate the modern attitude toward prisoners of war:

Prisoners of war are to be considered as unfortunate and not as criminal, and are to be treated accordingly, although the question of detention or liberation is one affecting the interest of the captor alone, and therefore one with which no other government ought to interfere in any way; yet the right to detain by no means implies the right to dispose of the prisoners at the pleasure of the captor. That right involves certain duties, among them that of providing the prisoners with the necessaries of life and abstaining from the infliction of any punishment upon them which they may not have merited by an offense against the laws of the country since they were taken. . . .

The law of war forbids the wounding, killing, impressment into the troops of the country, or the enslaving or otherwise maltreating of *prisoners of war*, unless they have been guilty of some grave crime; and from the obligation of this law no civilized state can discharge itself.

207. The Geneva Convention. The character and purpose of the Red Cross Convention, signed at Geneva, August 2, 1864, by representatives of twelve powers and later agreed to by twenty others, follow:[1]

The treatment of the sick and wounded in war is now largely regulated by the requirements of the Geneva Convention of August 2, 1864, the operation of which has been extended to hostilities at sea by the Additional Articles of October 10, 1868, and by the Convention in respect to the rules of maritime warfare which were adopted by the Peace Conference at The Hague in 1899. Nearly all civilized states

[1] By permission of Harper & Brothers.

are now parties to the operation of these agreements, the efficiency of which, as agencies for the amelioration of the condition of the sick and wounded, has been fully established in the great international conflicts which have taken place during the generation that has elapsed since their original adoption. . . .

The rules of the Geneva Convention, and other undertakings of like character, become operative only when individual combatants have been disabled by wounds and disease. Their effect is to confer certain privileges and immunities upon the sick and wounded, as a class, and to secure to the places in which they are collected and cared for, and to the persons who attend them, as complete an immunity from the effects of hostile operations as it is possible to accord them under the circumstances of each particular case.

208. Flags of truce. The following conventions regarding the laws and customs of war on land were adopted at the First Hague Conference, July 29, 1899:

Article XXXII. An individual is considered as bearing a flag of truce who is authorized by one of the belligerents to enter into communication with the other, and who carries a white flag. He has a right to inviolability, as well as the trumpeter, bugler, or drummer, the flag bearer, and the interpreter who may accompany him.

Article XXXIII. The Chief to whom a flag of truce is sent is not obliged to receive it in all circumstances.

He can take all steps necessary to prevent the envoy taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the envoy temporarily.

Article XXXIV. The envoy loses his rights of inviolability if it is proved beyond a doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery.

209. Methods of carrying on war. The international usage and practice of nations in war are still indicated fairly well by the rules laid down for the guidance of the army of the United States at the time of the Civil War. The history of this code is as follows:[1]

The need of a positive code of instructions was severely felt during the early part of the Civil War in the United States. During the first two years of that war the Federal Government had succeeded in placing in the field armies of unexampled size, composed, in great part, of

[1] By permission of Harper & Brothers.

men taken from civil pursuits, most of whom were unfamiliar with military affairs, and so utterly unacquainted with the usages of war. These armies were carrying on hostile operations of every kind over a wide area, and questions of considerable intricacy and difficulty were constantly arising, which required for their decision a knowledge of international law which was not always possessed by those to whom these questions were submitted for decision. . . .

To remedy this difficulty, Professor Francis Lieber, an eminent jurist, who had been for many years an esteemed and honored citizen of the United States, was requested by the Secretary of War to prepare a code of instructions for the government of the armies in the field. . . . The rules prepared by Dr. Lieber were submitted to a board of officers, by whom they were approved and recommended for adoption. They were published in 1863, and were made obligatory upon the armies of the United States by their publication in the form of a General Order of the War Department.

Although more than a generation has elapsed since they were prepared, they are still in substantial accordance with the existing rules of international law upon the subject of which they treat, and form the basis of Bluntschli's and other elaborate works upon the usages of war. They are accepted by text writers of authority as having standard and permanent value, and as expressing, with great accuracy, the usage and practice of nations in war.

210. Legal principles observed by prize courts. The nature of the law applied by prize courts may be stated as follows:

The court of prize is emphatically a court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country. By this law the definition of prize goods is that they are goods taken on the high seas, jure belli, out of the hands of the enemy. . . .

Prize courts are subject to the instructions of their own sovereign. In the absence of such instructions their jurisdiction and rules of decision are to be ascertained by reference to the known powers of such tribunals and the principles by which they are governed under the public law and the practice of nations.

Prize courts are tribunals of the law of nations, and the jurisprudence they administer is a part of that law. They deal with cases of capture as distinguished from seizures; their decrees are decrees of condemnation, not of forfeiture; they judge the character and relations of the vessel and cargo, and not the acts of persons.

V. Neutrality and Neutral Commerce

211. Neutralized states. States have been permanently neutralized by convention. Such states must not take part in war; in return they are guaranteed against attack.

As early as 1803 France promised constantly to employ her good offices to procure the neutrality of Switzerland . . .; and by a declaration confirmed by the Treaty of Vienna, Art. 84, it was recited that the European powers acknowledge "that the general interest demands that the Helvetic State should enjoy the advantage of a perpetual neutrality"; and such a neutrality was guaranteed to it accordingly. . . . By the treaties of 1831 and 1839 Belgium was recognized as "an independent and perpetually neutral state, bound to observe the same neutrality with reference to other states." At the outbreak of the war of 1870, England made treaties with France and Prussia, respectively, with a view to further securing the neutrality of Belgium. . . .

By the Treaty of London of May 11, 1867, Art. I, Luxemburg is declared to be a perpetually neutral state under the guarantee of the courts of Austria, Great Britain, Prussia, and Russia.

212. International position of the Suez and Panama canals. The following arrangements concerning the Panama Canal, contained in the Hay-Pauncefote treaty of 1901, are substantially the same as those concerning the Suez Canal, contained in the convention signed at Constantinople in 1888.

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality. . . .

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. . . .

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay. . . .

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal. . . .

5. The provisions of this Article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case, shall depart as soon as possible; but a vessel of war of one belligerent shall

not depart within twenty-four hours from the departure of a vessel of war of the other belligerents.

213. Rules of neutrality applied in the Geneva award. The arbiters, in determining British liability for the depredations of the *Alabama* and other cruisers, observed the following rules laid down for them in the Treaty of Washington, 1871.

A neutral Government is bound —

First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly. To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

214. The Rule of 1756. This principle, made famous during the Napoleonic period, may be briefly explained as follows:

Under the rule of colonial monopoly that universally prevailed in the eighteenth century, the trade with colonial possessions was exclusively confined to vessels of the home country. In 1756 the French, being, by reason of England's maritime supremacy, unable longer to carry on trade with their colonies in their own bottoms, and being thus deprived of colonial succor, issued licenses to Dutch vessels to take up and carry on the prostrate trade. Thereupon the British minister at The Hague, by instruction of his Government, announced to the Government of the Netherlands that Great Britain would in future enforce the rule that neutrals would not be permitted to engage in time of war in a trade from which they were excluded in time of peace. The restriction thus announced was enforced by the British Government through its prize courts. It has since been known as "the rule of the war of 1756."

215. The Declaration of Paris. On March 30, 1856, the Crimean War was terminated by the Treaty of Paris. At the suggestion of the French plenipotentiary, the representatives of the powers

that had been parties to the treaty met to consider the rules of maritime capture. On April 16, 1856, they adopted the following:

. . . Considering:

That maritime law, in time of war, has long been the subject of deplorable disputes;

That the uncertainty of the law, and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

That it is consequently advantageous to establish a uniform doctrine on so important a point; . . .

The above-mentioned Plenipotentiaries . . . have adopted the following solemn declaration:

1. Privateering is, and remains abolished.

2. The neutral flag covers enemy's goods, with the exception of contraband of war.

3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

216. Policy of the United States regarding neutral trade. The leading reasons for the attitude of the United States in desiring to extend the rights of neutrals follow:

The policy of the United States is to maintain neutral immunities for the following reasons: — (1) The probabilities of war are far less with us than with the great European states. From the nature of things, points of friction between the United States and foreign nations are comparatively few. . . . (2) Although the richest country in the world, our traditions and temper are averse to large naval and military establishments. (3) The idea of pacific settlement of disputed international questions is one of growing power among us; the horror of war has not been diminished by the experience of the civil war; there is no country in the world where love of order is so great, and in which public peace is kept by an army and navy so small. . . . (4) It is impossible to overcome the feeling that the sea, like the air, should be free, and that no power, no matter how great its resources, should be permitted to dominate it, so as to enable it, in case of war, to ransack all ships which may be met for the discovery of an enemy's goods. . . . (5) It is not right to offer such a premium to preponderance of naval strength as is offered by the theory of belligerent rights as maintained in Great Britain.

217. Method of exercising the right of search. The following instructions issued to American war vessels during the Spanish War indicate modern methods of search:

This right should be exercised with tact and consideration, and in strict conformity with treaty provisions, wherever they exist. The following directions are given, subject to any special treaty stipulations: After firing a blank charge, and causing the vessel to lie to, the cruiser should send a small boat, no larger than a whaleboat, with an officer to conduct the search. There may be arms in the boat, but the men should not wear them on their persons. The officer wearing only his side arms, and accompanied on board by not more than two men of his boat's crew, unarmed, should first examine the vessel's papers to ascertain her nationality and her ports of departure and destination. If she is neutral, and trading between neutral ports, the examination goes no further. If she is neutral, and bound to an enemy's port not blockaded, the papers which indicate the character of her cargo should be examined. If these show contraband of war, the vessel should be seized; if not, she should be set free, unless, by reason of strong grounds of suspicion, a further search should seem to be requisite.

218. Kinds of blockade. The distinctions between the two main types of blockade follow:

Blockades are divided, by English and American publicists, into two kinds: (1) A simple or *de facto* blockade, and (2) a public or governmental blockade. . . . A simple or *de facto* blockade is constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts, it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence. The burden of truth is thrown upon the captors, and they are bound to show that there was an actual blockade at the time of the capture. . . . A *public*, or governmental blockade, is one where the investment is not only actually established, but where also a public notification of the fact is made to neutral powers by the government, or officers of state, declaring the blockade. . . . Hence the burden of proof is changed, and the captured party is now bound to repel the legal presumptions against him by unequivocal evidence.

219. Contraband in the Declaration of London. The most definite statement of the vexed question of contraband was made at a conference of naval powers held in London during the winter of 1908–1909.

ARTICLE 22. The following articles and materials are, without notice, regarded as contraband, under the name of absolute contraband: . . .

ARTICLE 24. The following articles and materials, susceptible of use in war as well as for purposes of peace, are without notice regarded as contraband of war, under the name of conditional contraband: . . .

ARTICLE 27. Articles and materials, which are not susceptible of use in war, are not to be declared contraband of war. . . .

ARTICLE 30. Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails either transshipment or transport over land. . . .

ARTICLE 33. Conditional contraband is liable to capture if it is shown that it is destined for the use of the armed forces or of a government department of the enemy state, unless in this latter case the circumstances show that the articles cannot in fact be used for the purposes of the war in progress. . . .

ARTICLE 35. Conditional contraband is not liable to capture, except when on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged at an intervening neutral port.

CHAPTER XIII

FORM OF THE STATE AND OF GOVERNMENT

I. Forms of the State

220. Aristotle's classification of states. This analysis of the forms of the state, current among the Greeks, may still be applied in present political science.

The government, which is the supreme authority in states, must be in the hands of one, or of a few, or of many. The true forms of government, therefore, are those in which the one, or the few, or the many, govern with a view to the common interest; but governments which rule with a view to the private interest, whether of the one, or of the few, or of the many, are perversions. For citizens, if they are truly citizens, ought to participate in the advantages of a state. Of forms of government in which one rules, we call that which regards the common interests, kingship or royalty; that in which more than one, but not many, rule, aristocracy (the rule of the best); and it is so called, either because the rulers are the best men, or because they have at heart the best interests of the state and of the citizens. But when the citizens at large administer the state for the common interest, the government is called by the generic name — a constitution. . . .

Of the above-mentioned forms, the perversions are as follows: — of royalty, tyranny; of aristocracy, oligarchy; of constitutional government, democracy. For tyranny is a kind of monarchy which has in view the interest of the monarch only; oligarchy has in view the interest of the wealthy; democracy, of the needy: none of them the common good of all.

221. Four fundamental forms of the state. Bluntschli adds to Aristotle's system a fourth type of state.

1. The first form is Ideocracy, of which the highest type is Theocracy. Here the people regard their ruler as a superhuman being, who is raised above them by nature: God Himself is regarded as the true governor of the State.

2. In direct opposition to Theocracy is Democracy. In the former the people are subjected to an external power outside and above themselves;

in the latter the people govern themselves, i.e. collectively they form the government, but as individuals they are subjects.

3. In Aristocracy the distinction between government and subject is human, and within the limits of the nation: an upper class or tribe becomes the government, while the other classes and tribes are subjects. But while the latter have nothing to do with the government, the individual members of the ruling class are also subjects.

4. In Monarchy the distinction between government and subjects is complete, but it is again human. The government is concentrated in an individual, who is merely a ruler, and not at the same time a subject, but who belongs altogether to the State, and personifies the unity of the nation.

In each of these four fundamental forms an original type is reflected: —

Theocracy represents the rule of God over the world, but a rule which is exerted directly, and in a way harshly and despotically.

Monarchy glorifies the unity of humanity in "Man" as an individual: the ruler represents the collective State, the national unity is personified in its prince.

Democracy expresses the idea of the community of the nation, or of all individuals, and presents to us the State as a parish or commune.

Aristocracy embodies the distinction between the noble and the lower elements of the nation, and gives the rule to the former. Its type is the nobility of higher race and quality, just as the commune is the type of Democracy.

222. Criticism of Bluntschli's classification. Burgess rejects the addition of "theocracy" as a distinct type of state.

He [Bluntschli] holds to the general principle that states are to be distinguished into monarchies, aristocracies and democracies, but undertakes to add a fourth form, which he calls "Idiokratie." He defines the ideocracy to be a state in which the supreme ruler is considered to be God or some superhuman spirit or an idea. This appears to me very fanciful. The person or body of persons who in last resort interpret the will of God or of the superhuman spirit or the idea for a given people, and who give their interpretations the force of law, constitute the state. It signifies nothing that that person or body of persons may have professed to *derive* his or its powers, so long as the will of God or of the superhuman spirit or the principles of the idea can only be known and legally formulated through him or it. Political science cannot examine into the truth or fiction of such a claim. Its dictum is simply that the highest human power over a given population is the state, no matter what may be the superhuman support upon which it may claim to rest. We must,

therefore, reject this new creation from our political science. It must be relegated to the domain of political mysticism.

223. Classification of states according to international law. The following valuable classification of states from the standpoint of their personality in external dealings is given by Moore:

From the point of view of their external relations, states may be classed as either simple or composite. The characteristic of the simple state is that it has one supreme government, and exerts a single will, whether it be the individual will of a sovereign ruler, or the collective will of a popular body or of a representative assembly. . . .

The simple state may be either single, i.e., wholly separate and distinct from any other state, or it may be connected with another state by what is called a personal union. . . .

"Personal union" is the phrase reserved to denote the condition that exists where states, which are wholly separate and distinct, have the same ruling prince. . . .

A composite state is one composed of two or more states. The character of the international person thus constituted depends upon the nature of the act by which the union was created and the extent to which the sovereignty of the component parts is impaired or taken away.

For the purposes of international law, composite states are usually classed as real unions, confederacies, and federal unions.

Where states are not only ruled by the same prince, but are also united for international purposes by an express agreement, there is said to exist a real union. . . .

Where states associate themselves, in a permanent manner, for the exercise in common of their rights of sovereignty for the general advantage, they constitute a confederation. . . . Those states, however, retain their internal and, to a greater or less extent, their external sovereignty. Their personality in international law is not destroyed. . . .

Where states are united under a central government, which is supreme within its sphere and which possesses and exercises in external affairs the powers of national sovereignty, they are said to form a federal union. "The composite state, which results from this league, is alone a sovereign power." . . .

A state which is not a member of a composite state, but which, while it retains a certain personality in international law, is subject to the authority of another state in its foreign relations, is commonly called a semi-sovereign state. The paramount state is called the *suzerain*, and its relation to the subject state is described as *suzerainty*.

224. Impossibility of classifying states. Willoughby, considering sovereignty as the essence of the state, possessed alike by all, deems that such a thing as a classification of states is impossible.[1]

There can be no such thing as a classification of States, as States. In essence they are all alike, — each and all being distinguished by the same sovereign attributes. Hence it follows that the only manner in which States may be differentiated is according to the structural peculiarities of their governmental organizations. . . .

In two particulars, all governments are necessarily alike: first, their duties are of a threefold character, — legislative, executive, and judicial; and secondly, the *quantum* of their power is the same. It may be that the exercise of these three orders of functions is not intrusted to independent or distinct organs, and, indeed, their absolute separation is impossible; yet, however united or separated, they are distinguishable duties that must be performed by every State.

That the *quantum* of power exercised by all governments must be the same follows from the fact that, as has been stated, all States are necessarily completely organized within their governments The apparent differences in the scope of powers possessed, arise from the manner in which the totality of political power is distributed among the various organs, and the character of these organs themselves.

II. Forms of Government

225. Classification of governments. The following paragraphs indicate some of the leading standpoints from which classification of governments has been attempted:

From the standpoint of the variety of powers commonly exercised, governments have also been termed legal, paternal, socialistic, or communistic. . . .

Historically viewed, governments have been classified as ancient, classic, medieval, modern, and the like, such names obviously indicating no special peculiarities of form, except in so far as we are accustomed to connect certain types of rule with certain chronological periods. . . .

Turning now more directly to the classification of governments, irrespective of their good or bad qualities, we find it a comparatively easy task to separate them into distinct groups according to the possession or nonpossession by them of some one selected feature. Thus, for example, it is entirely feasible to classify them according to whether founded on

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written or unwritten constitutions; whether possessed of unicameral or bicameral legislatures; whether the chief executive power be in the hands of a single individual or of a number; whether this executive, single or collegiate, be hereditary or elective, and, if the latter, whether the tenure of office be for a number of years or for life, etc. At the same time it does not need to be said that groupings such as these are of an eminently unsatisfactory character. They demand a segregation of governments which, though agreeing in the possession of the feature selected as a basis of distinction, are otherwise widely dissimilar. Nevertheless, differences of structure seem to offer the only true means of distinguishing governments in kind.

226. Forms of democratic government. Bryce outlines the three main methods according to which popular rule has been organized.[1]

For the sake of making clear what follows, I will venture to recapitulate what was said in an earlier chapter as to the three forms which government has taken in free countries. First came primary assemblies, such as those of the Greek republics of antiquity, or those of the early Teutonic tribes, which have survived in a few Swiss cantons. The whole people met, debated current questions, decided them by its votes, chose those who were to carry out its will. Such a system of direct popular government is possible only in small communities, and in this day of large States has become a matter rather of antiquarian curiosity than of practical moment.

In the second form, power belongs to representative bodies, Parliaments and Chambers. The people in their various local areas elect men, supposed to be their wisest or most influential, to deliberate for them, resolve for them, choose their executive servants for them. They give these representatives a tolerably free hand, leaving them in power for a considerable space of time, and allowing them to act unchecked, except in so far as custom, or possibly some fundamental law, limits their discretion. This is done in the faith that the Chamber will feel its responsibility and act for the best interests of the country, carrying out what it believes to be the wishes of the majority, unless it should be convinced that in some particular point it knows better than the majority what the interests of the country require. Such a system has long prevailed in England, and the English model has been widely imitated on the continent of Europe and in the British colonies.

The third is something between the other two. It may be regarded either as an attempt to apply the principle of primary assemblies to large countries, or as a modification of the representative system in the

[1] By permission of The Macmillan Company.

direction of direct popular sovereignty. There is still a legislature, but it is elected for so short a time and checked in so many ways that much of its power and dignity has departed. Supremacy is not with it, but with the people, who have fixed limits beyond which it cannot go, and who use it merely as a piece of machinery for carrying out their wishes and settling points of detail for them. The supremacy of their will is expressed in the existence of a Constitution placed above the legislature, although capable of alteration by a direct popular vote. The position of the representatives has been altered. They are conceived of, not as wise and strong men chosen to govern, but as delegates under specific orders to be renewed at short intervals.

227. Classification based on the spirit of government. Governments differ in the spirit that animates their actual working as well as in the nature of their organization.

In addition to a system of classification by form, however, there should be a supplementary classification emphasizing the spirit of government. The government may, for example, be characterized as despotic, autocratic or constitutional; as aristocratic or democratic; as conservative, liberal, or radical.

If emphasis be placed on the spirit of government, a practical system of classification can be obtained by noting the degree of democratic development in the nation. This may be indicated in several ways: (1) By noting the ratio of the electorate to the whole population. A system of unrestricted manhood suffrage would approximately give one voter to every four and one-half persons in the population. As the ratio rises, the government is presumably less democratic. (2) If the government is representative, the basis of representation in the membership of the lawmaking body may be noted. This basis may be hereditary right or a right based on officeholding or a right based on wealth; or localities irrespective of wealth or population may be represented equally; or equal masses of population may form the basis of representation. (3) Possibly the clearest idea of the spirit of government may be had by noting the body that has the legal right to alter at will the fundamental law of the land. Such a body may be called the "legal sovereign," and may be composed of the electorate, as in Switzerland, or of a lawmaking body, as in Great Britain; or may be in the hands of an hereditary ruler, as in Russia. Under such a classification the ancient Greek terms might again be found useful, and governments be classified as in spirit monarchical, aristocratic or democratic, according as the power of legal sovereignty is in the hands of one, few, or many.

228. Types of government. Giddings classifies governments from the sociological standpoint.[1]

The sovereign may govern directly, or may delegate the function of governing to authorized ministers or agents.

Direct government by a personal sovereign, or by a sovereign class, is rule by a minority of the population. Direct government by a sovereign mass is rule by a majority, or by a large and powerful plurality of the population. Direct self-government by a deliberating sovereign people is rule by a plurality or by a majority of the population.

Delegated authority to govern may be vested in either a minority or a majority.

Direct government by the sovereign is necessarily an absolute rule, since the will of the sovereign is the supreme will. A personal, or class, sovereign, governing directly, rules absolutely, and such government by such a sovereign may be described as absolute minority rule. A mass sovereign, governing directly, governs absolutely, and such government by such a sovereign may be described as absolute majority rule.

Indirect or delegated government may be an absolute or a limited rule, according to the extent of the authority delegated by the sovereign.

A personal, class, mass, or general sovereign may delegate to a minister, or to a ministerial body, authority to govern unconditionally. That is to say, either may institute absolute minority rule. A sovereign mass, or a sovereign people, may delegate to a majority authority to govern unconditionally. That is to say, either mass or people may institute absolute majority rule.

On the other hand, a personal, class, mass, or general sovereign may delegate to a minister, or to a ministerial body, authority to govern conditionally and within prescribed limits. That is to say, it may institute a limited minority rule. A sovereign mass, or a sovereign people, may delegate to a majority authority to govern conditionally and within limits. That is to say, either mass or people may institute a limited majority rule.

There are, then, four fundamental types of government disclosed in the foregoing possibilities, and actually seen among men. They are, namely, Absolute Minority Rule, Limited Minority Rule, Absolute Majority Rule, and Limited Majority Rule.

229. Governments classified according to the character of the chief executive. The following classification is that of Gareis. Willoughby says that "though not completely satisfactory," it is "one of the best."

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(1) Those in which the chief executive organ is a *nonresponsible single person* or monarch; and he may be —

(*a*) without constitutional limitations upon his power; *i.e.* absolute or autocratic, as is the case in Russia, Turkey, Persia, etc. Or —

(*b*) constitutionally limited; as, for examples, the other monarchies of Europe.

(2) Those in which the chief executive organ is a *responsible single person;* as, for example, the President of the United States or of France. Responsibility is here used, of course, not in the sense of parliamentary responsibility, but of amenability to law for all acts done in a private capacity, or in excess of delegated authority.

(3) Those in which there is a *nonresponsible plural executive;* as, for example, the Roman collegiate, or the joint regency in Japan before 1867. This is a comparatively rare type.

(4) Those in which there is a *responsible plural executive;* as, for examples, the French Directory, the Roman consuls, and the Swiss Federal Council.

230. Forms of government. The following classification by Burgess is one of the most elaborate and logical systems of division:

I. My first canon of distinction will be the identity or nonidentity of the state with its government. From this standpoint government is either *immediate* or *representative.*

1. Immediate government is that form in which the state exercises directly the functions of government. This form of government must always be unlimited, no matter whether the state be monarchic, aristocratic or democratic; for the state alone can limit the government, and, therefore, where the state is the government, its limitations can only be self-limitations, *i.e.* no limitations in public law. . . .

Immediate government may be monarchic, aristocratic or democratic, according as the form of state with which it is identified is monarchic, aristocratic or democratic. . . .

2. Representative government is, in general definition, that form in which the state vests the power of government in an organization or in organizations more or less distinct from its own organization.

Representative government may be limited or unlimited. If the state vests its whole power in the government, and reserves no sphere of autonomy for the individual, the government is unlimited. . . . If, on the other hand, the state confers upon the government less than its whole power . . . either by enumerating the powers of government, or by defining and safeguarding individual liberty against them, the government is limited. . . .

Representative government may be monarchic, aristocratic or democratic, according as one or a few or the mass of the population of the state are made eligible by the state to hold office or mandate. . . .

II. My second canon of distinction is the concentration or distribution of governmental power.

The first alternative which arises in the application of this canon is between the *centralized* and *dual* systems of government.

1. Centralized government is that form in which the state vests all governmental authority in a single organization. In this form there is no constitutional autonomy in the localities, no independent local government. The local government is only an agency of the central government, established, modified or displaced by the central government at its own will. . . .

2. Dual government is the form in which the state distributes the powers of government between two classes of organizations, which are so far independent of each other, that the one cannot destroy the other or limit the powers of the other or encroach upon the sphere of the other as determined by the state in the constitution. Both are completely subject to the state. Either may be changed or abolished at will by the state. Neither is in essence an agency of the other, although it is conceivable, and often true, that the one may and does employ the other as agent.

The dual form is subject to a subdivision. It may be confederate government or federal government. Confederate government is the form in which, as to territory and population, the state is coextensive in its own organization with the organization of the local government. Federal government is the form in which, as to territory and population, the state is coextensive in its own organization with the organization of the general government. In the confederate system there are several states, an equal number of local governments, and one central government. In the federal system we have one state, one central government and several local governments. . . .

The second alternative arising from the application of my second canon of distinction is between what I will term *consolidated* government and *coördinated* government.

3. Consolidated government is the form in which the state confides all governmental power to a single body. If this body be a single natural person, then the government is monarchic. If it consist of a number of natural persons, then the government is aristocratic or democratic, according as the number of persons is narrower or wider, whom the state makes eligible to hold voice and vote in the governing body.

4. Coördinated government is that form in which the state distributes the powers of government, according to their nature, between separate departments or bodies, each created by the state in the constitution, and, therefore, each equally independent of, but coördinated with, the other or others. . . .

III. My third canon of distinction is the tenure of the persons holding office or mandate. Viewed from this standpoint government is either *hereditary* or *elective*.

1. Hereditary government is the form in which the state confers the powers of government upon a person or upon an organization or organizations composed of persons, standing in a certain family relation to his or their immediate predecessors. The state determines, in the constitution, what the relation shall be. Four general solutions of this problem meet us in political practice, *viz.*; ancienneté, ancienneté in the male line, primogeniture, primogeniture in the male line. . . .

2. Elective government is that form in which the state confers the powers of government upon a person, or upon an organization or organizations composed of persons, chosen by the suffrage of other persons enfranchised by the state, and holding the powers thus conferred for a distinct term and under certain conditions.

Election may be direct or indirect; *i.e.* the suffrage holders may vote immediately for the person to hold power, or for another person or other persons who shall vote for the person to hold power.

Election may also be by general ticket or by district ticket; *i.e.* each suffrage holder may vote for a number of persons representing a larger division of territory and population, or for a single person representing a smaller division. . . .

IV. My fourth and last canon of distinction is the relation of the legislature to the executive.

Viewed from this standpoint government is either *presidential* or *parliamentary*.

1. Presidential government is that form in which the state, the sovereign, makes the executive independent of the legislature, both in tenure and prerogative, and furnishes him with sufficient power to prevent the legislature from trenching upon the sphere marked out by the state as executive independence and prerogative. . . .

2. Parliamentary government is that form in which the state confers upon the legislature the complete control of the administration of law. Under this form the legislature originates the tenure of the real (though perhaps not the nominal) executive, and terminates it at pleasure; and under this form the exercise of no executive prerogative in any sense and manner unapproved by the legislature, can be successfully undertaken.

III. Parliamentary and Nonparliamentary Governments

231. Parliamentary system and congressional system. Hart gives a clear statement of the chief differences between these two great types of organization.

The English parliamentary system and the so-called "congressional," or committee, system are fairly rivals in representative government. The British system has been followed in France, Italy, Belgium, Denmark, Sweden, and to some degree in Austro-Hungary; parts of the congressional system are followed in Germany and Switzerland. The main differences between the two involve the relation of the legislative with the executive, and the preparation of legislative measures. Many critics of American government hold our system inferior on both counts to the English responsible ministry, which is in effect a joint committee of the two houses, numbering about nineteen and possessing the confidence of the House of Commons. The ministry takes charge of both the executive and the legislative business of the English nation: the different ministers are heads of executive departments, the details of which are carried on by permanent chiefs, and at the same time the ministry as a whole is a board for deciding on the executive policy of England. The ministry as a whole also decides what legislation shall be submitted to Parliament, drafts bills, fixes the order in which measures shall come up, and agrees on the attitude which the government will take on amendments offered in Parliament. If the ministry — or any member of it — is outvoted on any serious question, it forthwith resigns, hence its supporters must squarely back it up.

Under the congressional system, the executive business is nearly all out of the hands of Congress, because conducted by a president elected for four years, not affected by majorities against him in Congress, and appointing directly or indirectly all subordinate officials. The chieftains of the majority in Congress have no control over executive matters; in like manner, the president and his cabinet are not responsible for legislation, and cannot introduce official measures. On the other hand, the president knows that he has four years to carry out his policy; he is therefore less subject than the English prime minister to temporary currents of public prejudice, and he is not obliged to make concessions in order to remain in office. The relation between the executive and the legislature is much closer than appears on the surface; for, besides the president's official and unofficial influence over legislation, the members of the cabinet appear before committees of the House and Senate to urge the introduction and passage of measures which they think desirable.

The subdivision of public business among standing committees has many serious drawbacks, but it is not a necessary part of the congressional system.

In the long run, the congressional system works about as well as the parliamentary, and in some respects it works better; for, where there are three parties under the parliamentary system, it is difficult to keep up a stable administration. France during the last thirty years has had about forty ministries. In the United States the executive goes on steadily and undiminished, even if no party has a clear majority in the House or the Senate.

232. Defects of the presidential system. Bryce, in discussing the American system of government, sums up the main accusations against the nonparliamentary form of government as follows:[1]

We are now in a position to sum up the practical results of the system which purports to separate Congress from the executive, instead of uniting them as they are united under a cabinet government. I say "purports to separate," because it is plain that the separation, significant as it is, is less complete than current language imports, or than the Fathers of the Constitution would seem to have intended. The necessary coherence of the two powers baffled them. These results are five: —

The President and his ministers have no initiative in Congress, little influence over Congress, except what they can exert over individual members, through the bestowal of patronage.

Congress has, together with unlimited powers of inquiry, imperfect powers of control over the administrative departments.

The nation does not always know how or where to fix responsibility for misfeasance or neglect. The person and bodies concerned in making and executing the laws are so related to one another that each can generally shift the burden of blame on some one else, and no one acts under the full sense of direct accountability.

There is a loss of force by friction — *i.e.* part of the energy, force, and time of the men and bodies that make up the government is dissipated in struggles with one another. This belongs to all free governments, because all free governments rely upon checks. But the more checks, the more friction.

There is a risk that executive vigor and promptitude may be found wanting at critical moments.

[1] By permission of The Macmillan Company.

We may include these defects in one general expression. There is in the American government, considered as a whole, a want of unity. Its branches are unconnected; their efforts are not directed to one aim, do not produce one harmonious result.

233. Presidential and cabinet systems in times of crises. The advantages of the more flexible cabinet form of government in times of uncertainty and danger are thus stated by Bagehot:

But in addition to this, a Parliamentary or Cabinet constitution possesses an additional and special advantage in very dangerous times. It has what we may call a reserve of power fit for and needed by extreme exigencies.

The principle of popular government is that supreme power, the determining efficacy in matters political, resides in the people — not necessarily or commonly in the whole people, in the numerical majority, but in a chosen people, a picked and selected people. . . . Under a Cabinet constitution at a sudden emergency this people can choose a ruler for the occasion. It is quite possible and even likely that he would not be the ruler before the occasion. The great qualities, the imperious will, the rapid energy, the eager nature fit for a great crisis are not required — are impediments — in common times. A Lord Liverpool is better in everyday politics than a Chatham; a Louis Philippe far better than a Napoleon. By the structure of the world we often want, at the sudden occurrence of a grave tempest, to change the helmsman, to replace the pilot of the calm by the pilot of the storm.

In England we have had so few catastrophes since our Constitution attained maturity that we can hardly appreciate this latent excellence. We have not needed a Cavour to rule a revolution — a representative man above all men fit for a great occasion, and by a natural, legal mode brought in to rule. But even in England, at what was the nearest to a great sudden crisis which we have had of late years, at the Crimean difficulty, we used this inherent power. We abolished the Aberdeen Cabinet, the ablest we have had, perhaps, since the Reform Act — a Cabinet not only adapted, but eminently adapted, for every sort of difficulty save the one it had to meet, which abounded in pacific discretion, and was wanting only in the "demonic element"; we chose a statesman who had the sort of merit then wanted, who, when he feels the steady power of England behind him, will advance without reluctance, and will strike without restraint. As was said at the time, "We turned out the Quaker, and put in the pugilist."

But under a presidential government you can do nothing of the kind. The American government calls itself a government of the supreme people; but at a quick crisis, the time when a sovereign power is most needed, you cannot find the supreme people. You have got a Congress elected for one fixed period, going out perhaps by fixed installments, which cannot be accelerated or retarded; you have a president chosen for a fixed period, and immovable during that period: all the arrangements are for stated times. There is no elastic element; everything is rigid, specified, dated. Come what may, you can quicken nothing and can retard nothing. You have bespoken your government in advance, and whether it suits you or not, whether it works well or works ill, whether it is what you want or not, by law you must keep it. In a country of complex foreign relations it would mostly happen that the first and most critical year of every war would be managed by a peace premier, and the first and most critical years of peace by a war premier. In each case the period of transition would be irrevocably governed by a man selected not for what he was to introduce, but what he was to change; for the policy he was to abandon, not for the policy he was to administer.

IV. Modern States

234. Varieties of organization. Jenks points out some of the more important distinctions that characterize the organization of modern states.[1]

Within these limits, *sovereignty* may be *organized* in different ways. It may be vested (in theory at least) in the hands of a single individual, as, for example, in Russia. Or it may be vested, and this is by far the commoner case, in a number of individuals or bodies, as in the Crown, Lords and Commons, in the British Empire. As this latter arrangement always gives rise to a good many elaborate rules concerning the relationship between the different individuals or bodies composing the *sovereign power*, it has received the name of *constitutional government*, while the sovereignty vested in a single individual receives the name of *autocratic government*. . . . Needless to say, the proportions in which sovereign power is divided among the different members of a sovereign body varies almost infinitely with each case. And so also do the methods by which the various members are selected. Sometimes the executive and legislative powers are quite distinct, as in the German Empire, and, virtually, in Austria; sometimes they are combined, as in England.

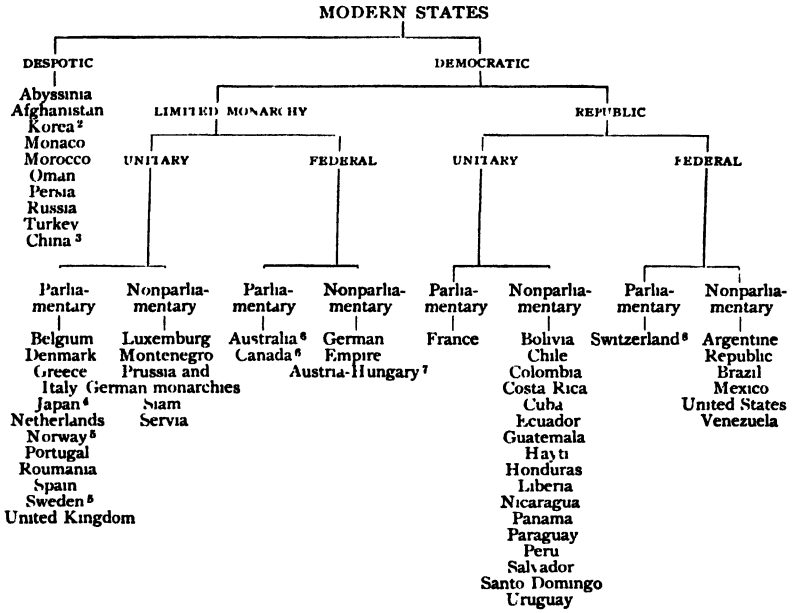
[1] Copyright, 1900, by The Macmillan Company.

Sometimes the law courts are beyond the control of the legislature, as in the United States of America; sometimes they are, legally at least, subject to its control, as, again, in the British Empire. Again, the head of the State may be hereditary or elective, and this independently of the extent of his powers. The German Emperor, with very great power, is hereditary; the President of the United States, also with great power, is elective. The King of the Netherlands, who has very little power, is hereditary; the President of the French Republic, also with small power, is elective.

Another, and almost equally important, variation of sovereignties is, that some are what we may call *ordinary*, others *extraordinary*. That is to say, in some States the sovereign authority is in constant action, or at least always ready to act; in others it requires an elaborate machinery to set it in motion. . . . This fact, which is extremely important, gives rise to the distinction between *fundamental* and *ordinary* laws; the former being those which cannot be passed or altered by the ordinary legislature, the latter, those which can. This distinction has been aptly expressed by Mr. James Bryce, as the distinction between *rigid* and *flexible* constitutions. It is closely, though not inevitably, connected with the division of constitutions into *written* and *unwritten*. The *written* constitution is nearly always rigid; because its framers do not really believe that it ever will require alteration. The *unwritten* constitution is nearly always *flexible*, i.e. it can be altered by the ordinary legislature. . . .

The last distinction in point of *form* which we need point out is the important distinction between *centralized* and *localized* States. . . . Beginning with the highly centralized States, we may notice that they correspond closely with those States which have been formed by the gradual conquest by one ruler over a group of surrounding rulers, whose independence he has desired to crush. Thus, modern France was formed by the victory of the kings at Paris in a struggle, long and profound, with the rulers of the neighboring fiefs . . . and France is the best example of a highly *centralized* country. That is to say, the *central government* at Paris really controls even petty local affairs throughout France, leaving practically no independence to the so-called local authorities. . . . On the other hand, a State which was formed suddenly by the conquest of a foreign ruler, or in which a long-established government has produced a real fusion of the population, there is generally a considerable allowance of genuine *local independence*. That is to say, the local authorities are genuinely chosen by the people whom they have to govern; they are not bound at every step to seek instructions from the central government; and so long as they act within their legal powers, they cannot be interfered with by the central authorities.

235. Classification of modern states. Leacock classifies existing states in the following diagram :[1]



236. Modern democratic states. Burgess states the essential nature of modern democracies as follows:

What we call the modern states are those based upon the principle of popular sovereignty; *i.e.* they are democracies. Not all of them appear to be such, but a close scrutiny of the facts will reveal the truth of the proposition that they are. The reason of the deceptive appearance in

[1] By permission of Houghton Mifflin Company.

[2] Since the treaty of November, 1905, Korea may be said to be under the suzerainty of Japan.

[3] The case of China is peculiar. The emperor appoints his own successor . . .

[4] The recognition of the cabinet principle has been in Japan a disputed constitutional point. See Encyclopædia Britannica, supplementary volume, article, "Japan."

[5] For the relation of executive and legislature in Norway and Sweden, see Wilson, "The State," §§ 813, 824.

[6] Considered apart from the rest of the British Empire.

[7] Hungary itself has cabinet government.

[8] The Swiss executive offers a special case. See "Statesman's Year-Book."

such cases will be found to be the fact that the state has but recently taken on its new form, and has not perfected its organization; while the old state form, remaining as government, is still clad in the habiliments of sovereignty, shabby and threadbare perhaps, but still recognizable. It will be highly instructive to consider, for a moment, the social conditions which precede, and make possible, the existence of the democratic state. They may be expressed in a single phrase, *viz.:* national harmony. There can be no democratic state unless the mass of the population of a given state shall have attained a consensus of opinion in reference to rights and wrongs, in reference to government and liberty. This implies, in the first place, that they shall understand each other; *i.e.* that they shall have a common language and a common psychologic standpoint and habit. It implies, in the second place, that they shall have a common interest, in greater or less degree, over against the populations of other states. It implies, finally, that they shall have risen, in their mental development, to the consciousness of the state, in its essence, means, and purposes; that is, the democratic state must be a national state, and the state whose population has become truly national will inevitably become democratic. There is a natural and an indissoluble connection between this condition of society and this form of state.

237. Modern national empires. Reinsch describes national imperialism, the ideal aimed at by states of the present day.[1]

We should here distinguish between the spirit of modern national imperialism and that which animated the Roman Empire. The cardinal difference between the two is that the ideal of the latter was the comprehension of all civilized nations under the sway of a world empire, while the former recognizes the separate existence of national states. *Orbis terrarum* and *imperium* were convertible terms to the Romans; there was only one empire, which embraced the world, or at least its desirable parts. Separate nationalism was not respected; in the words of Ihering, "The spiritual substance of Rome is an acid which, when brought in contact with the living organism of a nationality, acts as an irritant and dissolvent." National imperialism, on the other hand, takes as its basis a national state and is not inconsistent with respect for the political existence of other nationalities; it endeavors to increase the resources of the national state through the absorption or exploitation of undeveloped regions and inferior races, but does not attempt to impose political control upon highly civilized nations. Napoleon, indeed, strove to revive the Roman form of imperialism, but the rising spirit of nationalism

[1] Copyright, 1900, by The Macmillan Company.

was too strong for him; against the forces of historical development his genius was of no avail.

The nineteenth century has been an age of nationalism. The twentieth is to be the age of national imperialism.

238. The government of the future. Burgess risks the following prophecy concerning the probable form of the state in the future.

Toward what form the political world is tending is not so easy to discern. The drift away from monarchic, aristocratic, unlimited, hereditary forms would, I think, indicate a tendency, at least, toward republicanism. I do not believe it is utopian to predict that the republican form will live after all other forms have perished. The mysticism and credulity are being surely dispelled which make these forms necessary, useful or possible; and the popular intelligence and virtue are being developed which will make republicanism possible and, at last, necessary everywhere.

Whether it will be centralized or federalized republicanism is a question more difficult to answer; and most difficult of all is the query as to whether presidential or parliamentary government will be the general form of the future.

As I have said, the world manifests some dissatisfaction with both centralized and federalized government, and with both presidential and parliamentary government. In the existing centralized systems the tendency is manifest toward federalization in administration, while in the federalized systems, the tendency is manifest toward centralization in legislation. Again, in the presidential systems, the tendency seems toward some closer connection of the executive and the legislature in procedure, while in the parliamentary systems the tendency is, on the other hand, toward a greater independence of the executive. The form of the future will doubtless be the resultant of all of these tendencies and will satisfy them all.

It is a hazardous venture to prophesy what the form of the future will be. It seems to me, however, that that form will be a republic, with centralized legislation and federalized administration. Its executive will be independent in tenure, and will exercise a veto power, a military power, and an ordinance power active enough and strong enough to defend his constitutional prerogatives and initiate and direct the measures of administration. But he will be bound to keep his cabinet of advisers in political accord with the lower house of the legislature. He will be bound to change them as that majority changes; either immediately, or after a dissolution of that body by his order, approved by the

upper house of the legislature, and after the return of the same party majority by the electors. He will also be bound to approve the acts of the legislature which do not, in his judgment, trench upon his prerogative or contain unsound or disadvantageous measures of administration.

Which of the great states of the world will arrive at this form first and win for itself the prestige of becoming the example for all the rest, in the development of the world's political civilization, is a question which the future must decide; but I do not think it chauvinistic to say that the governmental system of the United States seems to me to be many stages in advance of all the rest in this line of progress. In spite of all the difficulties and the discouragements which surround us in our, in many respects, crude and undeveloped society, it seems to me evident that the destiny of history is clearly pointing to the United States as the great world organ for the modern solution of the problem of government as well as of liberty.

CHAPTER XIV

FEDERAL GOVERNMENT

I. Forms of Union

239. Classification of unions. Willoughby, following Jellinek[1] in the main, outlines the various forms of unions into which political organizations may enter.[2]

Jellinek, in his classification of unions, makes the first division into *Unorganized* and *Organized Unions*. These names serve to indicate the distinction that is made between the two classes. In the first class are included instances in which more or less permanent relations between States have been entered into for the regulation of certain mutual interests, but in which no central organization has been created. Such common action as is necessary in these unions is had through one or all of the governmental organs of the individual States. . . . Within this category fall such types as "Alliances" for offense or defense, and for the guarantee of particular rights; as, for example, perpetual neutrality of particular territories, etc. . . .

Coming now to "Organized Unions" we find established in them, as their name imports, permanent central organs. They admit of segregation into four classes, as follows: (1) International Administrative Unions, (2) The Realunion, (3) The Staatenbund (Confederacy), (4) The Bundesstaat (Federal State).

Examples of the first subclass are combinations of States for the common regulation of particular interests wherein permanent administrative authorities are created. . . .

By the term "*Realunion*" is indicated by German publicists that composite type of State life in which there is an intimate and lasting union entered into between two or more States, according to which there is a common ruler, but a preservation of the territorial divisions, and a recognition and protection of the constitutional rights of each of the uniting States. . . .

A type very much resembling the *Realunion*, and often confused with it, is what is termed the *Personalunion*. There is, however, a clear

[1] "Die Lehre von den Staatenverbindungen."

[2] Copyright, 1896, by The Macmillan Company

distinction between them. In the first there exists a permanent provision that the two States shall be commonly represented by a single sovereign. In the latter, community of ruler is accidental, and is occasioned by one sovereign becoming invested by descent or other casual circumstance with two or more rulerships. . . .

The two main types of the composite State are the Confederacy (Staatenbund) and the Federal State (Bundesstaat). . . .

240. Degrees of relationship among states. A classification of the relation that may exist among states that is of especial value in international affairs follows:

The best line of demarcation of classes among nations is that of the responsibility of a common agent in the exercise of rights over the entire territory of the nation. Where a nation exercises rights, if at all, through its own exclusive agents, or through an agent who, though common to another nation, is yet responsible to itself for the exercise of its rights, or where the rights exercised by its common agents extend to only a portion of its territory, the nation is commonly called independent; where, on the contrary, a common agent exercises one or more of the rights of a nation as to its whole territory, without responsibility to it, the nation is said to be dependent. Among independent nations, it is seen, there may be distinguished three groups: (1) those that exercise all the rights of independence that they possess through their own agents; (2) those that have rights exercised by agents responsible to themselves in common with other nations; and (3) those that have rights exercised as to a portion of their territory by agents who, within the limits of their office, are not directly responsible to themselves.

The bare relinquishment or deprivation of certain of the rights of independence is not regarded as a material impairment of that attribute. Two categories of independent nations in this situation are recognized. One of these consists of neutralized states, which do not possess the right of offensive warfare; and the other comprises tributary states, which are under an obligation to pay a tax to another nation. With this group may also be placed nations which enjoy rights not generally possessed by independent nations and hence not necessary to the conception of independence. These are guaranteed states.

The employment of a common agent, responsible to each of the several nations, constitutes an alliance or union. Such is the personal union in which two or more nations have a common ruler through accident or coincidence. The real union or confederation is a form in which the employment of a common agent is the result of treaty. In both the personal union and the real union or confederation the rights

exercised by the common agent include always a part at least of the rights of treating with other nations. Many unions of states through which are established commissions of one kind or another are not classified in international law, owing to their temporary character or to the relative unimportance of the rights exercised by the agent.

The third class of independent nations consists of those, one or more of whose rights are exercised as to a portion of their territory by an agent not responsible to themselves. Such are the nations subject to the exercise within definite areas of their territories of foreign consular jurisdiction over aliens of the consuls' nationality. Such also are the nations, portions of whose territories are administered by a common agent not responsible to themselves. Territory thus held is known partly as leased territory and partly as vassal territory. The nation that possesses the right of territory is the suzerain state; the nation to which the common agent is responsible is the lessee or administering state.

A dependent nation is one that has an agent not directly responsible to itself in common with some other nation for the exercise of one or more of its rights of independence as to its entire territory. Of this class is the protected state, which differs from the guaranteed state in that in return for protection it relinquishes some portion of its independence to the exercise of a common agent. An administered state is unlike the protected state in that the rights exercised by the common agent in the former include those concerned purely with internal administration.

241. Forms of union. Burgess considers the main forms of union for the purpose of showing that no such thing as a compound state can exist; but that, at most, only a dual system of government may be created.

Two states in personal union form no compound state. They do not even form a compound government. A personal union of two or more states results when the executive head of the government of one becomes the executive head of the government or governments of the other or others. This person then acts in two or more entirely distinct capacities. . . . The fact that two or more states make use of the same person, or even of the same institution, in their governmental organization, does not make these states a compound state. Its influence toward the consolidation of the states is favorable; but that is another thing.

Again, the confederacy is no compound state. The states forming the same remain separate, simple states. The confederate organization has no power to bind any one of the states entering into the same without its own separate and expressed consent; *i.e.* it has no sovereignty;

it is no state at all; it is only government. The confederate constitution is a treaty, an interstate agreement. It differs from the usual treaty in two points, *viz.;* it creates a sort of governmental organization, or rather a council of advisers, and contains the general agreement on the part of the different states to execute the recommendations of this body; and it has, generally, no limitation as to duration. These are circumstances favorable to the consolidation of the separate states into one state. The very fact of the confederacy is the best of proof that there are natural forces at work conspiring to secure such consolidation. After this consolidation shall have been accomplished, however, there is no compound state as the result; *i.e.* no state in which the sovereignty is partly in the new state and partly in the old states, but there is a simple state of wider organization.

This last reflection leads to the consideration of the final species of compound state . . . *viz.;* the federal. I take the ground here, again, that this is no compound state; that there is no such thing as a federal state; and that what is really meant by the phrase is a dual system of government under a common sovereign.. If we put this case to a rigid scientific test, we shall find that the so-called federal state is a state which extends over a territory and comprehends a population previously divided into several independent states; that physical, ethnical, economic, and social harmony, conspiring to produce political unity, existed throughout the several states; that consolidation was resisted by the governments of some of the states, possibly by some of the states themselves; that, consequently, the consolidation was produced by violence, and the first organization of the new state was therefore revolutionary, *i.e.* was not created according to the prescripts of existing law; that the new state under its revolutionary organization has framed a constitution in which it has constructed a government for the general affairs of the whole state, and has left to the old bodies, whose former sovereignty it has destroyed, the residuary powers of government, to be exercised by them, under certain general limitations, as they will, so long as the new state may not see fit to make other disposition in reference to them. . . . It is no longer proper to call them states at all.

242. Nature of the union between Austria and Hungary. Lowell discusses the character of this peculiar union, showing its nature and the reasons for its existence.[1]

If France has been a laboratory for political experiments, Austria-Hungary is a museum of political curiosities, but it contains nothing so extraordinary as the relation between Austria and Hungary themselves.

[1] By permission of Houghton Mifflin Company.

The explanation of the strange connection is to be found in the fact that the two countries are not held together from within by any affection or loyalty to a common Fatherland, but are forced together by a pressure from outside which makes the union an international and military necessity. Austria, on the one hand, would not be large enough alone to be a really valuable ally to Germany and Italy; and if not an ally, she would be likely to become a prey, for she contains districts which they would be glad to absorb. Moreover, there would be imminent danger of some of her different races breaking into open revolt if the Emperor had not the Hungarian troops at his command. On the other hand, the Magyars without Austria would not be sufficiently strong to block the ambitions of Russia, or resist the tide of panslavism. They would not only have little influence outside their own dominions, but they would run a grave risk of foreign interference in favor of the Slavs in Hungary. The union is, therefore, unavoidable, and it is very little closer than is absolutely necessary to carry out the purposes for which it exists. There is a common army, a common direction of foreign affairs, and a terminable customs union, which is, after all, the most convenient method of defraying part of the cost of the military establishment.

In regard to the system adopted for accomplishing this object, two points are especially noticeable. One is the privileged position of Hungary, which pays thirty-two per cent. of the expenses, and furnishes forty-one per cent. of the troops, but is given one half of the power by law, and practically enjoys even a larger share. The other point is the clumsiness of the machinery, which requires for its working an infinite amount of tact and skill. There is no single authority that has power to settle anything, but every measure involves a negotiation between the two delegations or the two parliaments, and government becomes in consequence an endless series of compromises between legislative bodies belonging to different races which are jealous of each other. Moreover, the true source of power lies in the two parliaments, and to these the joint ministers have no access. It is in fact specially provided that they shall not be members of either cabinet. . . . The ministers of Austria are at least nominally responsible to the lower house of the Reichsrath, and those of Hungary are actually responsible to the Table of Deputies, but the joint ministers are not in fact directly responsible to any legislative body. One would naturally suppose that a mechanism so intricate and so unwieldy would be continually getting out of order, and in constant danger of breaking down. But political necessity is stronger than perfection of organization, and apart from some radical change in the western half of the monarchy, the forces that have made the dual system work smoothly in the past are likely to produce the same result in the future.

II. Nature of Federal Government

243. Distinctions between federation and confederation. Dealey points out some of the essential differences between two often-confused forms of organization:

In a confederation the several states composing the unity are individually sovereign, and are merely bound together by a sort of treaty relationship, under the terms of which a joint organization is effected for the performance of specified functions delegated to it. As each state in the union remains sovereign it may legally secede at pleasure, influenced only by the fear of consequences in case it violates obligations existing between itself and the other states of the confederation. In a federation, however, this right of withdrawal is not claimed by the commonwealths in the union, which can only be dissolved by mutual consent. In such a union the sovereignty of the several states merges into the sovereignty of the totality and the commonwealths cease to be international states. They differ, however, in status from provinces or departments in that their autonomy is fully safeguarded by constitution. Furthermore, they are given by constitution a determining voice in the federal government and in the amendment and revision of the national constitution. In a federation, therefore, the unity is permanent and definite, not dissolvable at the whim of one or several of its parts, but only by the united will of all. Its federal government exercises powers that cannot be hindered by individual commonwealths, and that must be altered if at all by united action under the constitution. On the other hand, the commonwealths of the federation exercise sovereign powers in purely local matters without interference from the federal government, and each has a voice in the settlement of all matters that concern the welfare of the union as a whole.

244. Distinguishing marks of a federal state. Wilson considers the following to be the essential features of federal union:

The federal state has, as contrasted with a confederation, these distinguishing features: (a) A permanent surrender on the part of the constituent communities of their right to act independently of each other in matters which touch the common interest, and the consequent fusion of these communities, in respect of these matters, into what is practically a single state. As regards other states they have merged their individuality into one national whole: the lines which separate them are none of them on the outside but all on the inside. (b) The federal state possesses a special body of federal law and a special federal

jurisprudence in which is expressed the national authority of the compound state. This is not a law agreed to by the constituent communities: as regards the federal law there are no constituent communities. It is the spoken will of the new community, the Union. (c) There results a new conception of sovereignty. The functions of political authority are parceled out. In certain spheres of action the authorities of the Union are entitled to utter laws which are the supreme law of the land; in other spheres of action the constituent communities still act with the full autonomy of independent states. The one set of authorities is sovereign; for it presides, and the range of its powers is, in the last resort, determined by itself; but the other set of authorities exercises full dominion, though in a narrower sphere. Its powers are independent and self-sufficient, neither given nor subject to be taken away by the government of the Union, originative of rights, and exercised at will.

All modern federal states have written constitutions; but a written constitution is not an essential characteristic of federalism, it is only a feature of high convenience; such delicate coördinate rights and functions as are characteristic of federalism must be carefully defined; each set of authorities must have its definite commission.

245. The nature of a federal state. The jural basis on which a federation rests and the nature of the state thus formed are well summarized in the following:

A State owes its existence to the fact that, in the individuals over whom its authority extends, there is a sentiment of unity sufficiently strong to lead them to surrender themselves to the control of a single political power for the sake of realizing the desires to which such a sentiment gives rise. In other words, this subjective condition first comes into being, and, when sufficiently powerful, finds objective manifestation in the creation of a political organization.

This being the manner in which a State comes into being, it follows that it is improper, in any instance, to ascribe to it a juristic or conventional origin. A State is not created by the formal adoption of a written Constitution. . . . Written Constitutions are, indeed, of comparatively recent origin, and their *raison d'être* goes no deeper than political expediency.

Another conclusion following from the fact that a formal or juristic origin cannot be ascribed to States, is that no State can obtain its sovereignty by a simple transfer of authority from other States. A new State can take its origin only after the entire withdrawal of a people from the civic bonds in which they have before been living. Not until

the old State (or States) has (or have) been destroyed, peaceably or by force, can the new State take its rise, for a People cannot live under two sovereign powers at the same time. . . .

Applying the foregoing conclusions to the apparent creation of a new Federal State by the union of a number of States, we are necessarily led to hold that though the birth of the new sovereignty is practically synchronous with the adoption of the written articles of union, it cannot be said that such Federal State owes its creation to that act. If it be admitted that, as a matter of fact, a single sovereign State has come into being, its conditioning basis must be considered to have been the feeling of national unity that first created it a single political body out of a number of sovereign Peoples, and then gave to it an objective organization. The new State cannot, in other words, be held to have derived its sovereignty by grant from the formerly existing sovereignties, nor can such sovereignties be held to continue to exist after the new national sovereignty becomes a fact.

We are thus irresistibly led to the conclusions that not only cannot a so-called Federal State be based upon an agreement or compact between preëxistent States, but that it cannot be itself, in any strict sense, composed of constituent States. In all exactness, the term "Federal State" is thus an improper one. A federal form of *Government* we may have, but not a Federal *State;* for a State is by its very nature a unity in that its essential attribute, its sovereignty, is necessarily a unity. There cannot be, therefore, any such thing as a State composed of States. Strictly speaking, therefore, the only correct manner in which the term "Federal State" may be employed is to designate a State in which a very considerable degree of administrative autonomy is given to the several districts into which the State's territory is divided. Conversely, we must hold that in all composite political organizations in which the individual members still retain their sovereignty, and therefore continue to exist as States, no National State is created. A Central Government with very considerable powers may indeed exist, but only as the common agent of the several associated States, not as the organ of a distinct central sovereignty. Furthermore, the written articles of union, if such there be, cannot be regarded as a law or Constitution, but only as an international compact or treaty.

The foregoing analysis of the nature of sovereignty and the State enables us to say that the distinction between a National State with a federal form of government and a Confederacy of sovereign States is not based upon the *quantum* of powers, the exercise of which is vested in the Central Government; nor, necessarily, upon whether the commands emanating from the central legislature operate directly upon

individuals or upon the individual commonwealths; nor, finally, upon the difference between a Central Government with enumerated and one with unenumerated powers. The one absolute and finally determining criterion is: What authority has, in the last instance, the legal power of fixing its own legal competence, and, as a result, that of the others?

In the sovereign State of the federal governmental form, the legal right of secession on the part of the individual commonwealths is of course excluded. From the strictly juristic standpoint, the Commonwealths derive their existence from the will of the national State. They have, therefore, no control over their own political status.

III. Distribution of Powers

246. Development of the theory of the American Union. The leading theories held in the United States as to the nature of the Union and the proper division of powers may be summarized as follows:[1]

At the time of the adoption of the Constitution, and for a considerable period thereafter, it was believed that the Union was of a peculiar and anomalous character, and that the sovereignty, so far as vested in government, was divided between the states and the United States. The real sovereign was thought to be the "people," but whether this meant the people of the United States as a whole or the people of the several states was left undetermined. As the contest between nationalism and state rights became more acute, this middle position was abandoned by both parties. Calhoun contended that the sovereign people were the people of the several states, and that the sovereignty was, moreover, essentially indivisible. The states were hence sovereign communities, and the general government had only the powers delegated to it by them.

On the other hand, the nationalist position was defended by Webster, who declared that the Constitution was adopted by the people of the United States as a whole, by means of an agreement as binding as the social contract. After the war had settled the vexed question of secession, the new school of nationalists developed and strengthened the earlier doctrine. The argument from the letter of the law was less emphasized and the consideration of social and political facts made more conspicuous. The nation was declared supreme, but this differed from the earlier "people" in that the contract idea was largely eliminated, and the organic and evolutionary character of the nation given greater attention. Calhoun's doctrine of the indivisibility of sovereignty was

[1] Copyright, 1903, by The Macmillan Company.

accepted, but sovereignty was claimed for the Union to the exclusion of the states, which were relegated to the position of organs of the nation. Differences of opinion appeared as to the exact location of the sovereignty, whether with the nation as an aggregation of individuals or as an aggregation of states; but the sovereignty of the Union was undisputed.

247. Distribution of powers in the United States. The following statement indicates the general nature of the constitutional division of powers between the national and the commonwealth governments in the United States:

The first state constitutions were adopted at a time when there was no established federal government, so that all the powers of government, so far as their exercise was in any way provided for, were distributed among the three departments of the state governments, and this form of constitution has been substantially followed to the present time in the amendment of former constitutions or the making of new ones. But when the people, through their proper representative, adopted the federal constitution, they thereby restricted the authority of the state government, so far as powers which had theretofore existed in the state governments were conferred upon that department by the state constitution, subject to the limitations found in the state constitution itself; and subject also to the implied limitation arising out of the creation and existence of a federal government with the powers delegated to it. . . . There is a division of powers of government, therefore, between the state and federal governments, which division was effectuated by the adoption of the federal constitution, creating a national government which should exercise the authority conferred upon it by that instrument. . . . Practically, it is to be noticed that the powers given to the federal government are in general only those essential to the existence of such a government and the discharge of functions involving a union of the states and the common interests of the people of the different states; while to the state governments is left such authority as is necessary to the protection of the people of the different states in their personal liberty, their property, and their general welfare. . . .

General powers of government, involving the protection of personal and property rights, remain in the state, except in so far as by the provisions of the federal constitution they are conferred upon the federal government. Thus the so-called police power, that is, the power to regulate the conduct of persons and the control and management of property, with the general object of securing to each protection against unlawful interference by another, and to protect the public as a whole

against injury from unlawful action of its members, is in the state. It is for the state government to regulate the conduct of persons and the control of property so as to prevent injury to the public or to others. As a branch of this general police power, the punishment of crime is left to the states. . . .

On the other hand, the federal government is given authority to legislate with reference to taxation for national purposes, the relations of the United States to foreign governments, the making of war and peace, the maintenance of an army and navy, the regulation of foreign and interstate commerce, and the government of territory not included within any state. . . .

It is apparent from what has been said that the general powers of government are vested in the departments of the state government, while the departments of the federal government have only such powers as are given to them under the federal constitution. It may therefore properly be said that the state government has all the governmental power not denied to it by the state constitution, so far as not inconsistent with the powers given to the general government by the federal constitution; while the federal government, on the other hand, is one of enumerated powers. . . .

Although the federal government is given limited rather than general powers, it cannot be said that it has no powers save those expressed in the federal constitution. In determining the meaning of any written document, whether it be a contract, a statute, or a constitution, it will frequently be necessary to determine the meaning by considering what is implied, as well as what is expressed, in the language used. . . . The federal government, therefore, has not only the powers expressly granted to it by the constitution, but also those which by reasonable implication are included in or flow from those expressly granted.

248. Continental theories of federalism. The following is a brief summary of the development in Europe of the political principles applied in the recent rise of federal government:

Likewise the continental forms of federalism induced the growth of theories as to the nature of sovereignty. Transmitted by De Tocqueville, the idea of a double sovereignty was at first accepted as a satisfactory solution of the problems presented by the "Bundesstaat." But under the influence of altered constitutional conditions, in which German national sovereignty appeared in a clearer light than before, this theory was abandoned, and another developed. This took the form of the "Kompetenz-Kompetenz," the idea that sovereignty consists essentially

in the power of the State to determine at will the limits of its own competence or jurisdiction. The distinguishing characteristic of the supreme power was held to be the capacity to mark out independently the metes and bounds of its own activity. Even this doctrine was deemed too positive, however, and there appeared a modification of the idea to the effect that sovereignty consists merely in the power of a community to be legally bound solely through its own will. A State may not be able to extend the bounds of its jurisdiction at pleasure, yet if its acts are all determined by its own will and it cannot be legally bound by the will of another, the possession of sovereignty must, none the less, be conceded. These new doctrines were attended, however, by important changes of view as to the nature of the State. The historic theory that the State and sovereignty are inseparably united was found to be no longer applicable to modern political conditions, and the idea of a nonsovereign State was widely adopted as the easiest way of escape from the difficulties of constitutional and juristic construction presented by federalism.

249. Powers of the imperial government of Germany. The constitution of the German Empire indicates the sphere of federal jurisdiction as follows:

ART. 4. The following matters shall be under the supervision of the Empire and subject to imperial legislation:

(1) Regulations with respect to the freedom of migration, matters of domicile and settlement, citizenship, passports; surveillance of foreigners, trade and industry, including insurance, so far as these matters are not already provided for by Art. 3 of this constitution, in Bavaria, however, exclusive of matters relating to domicile and settlement; and likewise matters relating to colonization and emigration to foreign countries.

(2) Legislation concerning customs duties, commerce, and such taxes as are to be applied to the uses of the Empire.

(3) Regulation of weights and measures; of the coinage, and the establishment of the principles for the issue of funded and unfunded paper money.

(4) General banking regulations.

(5) Patents for inventions.

(6) The protection of intellectual property.

(7) The organization of a general system of protection for German trade in foreign countries, of German navigation, and of the German flag on the high seas; and the establishment of a common consular representation, which shall be maintained by the Empire.

(8) Railway matters, subject in Bavaria to the provisions of Art. 46; and the construction of land and water ways for the purposes of public defense, and of general commerce.

(9) Rafting and navigation upon waterways which are common to several states, the condition of such waterways, river and other water dues [and also the signals of maritime navigation (beacons, buoys, lights, and other signals)].

(10) Postal and telegraph affairs; in Bavaria and Wurttemberg, however, only in accordance with the provisions of Art. 52.

(11) Regulations concerning the reciprocal execution of judicial sentences in civil matters, and the fulfillment of requisitions in general.

(12) The authentication of public documents.

(13) General legislation as to the whole domain of civil and criminal law, and judicial procedure.

(14) The imperial military and naval affairs.

(15) Police regulation of medical and veterinary matters.

(16) Laws relating to the press, and to the right of association.

250. Powers of the federal government of Switzerland. In contrast to the brief and general statement of the powers of the federal government in the United States, the Swiss constitution enumerates the powers of the federal government in elaborate detail.

ARTICLE 8. The Confederation shall have the sole right of declaring war, of making peace, and of concluding alliances and treaties with foreign powers, particularly treaties relating to tariffs and commerce. . . .

ARTICLE 14. In case of differences arising between cantons, the states shall abstain from violence and from arming themselves, they shall submit to the decision to be taken upon such differences by the Confederation. . . .

ARTICLE 23. The Confederation may construct at its own expense, or may aid by subsidies, public works which concern Switzerland or a considerable part of the country. . . .

ARTICLE 24. The Confederation shall have the right of superintendence over the police of streams and forests. . . .

ARTICLE 25. The Confederation shall have power to make legislative enactments for the regulation of fishing and hunting, particularly with a view to the preservation of the big game in the mountains, as well as for the protection of birds useful to agriculture and forestry. . . .

ARTICLE 26. Legislation upon the construction and operation of railroads is within the province of the Confederation.

ARTICLE 27. The Confederation may establish, besides the existing Polytechnic School, a federal university and other institutions of higher instruction, or may subsidize institutions of such a character. . . .

ARTICLE 28. The customs system shall be within the control of the Confederation. The Confederation may levy export and import duties. . . .

ARTICLE 32 (ii). The Confederation is authorized to make regulations, by law, for the manufacture and sale of distilled liquors. . . .

ARTICLE 34. The Confederation shall have power to enact uniform laws as to the labor of children in factories, and as to the length of the working day fixed for adults therein, and as to the protection of laborers engaged in unsanitary and dangerous manufactures. . . .

ARTICLE 34 (ii). The Confederation shall by law establish accident and invalid insurance. . . .

ARTICLE 36. The posts and telegraphs in all Switzerland shall be controlled by the Confederation. . . .

ARTICLE 38. The Confederation shall exercise all the exclusive rights pertaining to coinage. . . .

ARTICLE 40. The Confederation shall fix the standard of weights and measures. . . .

ARTICLE 41. The manufacture and sale of gunpowder throughout Switzerland shall belong exclusively to the Confederation. . . .

ARTICLE 69. Legislation concerning measures of sanitary police against epidemic and cattle diseases, causing a common danger, is included in the powers of the Confederation.

ARTICLE 69 (ii). The Confederation shall have the power to enact laws:

(*a*) Concerning traffic in food products.

(*b*) Concerning traffic in other articles of use and consumption, in so far as they may be dangerous to life or health.

IV. ADVANTAGES AND DISADVANTAGES OF FEDERAL GOVERNMENT

251. Advantages of federal organization. Hamilton, writing in the "Federalist," quotes the following arguments from Montesquieu in favor of a "confederate republic."

It is very probable . . . that mankind would have been obliged, at length, to live constantly under the government of a SINGLE PERSON, had they not contrived a kind of constitution, that has all the internal advantages of a republican, together with the external force of a monarchical government. I mean a CONFEDERATE REPUBLIC.

This form of government is a convention by which several smaller *states* agree to become members of a larger *one*, which they intend to form. It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of new associations, till they arrive to such a degree of power as to be able to provide for the security of the united body.

A republic of this kind, able to withstand an external force, may support itself without any internal corruption. The form of this society prevents all manner of inconveniences.

If a single member should attempt to usurp the supreme authority, he could not be supposed to have an equal authority and credit in all the confederate states. Were he to have too great influence over one, this would alarm the rest. Were he to subdue a part, that which would still remain free might oppose him with forces independent of those which he had usurped, and overpower him before he could be settled in his usurpation.

Should a popular insurrection happen in one of the confederate states, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound. The state may be destroyed on one side, and not on the other, the confederacy may be dissolved, and the confederates preserve their sovereignty.

As this government is composed of small republics, it enjoys the internal happiness of each, and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large monarchies.

252. Weaknesses in federal government. Bryce outlines the weak points of the federal system and applies them to the United States.[1]

The faults generally charged on federations as compared with unified governments are the following: —

I. Weakness in the conduct of foreign affairs.

II. Weakness in home government, that is to say, deficient authority over the component States and the individual citizens.

III. Liability to dissolution by the secession or rebellion of States.

IV. Liability to division into groups and factions by the formation of separate combinations of the component States.

V. Want of uniformity among the States in legislation and administration.

VI. Trouble, expense, and delay due to the complexity of a double system of legislation and administration.

[1] By permission of The Macmillan Company.

The first four of these are all due to the same cause, viz. the existence within one government, which ought to be able to speak and act in the name and with the united strength of the nation, of distinct centers of force, organized political bodies into which part of the nation's strength has flowed, and whose resistance to the will of the majority of the whole nation is likely to be more effective than could be the resistance of individuals, because such bodies have each of them a government, a revenue, a militia, a local patriotism to unite them, whereas individual recalcitrants, however numerous, would be unorganized, and less likely to find a legal standing ground for opposition. The gravity of the first two of the four alleged faults has been exaggerated by most writers, who have assumed on rather scanty grounds that Federal governments are necessarily weak governments. History does not warrant so broad a proposition. . . .

All that can fairly be concluded from the history of the American Union is that Federalism is obliged by the law of its nature to leave in the hands of States powers whose exercise may give to political controversy a peculiarly dangerous form, may impede the assertion of national authority, may even, when long-continued exasperation has suspended or destroyed the feeling of a common patriotism, threaten national unity itself. Against this danger is to be set the fact that the looser structure of a Federal government and the scope it gives for diversities of legislation in different parts of a country may avert sources of discord, or prevent local discord from growing into a contest of national magnitude.

253. Advantages and disadvantages of federal union. Sidgwick estimates the relative value of the arguments for and against the formation of federal union, as follows:[1]

Firstly, it enables small independent communities not strongly divided by interests or sentiments, to escape the chief military and economic disadvantages attaching to small states, at the least possible sacrifice of independence. A small state with large and powerful neighbors incurs some danger of high-handed aggression — though the mutual jealousy of the neighbors may often render this remote and vague — and it incurs the milder but more certain disadvantage of being obliged to yield in disputes where the question of right is ambiguous. Further, so long as modern states endeavor, by elaborately arranged tariffs, to exclude or hamper the competition of foreign producers in their markets, it will generally be some disadvantage to the members of a

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small state that they can only rely on a comparatively small area of unrestricted trade. . . .

Further, North America may also illustrate the advantages of federalism from a different point of view; *i.e.* as a mode of political organization by which a nation may realize the maximum of liberty compatible with order: since, as we have already seen, the amount of governmental coercion is likely, *ceteris paribus*, to be less, in proportion as the powers of local governments are extended at the expense of the central government. . . . For the federal form of polity also diminishes — in proportion as the functions of the central legislature are restricted — the practical difficulties which extent of territory tends to throw in the way of good government; especially the difficulty of enforcing obedience if the inhabitants of distant districts are recalcitrant, and the difficulty of securing that the central government is sufficiently informed as to the needs of such districts. . . .

The chief disadvantages of Federalism have been incidentally noticed in the preceding chapter, when we were discussing the proper limits of the powers of local government in a unitary state. I have there sufficiently dwelt on the drawbacks of localized legislation in a country whose parts are in active mutual communication I also pointed out that the strength and stability which a state derives from internal cohesion tend to be somewhat reduced by the independent activity of local governments, if the latter can be effectively used as centers of local resistance to the national will. . . . On the other hand, if disorder and disruption are prevented, the federal form of polity, requiring as it does a rigid and stable constitution to secure the partial independence of the part states, is exposed to the general objections which may be urged against such a constitution as compared with a more flexible one.

In conclusion, it may be observed, that federalism is likely to be in many cases a transitional stage through which a society — or an aggregate of societies — passes on its way to a completer union, since, as time goes on, and mutual intercourse grows, the narrower patriotic sentiments that were originally a bar to full political union tend to diminish, while the inconvenience of a diversity of laws is more keenly felt, especially in a continuous territory.

254. The weakness of the American confederation. Madison, in his notes on the debates in the Federal Convention, gives the following extracts from his speech against the "New Jersey Plan." The leading defects of the existing Confederation and the remedies expected from a stronger union are indicated.

Proceeding to the consideration of Mr. Patterson's plan, he stated the object of a proper plan to be twofold — first, to preserve the Union; secondly, to provide a government that will remedy the evils felt by the states, both in their united and individual capacities. Examine Mr. Patterson's plan, and say whether it promises satisfaction in these respects.

1. Will it prevent the violations of the law of nations and of treaties, which, if not prevented, must involve us in the calamities of foreign wars? The tendency of the states to these violations has been manifested in sundry instances. . . .

2. Will it prevent encroachments on the federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic, ancient and modern. . . .

3. Will it prevent trespasses of the states on each other? . . . We have seen retaliating acts on the subject, which threatened danger, not to the harmony only, but the tranquillity of the Union. . . .

4. Will it secure the internal tranquillity of the states themselves? The insurrections in Massachusetts admonished all the states of the danger to which they were exposed. . . .

5. Will it secure a good internal legislation and administration to the particular states? In developing the evils which vitiate the political system of the United States, it is proper to take into view those which prevail within the states individually, as well as those which affect them collectively; since the former indirectly affect the whole. . . . Under this head he enumerated and animadverted on — first, the multiplicity of the laws passed by the several states; secondly, the mutability of their laws; thirdly, the injustice of them; and, fourthly, the impotence of them. . . .

6. Will it secure the Union against the influence of foreign powers over its members? . . .

7. He begged the smaller states, which were most attached to Mr. Patterson's plan, to consider the situation in which it would leave them. In the first place, they would continue to bear the whole expense of maintaining their delegates in Congress. . . . In the second place, the coercion on which the efficacy of the plan depends can never be exerted but on themselves. The larger states will be impregnable, the smaller only can feel the vengeance of it.

255. Probable future of federalism. Numerous recent publicists believe that present tendencies indicate a further development of the principle of federal union among states.[1]

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The future of constitutional monarchy I was unwilling to prophesy: but I feel more disposed to predict a development of federality, partly from the operation of the democratic tendency just noticed, partly from the tendency shown throughout the history of civilization to form continually larger political societies — as Spencer would say, to "integration" — which seems to accompany the growth of civilization. This tendency we traced in the early history of the Græco-Italian city states; Rome and Athens were obviously formed by the aggregation of elements between which a state of hostility had previously existed. We noticed also that the history of the German tribes showed them gradually combining in larger and larger aggregates. And especially we noticed how, in the third century B.C., after the Greek cities had been for forty years tossed helpless in the strife among the successors of Alexander — against whose armies they were, from mere size, unable effectively to contend — the revival and extension of the Achæan league, uniting several important city states into one body with the old, comparatively insignificant Achæan towns, gave them a brief interval of real independence. We have seen the same tendency in recent times in the formation of Germany and Italy: and we have in North America an impressive example of a political society maintaining internal peace over a region larger than Western Europe. I therefore think it not beyond the limits of a sober forecast to conjecture that some further integration may take place in the West European states: and if it should take place, it seems probable that the example of America will be followed, and that the new political aggregate will be formed on the basis of a federal polity.

When we turn our gaze from the past to the future, an extension of federalism seems to me the most probable of the political prophecies relative to the form of government.

CHAPTER XV

CONSTITUTIONS

I. Nature of Constitutions

256. Meanings of the term "constitution." In the Introduction to his recent work on "The Government of England," Lowell points out the different meanings of the word "constitution." [1]

De Tocqueville declared that the English Constitution did not really exist, and he said so because in his mind the word "constitution" meant a perfectly definite thing to which nothing in England conformed. An examination of modern governments shows, however, that the thing is by no means so definite as he had supposed.

The term "constitution" is usually applied to an attempt to embody in a single authoritative document, or a small group of documents, the fundamental political institutions of a state. But such an attempt is rarely, if ever, completely successful; and even if the constitution when framed covers all the main principles on which the government is based, it often happens that they become modified in practice, or that other principles arise, so that the constitution no longer corresponds fully with the actual government of the country. . . .

De Tocqueville had more particularly in mind another meaning which is commonly attached to the term "constitution." It is that of an instrument of special sanctity, distinct in character from all other laws; and alterable only by a peculiar process, differing to a greater or less extent from the ordinary forms of legislation. . . . A separation between the constituent and lawmaking powers does not, in fact, always exist in written constitutions. . . . From countries which can change their fundamental constitution by the ordinary process of legislation we pass by almost imperceptible degrees to those where the constitutional and lawmaking powers are in substantially different hands. . . .

The separation of constituent and lawmaking powers has been rendered of much less practical importance in some countries not only by making the process of amending the constitution more simple, but also

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by making the enactment of laws more complex. . . . It would seem, therefore, that the distinction between constitutions which are flexible and those which are rigid, while valuable, has ceased to mark a contrast between widely separated groups; and that it might be well to regard the distinction as one of degree rather than of kind. . . .

If the term "constitution" does not necessarily imply that the so-called constituent and lawmaking powers are in different hands, still less does it imply the existence of a law of superior obligation which controls legally the acts of the legislature. . . . The conception of a constitution as a law of superior obligation, which imposes legal restraints upon the action of the legislature, is really confined to a very few countries, chiefly to America and the English self-governing colonies. In Europe it has no proper place, for whether a constitution in continental states be or be not regarded as a supreme law, no body of men has, as a rule, been intrusted with legal authority to enforce its provisions as against the legislature.

257. Definitions of the term "constitution." The following definitions indicate the general nature of the constitution of a state:

T. D. Woolsey: There must in every state be some leading principles according to which the relations of the organs and functions of the state are adjusted; work is distributed, powers are assigned in such sort that there shall be as little interference as possible, and all the active powers of the state shall know their places. There must also be some understanding as to what are the relations of the governing parts to the governed, and what may be done in the exercise of lawful authority. There will of necessity, therefore, be some limitations on the action of the several organs, and some rights guaranteed to the people. . . . The collection of principles according to which the powers of the government, the rights of the governed, and the relations between the two are adjusted is called a *constitution.*

J. Q. Dealey: Every state from the moment when it begins its existence has a constitution, which may be defined as that fundamental law or body of laws, written or unwritten, in which may be found (a) the form of the organization of the state, (b) the extent of power intrusted to the various agencies of the state, and (c) the manner in which these powers are to be exercised.

S. Amos: All the Laws and all the customary practices which, taken together, determine the person or persons who shall constitute the Supreme Political Authority of a State, and which ascertain the modes of Legislation, and the method of appointing and restricting the Executive Authority, are compendiously styled the *Constitution* of that State.

258. Classification of constitutions. According to their relation to the ordinary laws of the state and to their ease of amendment, Bryce divides constitutions into two main types, — flexible and rigid.

If we survey constitutions generally, in the past as well as in the present, we find them conforming to one or other of two leading types. Some are natural growths, unsymmetrical both in their form and in their contents. They consist of a variety of specific enactments or agreements of different dates, possibly proceeding from different sources, intermixed with customary rules which rest only on tradition or precedent, but are deemed of practically equal authority. Other constitutions are works of conscious art, that is to say, they are the result of a deliberate effort on the part of the State to lay down once for all a body of coherent provisions under which its government shall be established and conducted. Such constitutions are usually comprised in one instrument — possibly, however, in more than one — an instrument solemnly enacted whose form and title distinguish it from ordinary laws. . . . It is, therefore, desirable to have some more definite and characteristic test or criterion whereby to mark off the two types which have been just described in general terms.

Such a criterion may be found in the relation which each constitution bears to the ordinary laws of the State, and to the ordinary authority which enacts those laws. Some constitutions, including all that belong to the older or Common Law type, are on the level of the other laws of the country, whether those laws exist in the form of statutes only, or also in the form of recorded decisions defining and confirming a custom. Such constitutions proceed from the same authorities which make the ordinary laws; and they are promulgated or repealed in the same way as ordinary laws. In such cases the term "Constitution" denotes nothing more than such and so many of the statutes and customs of the country as determine the form and arrangements of its political system. And it is often difficult to say of any particular law whether it is or is not a part of the political constitution.

Other constitutions, most of them belonging to the newer or Statutory class, stand above the other laws of the country which they regulate. The instrument (or instruments) in which such a constitution is embodied proceeds from a source different from that whence spring the other laws, is repealable in a different way, exerts a superior force. It is enacted, not by the ordinary legislative authority, but by some higher or specially empowered person or body. If it is susceptible of change, it can be changed only by that authority or by that special person or body. When any of its provisions conflict with a provision of the ordinary law, it prevails, and the ordinary must give way. . . .

Constitutions of the older type may be called Flexible, because they have elasticity, because they can be bent and altered in form while retaining their main features. Constitutions of the newer kind cannot, because their lines are hard and fixed. They may therefore receive the name of Rigid Constitutions.

259. Written and unwritten constitutions. Some of the important differences between written and unwritten constitutions may be stated as follows:

The constitution of a government is the body or collection of rules and principles in accordance with which the powers of that government are exercised; and a constitutional government is one the powers of which are exercised in accordance with rules and principles which are generally accepted as binding upon it and usually followed. In this proper and usual sense all the governments of civilized peoples are constitutional, whether they be monarchical or republican. If the body of rules and principles is not reduced to definite and authoritatively written form, the constitution is said to be unwritten, as in the familiar case of Great Britain. The body of rules and principles defining the nature of the British government and prescribing the persons who exercise authority under it and the scope of such authority is to some extent declared in statutes which are a part of the written law; to a further extent is composed of rules of law recognized by the courts, without any written basis, and therefore a part of the unwritten law; and to a still further extent consists of conventions or customs which though generally recognized and followed, do not have the force of law. . . .

The constitution of Great Britain as a whole is, therefore, unwritten in the sense that it is not reduced to any definite and authoritative statement, although as a whole or in parts it has been expounded and explained by authors who have written on the subject, and who have stated, with more or less fullness and accuracy, its rules and principles. . . .

In the United States the constitutions of the various states and of the federal government are formally written and rest upon the will of the people expressed directly, through their chosen representatives, and are regarded, therefore, as having a higher authority than that of statutes enacted by the legislatures, created and existing in accordance with the provisions of the constitutions, or of executive acts authorized by the constitutions. . . . Strictly speaking, constitutional law, as the term is used in this country, takes no account of mere practices and usages, no matter how generally observed, but is based on the language of written constitutions, and takes into account statutes, treaties, executive acts and regulations, and the decisions of the courts applying their provisions to specific cases.

Although the authority of a state or federal government is to be determined by the provisions of the written state and federal constitutions, and not from any mere general principles or constitutional rules recognized in this country or in England, nevertheless a written constitution is, like a statute, subject to interpretation, and must be applied to new circumstances and conditions by determining the true intent and purpose of its provisions. Nowhere is there any authority, however, to add to those provisions or to eliminate any portion of them, or to give them a meaning not reasonably within the intent with which they were framed, save by a formal amendment, as authorized in the constitutions themselves. . . .

In Great Britain no act of Parliament regularly adopted can be said to be unconstitutional in the sense of being invalid and without legal effect. It may be urged as against a proposed act of Parliament that it will be unconstitutional because in violation of the general principles and usages recognized by the unwritten constitution. But when adopted the statute in practical effect modifies the constitution, and is fully operative and potent. In this country, however, a statute which is in violation of the constitution is wholly invalid and impotent, and the constitution remains unaffected.

260. The nature of the English constitution. The various elements that make up the constitution of England are thus summarized by a leading English publicist.

The Constitution of England is the resulting product of all the institutions, the customary practices, and the laws which together determine what persons take part in the government of the country, how these persons are related to one another; how laws are made, and how and by whom they are executed, and what securities the people of the country have against misgovernment. . . .

There are parts of the Constitution which seem to be far more solid and indestructible than other parts; so much so that they could not be suddenly removed or even changed without the permanence of the State itself seeming to be endangered. Such parts are the institution of Monarchy in its limited or constitutional form; the distribution of the Legislature into three branches; the Representative system of Government with its attendant control of Taxation; the independence of Judges, and the securities afforded against unfair trials and tyrannical imprisonment; and the subjection of all State officials to the Common Law of the Land. . . .

There are, again, parts of the Constitution which are made up of enduring and of fragile elements conjointly. The former either undergo

no change, or change so insensibly that the effects can only be observed at long intervals of time; the latter are readily and constantly modified as occasion dictates. The changeable and the unchangeable elements are, however, so closely blended together that they cannot easily be severed, and much of the difficulty that attends proposed changes is due to this fact. Examples of such composite parts are the rules which determine the qualifications of members of the two Houses, and of electors of members of the House of Commons; which fix the exact line of succession to the Crown; and which determine the judicial or other special privileges of the two Houses and of the members of each House. . . .

Besides a careful study of existing and immemorial institutions, the Constitution of England can be known only by reference to the following classes of authorities:

I. Written documents of the nature of solemn engagements made at great national crises between persons representing opposed political forces. Such are the Great Charter and its several Confirmations and Amended Editions, the Petition of Right, and the Declaration of Rights.

II. Statutes, such as the Habeas Corpus Act and its Amendments, the Bill of Rights, the Act of Settlement, Mr. Fox's Libel Act, the Prisoners' Counsel Act, the Reform Acts, the Supreme Court of Judicature Act, the Naturalization Act, the Municipal Corporation Act, and the Local Government Acts.

III. Authoritative Judicial Decisions, as those on the Rights of Jurymen, on the Prerogative of the Crown, on the Privileges of the Houses of Parliament and of their Members, and on the rights and duties of the Police.

IV. Parliamentary Precedents as recorded in Reports of Committees of both Houses, in the writings of authoritative Commentators on Parliamentary usage, and in the reported Debates and Proceedings of both Houses.

II. Requisites of Constitutions

261. The fundamental parts of a constitution. Burgess states as follows the contents of a proper constitution:

A complete constitution may be said to consist of three fundamental parts. The first is the organization of the state for the accomplishment of future changes in the constitution. This is usually called the amending clause, and the power which it describes and regulates is called the amending power. This is the most important part of a constitution. Upon its existence and truthfulness, *i.e.* its correspondence with real and natural conditions, depends the question as to whether the state shall

develop with peaceable continuity or shall suffer alternations of stagnation, retrogression, and revolution. A constitution, which may be imperfect and erroneous in its other parts, can be easily supplemented and corrected, if only the state be truthfully organized in the constitution; but if this be not accomplished, error will accumulate until nothing short of revolution can save the life of the state. . . . The second fundamental part of a complete constitution, I denominate the constitution of liberty; and the third, the constitution of government. . . .

A true and perfect political science will require, as I have already pointed out, first, the organization of the state, *i.e.* the sovereignty back of the constitution; second, the continued organization of the sovereignty within the constitution; third, the tracing out of the domain of civil liberty within the constitution, by the sovereignty, the state; fourth, the guaranty of civil liberty ordinarily against every power, except the sovereignty organized within the constitution; fifth, provisions for the temporary suspension of civil liberty by the government in time of war and public danger, sixth, the organization of government within the constitution, by the sovereignty, the state; and seventh, the security of the government against all changes, except by the sovereignty organized within the constitution.

262. Contents of constitutional law. A more detailed statement of the topics that properly belong to constitutional law is given by Holland.

The definition of the sovereign power in a state necessarily leads to the consideration of its component parts. . . . With reference to all these questions constitutional law enters into minute detail. It prescribes the order of succession to the throne; or, in a Republic, the mode of electing a President. It provides for the continuity of the executive power. It enumerates the "prerogatives" of the king, or other chief magistrate. It regulates the composition of the Council of State, and of the Upper and Lower Houses of the Assembly, when the Assembly is thus divided; the mode in which a seat is acquired in the Upper House, whether by succession, nomination, election, or tenure of office; the mode of electing the members of the house of representatives; the powers and privileges of the assembly as a whole, and of the individuals who compose it; and the machinery of lawmaking. It deals also with the ministers, their responsibility and their respective spheres of action; the government offices and their organization; the armed forces of the State, their control and the mode in which they are recruited; the relation, if any, between Church and State; the judges and their immunities; their power, if any, of

disallowing as unconstitutional the acts of nonsovereign legislative bodies; local self-government; the relations between the mother country and its colonies and dependencies. It describes the portions of the earth's surface over which the sovereignty of the State extends, and defines the persons who are subject to its authority. It comprises therefore rules for the ascertainment of nationality, and for regulating the acquisition of a new nationality by "naturalization." It declares the rights of the State over its subjects in respect of their liability to military conscription, to service as jurymen, and otherwise. It declares, on the other hand, the rights of the subjects to be assisted and protected by the State, and of that narrower class of subjects which enjoys full civic rights to hold public offices and to elect their representatives to the Assembly, or Parliament, of the Nation.

263. The American conception of a constitution. A brief statement of the essentials of a constitution according to the American point of view follows:

By "constitution" we mean a specific written instrument defining the government; and an executive or legislative act is unconstitutional if contrary to the terms of that instrument. The five elements of the fundamental conception of our constitution are, that it is definite, comprehensive, supreme over all other forms of written law, fundamental, and alterable only by a special process.

264. Preambles to constitutions. Many constitutions contain interesting preliminary statements that throw light on the political history and the national psychology of peoples.

Constitution of the Argentine Nation: We, the representatives of the people of the Argentine Nation, assembled in general constitutional convention by the will and election of the provinces of which it is composed, in pursuance of previous agreements, for the purpose of constituting the National Union, of establishing justice, of insuring domestic peace, of providing for the common defense, of promoting the general welfare, and of securing the benefits of liberty to ourselves, our posterity, and to all persons who may desire to inhabit the Argentine soil, invoking the protection of God, the source of all reason and justice, do hereby ordain, decree, and establish this constitution for the Argentine Nation. . . .

Commonwealth of Australia Constitution Act: WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite

in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established: and Whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows: . . .

The British North America Act An Act for the Union of Canada, Nova Scotia and New Brunswick, and the Government thereof; and for purposes connected therewith.

Whereas the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the united kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the united kingdom.

And whereas such a union would conduce to the welfare of the provinces and promote the interests of the British empire:

And whereas on the establishment of the union by authority of parliament it is expedient, not only that the constitution of the legislative authority in the Dominion be provided for, but also that the nature of the executive government therein be declared.

And whereas it is expedient that provision be made for the eventual admission into the union of other parts of British North America:

Be it therefore enacted and declared by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same as follows: . . .

Constitution of the German Empire His Majesty the King of Prussia, in the name of the North German Confederation, His Majesty the King of Bavaria, His Majesty the King of Wurttemberg, His Royal Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse and Rhenish Hesse for those parts of the Grand Duchy of Hesse lying south of the Main, conclude an eternal alliance for the protection of the territory of the Confederation, and of the rights of the same as well as for the promotion of the welfare of the German people. This Confederation shall bear the name of the German Empire, and shall have the following Constitution: . . .

Constitution of the Swiss Confederation: In the Name of Almighty God.

THE SWISS CONFEDERATION, desiring to confirm the alliance of the Confederates, to maintain and to promote the unity, strength, and honor of the Swiss nation, has adopted the following federal constitution: . . .

The Constitution of the United States: We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

III. Creation of Constitutions

265. The constitution and state origin. The fact that the state exists subjectively before it is definitely organized, and that the adoption of a constitution is merely a formal expression of preexisting national consciousness is brought out in the following:[1]

It follows from what has been said, that this transformation of a community or of a society into a People, potentially or actually considered, cannot be due to any formal act on their part. Sentiments and desires are not thus formed. The necessity for the existence of the subjective condition prior to the objective creation of a political organization, makes impossible the assumption of a formal origin of the State. The logical result, therefore, is, that it is impossible to ascribe, even in modern times, a formal or juristic origin to the State. The adoption of a formal constitution cannot be considered as a creative act. The State is not, thereby, brought into existence, though from the historical standpoint it is for convenience properly so considered. The solemn adoption by a people of such a fundamental instrument is but the act through which that which has formerly existed in a more or less undefined and vague state, is brought into definite and positive statement.

It may be the fact, indeed, that the origin of the State (as, for example, the creation of a federal State, by the union of formerly independent States) is apparently synchronous with the adoption of the written constitution by which such union is effected. But it cannot be said that such federal State was created by such instrument. The creating cause was the feeling of national unity which found its formal and juristic expression in the articles of union. The constitution is the instrument that definitely creates and defines the organs through which the State, already subjectively in existence, is henceforth to exercise its activities. The essence of the State is the national feeling that unites its People, and its written constitution is but the formal expression of the fundamental principles according to which this People propose to conduct their political life. The truth of this is seen in the fact that a

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written constitution is by no means essential to State life, and is, indeed, of very recent invention. Its *raison d'être* is no deeper than a political expediency that is based upon the definiteness thus obtained, and the added stability acquired by the restrictions that these written instruments ordinarily impose upon hasty and constant amendment.

From the standpoint of Public Law, it may not be necessary to go back of a written constitution; but from the philosophical standpoint the more teleological view is demanded. Viewed in this latter aspect, the true constitution of the State may be said to date from the earliest beginnings of State life, when first the feeling of unity began to be felt by the people, and to have developed *pari passu* as the feelings of national life have grown and found expression in political organization and control.

266. Adoption of written constitutions. A summary of the leading states that have recently adopted written constitutions follows:[1]

Within the last century and a half most of the great states have adopted written constitutions. The American colonies, in converting themselves into states, led the way. Written constitutions were adopted in the year 1776 by New Hampshire, Virginia, South Carolina, New Jersey, Delaware, Pennsylvania, Maryland, and North Carolina; in the following year by Georgia and New York; and by Massachusetts in 1780. Connecticut and Rhode Island converted their royal charters into constitutions by putting the name of the people in the place of that of the king. France, at the commencement of the Revolution, framed and adopted (1791) a written constitution which, although soon set aside in favor of others equally ephemeral (1793, 1795, 1799), established a historic precedent. Each of the successive French governments of the nineteenth century has adopted a written constitution — the Bourbon government of the Restoration preferring, however, to avoid the word "constitution" and to substitute for it the term "charter," which seemed to have less flavor of popular sovereignty. The present government in France, — the third republic, — though it has no single document called a constitution, has, nevertheless, a code of "constitutional laws," with a special method of revision. In the Napoleonic era a number of written constitutions were issued under French influence to the tributary Italian states. During the same time written constitutions were declared in Spain both by the Bonapartists, recognizing King Joseph (1808), and by the partisans of the Bourbon Ferdinand VII (1812). Neither of these proved permanent; but Spain is at present

[1] By permission of Houghton Mifflin Company.

under a written constitution presented by the government to a convention, which ratified it in 1876. During the European rising against Napoleon (1813, 1814) written constitutions were promised by Prussia and by several of the states of Germany; after the war they were actually granted by Bavaria (1818) and by Württemberg (1819). The great revolution of 1848 precipitated a shower of written constitutions all over central Europe. Though nearly all of them were canceled in the ensuing monarchial reaction, that of Sardinia (the "Fundamental Statute" of 1848) has remained in revised form as the constitution of the present kingdom of Italy. The king of Prussia issued in 1850 a constitution prepared by the crown and accepted by a legislative body of a reactionary character, which has since, in theory at least, served as the basis of the Prussian government. Austria, in 1867 (defeated in the war with Prussia and Italy, and fearing a disintegration of her heterogeneous provinces), adopted a set of fundamental laws closely analogous to a written constitution. At the present time, then, with the exception of England, Hungary, and the absolute monarchies, the chief European states have written constitutions. The same is true of the republics of Central and South America, all of which have written constitutions, serving at any rate as the nominal basis of their government.

267. English written constitutions. During the Commonwealth several attempts were made to draw up written constitutions for England. Their underlying ideas reappeared in colonial charters and governments and, later, in American state and federal constitutions.

At the culminating point of the Puritan Revolution, when Cromwell, swept on by the democratic movement, is compelled to follow it if he would become its master, a curious constitutional project is seen coming to the surface. This is the "Agreement of the People" presented by the army to the House of Commons, for its approval and eventual submission to the people. The idea of its authors, clearly stated in the document itself, and discussed in the pamphlets of the day, was the establishment of a supreme law, placed beyond the reach of Parliament, defining the powers of that body and expressly declaring the rights which the nation reserved to itself and which no authority might touch with impunity. This popular compact was to receive the personal adhesion of the citizens, according to a special procedure therein provided. Its promulgation depended upon its acceptance by the people. . . .

This manifesto contains the outline of a complete constitution. When we read it and summarize the demands it contains, we are astounded to find that it is nearly two centuries and a half old. The principles which

it lays down are, for the most part, the very principles which contemporary democracy has first succeeded in establishing, or is still demanding. The sovereignty of the people: supreme power vested in a single representative assembly; the executive intrusted by an assembly to a council of state, elected for the term of one legislature; biennial parliaments; equitable and proportionate distribution of seats: extension of the right of voting and of election to all citizens dwelling in the electoral districts who are of full age, and neither hired servants nor in receipt of relief: the toleration of all forms of Christianity: the suppression of state interference in church government; the limitation of the powers of the representative assembly, by fundamental laws embodied in the constitution, especially with regard to the civil liberties guaranteed to citizens — these are the principles proclaimed by the English democrats in January, 1648–49. . . .

The Instrument of Government which was elaborated in 1653 by the Council of Officers, was a written Constitution, the first, and down to the present time the only one ever possessed by modern England.

268. Early American constitutions. A suggestive analysis of the formation of constitutions by the original American commonwealths follows:

For the organization of state governments the precedents were those of the existing English and colonial governments; but they took care to formulate their principles of government in written documents, very brief at first, but afterwards extended into the type of the present state constitution. First in time was the vote of the New Hampshire Convention: "In Congress at Exeter, January 5, 1776, voted, that this colony take up civil government in this colony in the manner and form following." Ten other states, from 1776 to 1780, framed regular constitutional documents. The charters of Connecticut and Rhode Island were already so liberal that with very slight changes they answered for many years as state constitutions.

The original state constitutions usually contained two parts: (1) A statement of the rights of individuals, which practically repeated, and often used the phrases of, the English documents of personal liberty from Magna Charta down, and of the American Declarations of Rights of 1765 and 1774. . . . (2) The second part of the early constitutions was a framework of government, usually expressed in very brief phrases. . . .

Of the eleven new constitutions, ten were put into force by the congress or convention which drew them, and which represented the sovereign

authority of the people; but those conventions were also the legislatures of the time. Massachusetts worked out a different system. . . . in 1780 Massachusetts called a convention expressly to frame a constitution, which took effect only after a popular majority; and most constitutions since that time have been framed in the same manner. . . .

This era of constitution making deserves analysis. Its significance was: (1) the consciousness that the constitutions must have a written basis and clearly restrict the governing authorities; (2) the conception that the making of a constitution was a slow affair which required special attention, and eventually that a constitution ought to be framed by a special convention and then ratified by popular vote; (3) though the suffrage was limited, the form of government was very democratic, for the largest governing power was the elective legislatures, balanced and checked by an executive and by the courts; (4) the constitutions included elaborate statements of the rights of the individual, rights preceding and independent of government, (5) the written constitution was considered to be a law of a superior and more permanent character than any ordinary statute.

269. The sources of the American constitution. The following extract emphasizes the fact that the Constitution of the United States was not a new or original creation.[1]

By a process of adoption and adaptation, rather than of new creation, the Convention at Philadelphia gave the highest evidence of its sagacity. "The American Constitution," says Mr. Bryce, "is no exception to the rule that everything which has power to win the obedience and respect of men must have its roots deep in the past, and that the more slowly every institution has grown, so much the more enduring is it likely to prove. There is little in that Constitution that is absolutely new. There is much that is as old as Magna Charta." The delegates of the Convention "had neither the rashness nor the capacity for constructing a constitution *a priori*. There is wonderfully little genuine inventiveness in the world, and perhaps least of all has been shown in the sphere of political institutions. These men, practical politicians, who knew how infinitely difficult a business government is, desired no bold experiments. They preferred, so far as circumstances permitted, to walk in the old paths, to follow methods which experience had tested." Professor Johnson speaks in the same strain: "If the brilliant success of the American Constitution proves anything, it does not prove that a viable constitution can ever be struck off at a given time by the brain and purpose of man. Man may be a political animal, but in no such sense as this. . . .

[1] By permission of The Macmillan Company.

To accuse the members of having deliberately hazarded the destinies of their country upon the outcome of an entirely new and untried instrument of government, would be an injustice against which they would have been the first to protest; and yet the intensity of posterity's admiration for their success is continually tempting new writers into what is in reality just such an accusation." And Mr. James Russell Lowell has observed, with his usual grace: "They had a profound disbelief in theory, and knew better than to commit the folly of breaking with the past. They were not seduced by the French fallacy, that a new system of government could be ordered like a new suit of clothes. They would as soon have thought of ordering a suit of flesh and skin. It is only on the roaring loom of time that the stuff is woven for such a vesture of thought and expression as they were meditating."

270. Adoption of the Constitution of the United States. The essentially revolutionary nature of the adoption of the American Constitution is brought out in the following:

In the new constitution framed by the delegates from the different states, . . . it was provided that the ratification thereof by conventions in nine of the thirteen states should be sufficient to authorize it to go into effect as among the states in which it was so adopted. As the Articles of Confederation provided only for their amendment by unanimous consent of the thirteen states, it is apparent that the new constitution was to this extent a revolutionary measure, not authorized by the Articles of Confederation. As a matter of fact one state — Rhode Island — sent no delegates to this convention, and was therefore in no way bound by its proceedings; and neither Rhode Island nor North Carolina ratified until after the federal government authorized by the constitution was actually in operation. Moreover, the Articles of Confederation provided for their change or amendment by the action of the states, — meaning the state legislatures, — whereas the constitution was by action of Congress submitted for ratification in the different states by conventions chosen by the voters, as the legislatures of the different states might provide (Constitution, Art. VII). The federal government under the constitution was not, therefore, the legal successor to the government under the Articles of Confederation, but supplanted it. So far, however, as the new government was recognized by the states, eleven of whom had ratified before such government was organized, it was as to them legitimate and regular, and it was acquiesced in by the remaining two states when they finally ratified it in the prescribed form.

271. The creation of the French constitution. A recent book states the peculiar form of the French constitution as follows:

Finally, at the beginning of the year 1875, four years after the election of the Assembly, it at last took up seriously the consideration of a permanent form of government, and on January 29 a motion was carried by a majority of one providing that the president of the *republic* should be elected by the Senate and Chamber of Deputies meeting together in a single assembly. Thus the republicans at last carried the day by the narrowest possible margin.

The restoration of the monarchy having now become impossible, for the time being at least, the Assembly proceeded with the work of completing a form of government, not by drafting an elaborate constitution but by passing a series of laws. These separate laws, supplemented by later amendments, form the constitution of the Third Republic, which consequently differs in many fundamental ways from all the previous French constitutions. It contains no reference to the sovereignty of the people; it includes no bill of rights enumerating the liberties of French citizens; and it makes no definite provision for maintaining a republican form of government. It is, in fact, by no means a logically arranged and finished document; on the contrary, it bears throughout the marks of hasty compilation, designed as it was to tide the nation over a crisis until one of the contending parties in the Assembly should secure a triumphant majority. Nevertheless, despite the expectations of many who took part in its making, it has lasted longer and provided a more stable government than any of the numerous constitutions France has had since 1789.

272. Scope and character of French constitutional laws. Wilson points out the legal distinction between "constitutional" and "organic" laws in France.

In framing the laws which were to give shape to the new government the Assembly distinguished between those which were to be "constitutional" and subject to change only by special processes of amendment, and those which, though "organic," were to be left subject to change by the ordinary processes of statutory enactment by the two Houses of the Legislature. The "constitutional" laws, passed February 24th and 25th and July 16th, 1875, respectively, dealt in the simplest possible manner with the larger features of the new government's structure and operation: the election and general powers of the President; the division of the National Assembly into two houses, a Senate and Chamber of Deputies; the general powers and mutual relations of the

two Houses, the President's relation to them, and the general rules which should control their assembling and adjournment. Two "organic" statutes, bearing date August 2nd and November 30th, 1875, respectively, provided for the election of Senators and Deputies. The only radical amendment of the "constitutional" laws since then effected was made in August, 1884, when almost the whole of the constitutional law regarding the composition and powers of the Senate was repealed, and replaced by an "organic" law (that is, an ordinary statute) which introduced a number of important changes, and left the organization and authority of the Senate henceforth open to the freest legislative alteration, likely to be checked only by the circumstance that the Senate must itself assent to the changes made. The "organic" laws of 1875 with regard to elections to the Chamber of Deputies have been several times amended.

273. The formation of the German constitution. The leading steps in the accomplishment of German unity were as follows:

In 1848 most of the German states, except Prussia, granted to their people constitutional government. In the same year a "German National Parliament" met at Frankfort . . . and attempted to formulate a plan for more perfect union under the leadership of Prussia; but its leaders proposed much more than was possible, the time was not yet ripe, and the attempt failed. Still earlier, in 1833, Prussia had led in the formation of a "Customs Union" (*Zollverein*) between herself and all the states of the Confederation except Austria, which laid a free-trade basis for those subsequent political arrangements from which also Austria was to be excluded. In 1850 Prussia received from the hands of her king the forms, at least, of a liberal government, with parliamentary institutions, and these concessions, though at first largely make-believe, served eventually as the basis for more substantial popular liberties.

Finally, in 1866, came the open breach between Prussia and Austria. The result was a six weeks' war in which Austria was completely defeated and humiliated. The Confederation of 1815 fell to pieces; Prussia drew about her the Protestant states of Northern Germany in a "North German Confederation"; the middle states, Bavaria, Württemberg, Baden, etc., held off for a while to themselves; and Austria found herself finally excluded from German political arrangements. . . .

The finishing impulse was given to the new processes of union by the Franco-Prussian war of 1870–1871. Prussia's brilliant successes in that contest, won, as it seemed, in the interest of German patriotism against French insolence, broke the coldness of the middle states toward their great northern neighbor. . . .

The first step toward the present union was taken in 1870, when Baden, Bavaria, and Württemberg, fearing that the object of Napoleon III was to conquer the central German states or renew the Confederation of the Rhine, decisively espoused the side of Prussia and the North German Confederation. While the siege of Paris was in progress these three states sent delegates to King William at Versailles and formally united themselves with their northern compatriots: the North German Confederation became the German Confederation, with King William as president. Almost immediately, thereafter, the influences of the time carried the Confederates a step farther: at the suggestion of the king of Bavaria, the president king was crowned Emperor, and the German Confederation became the German Empire. The present constitution of the Empire bears date April 16, 1871.

274. The practical nature of the German constitution. Lowell points out the chief purposes for which the German Empire was formed.[1]

The constitution has nothing about it that is abstract or ideal. It was drawn up by a man of affairs who knew precisely what he wanted, and understood very well the limitations imposed upon him, and the concessions he was obliged to make to the existing order of things. His prime object was to create a powerful military state, and hence, as has been pointed out, the articles on most subjects are comparatively meager, but those on the army, the navy, and the revenue are drawn up with a minuteness befitting the by-laws of a commercial company.

IV. Amendment of Constitutions

275. Methods of amendment. The constitutional provisions for amendment in some of the leading states are as follows:

France: Article 8. The chambers shall have the right by separate resolutions, taken in each by an absolute majority of votes, either upon their own initiative or upon the request of the President of the Republic, to declare a revision of the constitutional laws necessary.

After each of the two chambers shall have come to this decision, they shall meet together in National Assembly to proceed with the revision.

The acts effecting revision of the constitutional laws, in whole or in part, shall be passed by an absolute majority of the members composing the National Assembly.

[1] By permission of Houghton Mifflin Company.

Germany: ARTICLE 78. Amendments of the constitution shall be made by legislative enactment. They shall be considered as rejected when fourteen votes are cast against them in the Bundesrath.

The provisions of the constitution of the Empire, by which certain rights are secured to particular states of the Union in their relation to the whole, may be amended only with the consent of the states affected.

Switzerland: ARTICLE 118. The federal constitution may at any time be amended, in whole or in part.

ARTICLE 119. Total revision shall take place in the manner provided for passing federal laws.

ARTICLE 120. When either council of the Federal Assembly resolves in favor of a total revision of the constitution and the other council does not consent thereto, or when fifty thousand Swiss voters demand a total revision, the question whether the federal constitution ought to be revised shall be in either case submitted to a vote of the Swiss people, voting yes or no.

If in either case the majority of those voting pronounce in the affirmative, there shall be a new election of both councils for the purpose of undertaking the revision.

ARTICLE 121. Partial revision may take place either by popular initiative or in the manner provided for the passage of federal laws.

The popular initiative shall consist of a petition of fifty thousand Swiss voters for the adoption of a new article or for the abrogation or amendment of specified articles of the constitution.

When several different subjects are proposed by popular initiative for revision or for adoption into the federal constitution, each one of them must be demanded by a separate initiative petition.

The initiative petition may be presented in general terms or as a completed proposal of amendment.

If the initiative petition is presented in general terms and the federal legislative bodies are in agreement with it, they shall draw up a project of partial revision in accordance with the sense of the petitioners, and shall submit it to the people and the cantons for acceptance or rejection. If, on the contrary, the Federal Assembly is not in agreement with the petition, the question of partial revision shall be submitted to a vote of the people, and if a majority of those voting pronounce in the affirmative, the Federal Assembly shall proceed with the revision in conformity with the popular decision.

If the petition is presented in the form of a completed project of amendment and the Federal Assembly is in agreement therewith, the project shall be submitted to the people and the cantons for acceptance or rejection. If the Federal Assembly is not in agreement with the project,

it may prepare a project of its own, or recommend the rejection of the proposed amendment, and it may submit its own counter-project or its recommendation for rejection at the same time that the initiative petition is submitted to the vote of the people and cantons.

ARTICLE 122. The details of procedure in cases of popular initiative and popular votes on amendments to the constitution shall be determined by federal law.

ARTICLE 123. The amended federal constitution or the revised portion of it shall be in force when it has been adopted by a majority of Swiss citizens voting thereon and by a majority of the cantons.

In making up the majority of cantons the vote of a half canton shall be counted as half a vote.

The result of the popular vote in each canton shall be considered as the vote of the canton.

The United States. ARTICLE V. The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

276. The difficulties of constitutional amendment in the United States. Ames points out the evils and dangers that may result from the difficulties in the way of legal amendment of the Constitution of the United States.

Why, it may be asked, have so few of the more than eighteen hundred propositions looking to the amendment of our fundamental law been successful? In part because some were suggested as cures for temporary evils, others were trivial or impracticable, still others found a place in that unwritten constitution which has grown up side by side with the written document, and whose provisions are often as effective as those contained in the organic law; but the real reason for the failure of those other amendments which have been called for repeatedly by the general public has been due to the insurmountable constitutional obstacles in their way. "It would seem," as a well-known American writer has

truly said, "that no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery in Article V."

Fortunately, the Federal Constitution, owing to the fact that it deals only with the most general elements of government, has proved so elastic as to adapt itself to new contingencies and circumstances, and thus the necessity of amendment has been reduced to a minimum. There still remain, however, certain desirable reforms, rendered apparent by more than a century's experience and the changed conditions of our people and age. Although constructive statesmanship did not end with the adoption of the Constitution as some would have us believe, and although there exists to-day more wisdom and capacity in matters pertaining to the science of government than at the time the Constitution was formed, still it has proved to be impossible to secure these reforms because they can be effected only by a formal amendment.

Nearly all Americans will agree that a rigid constitution has its excellencies, but is there not a limit to the degree of rigidity desirable? Did not the framers of our Federal Constitution, while seeking "to avoid the dangers attending a too frequent change of their fundamental code," advert "to an opposite danger to be equally shunned — that of making amendments too difficult"? Has not the mode provided proved to be of such a character that in some instances "discovered faults" have been perpetuated? While continuing to follow the wise injunction of the "Father of the Country" "to resist with care the spirit of innovation upon the principles of the Constitution," may we not do well to make such constitutional modifications as "experience" — "the surest standard by which to test the real tendency of existing constitutions" — has shown desirable? Certainly the facts plainly show that the cause of the difficulty is, to use the words of Chief Justice Marshall, that the machinery of procuring an amendment is "unwieldy and cumbrous." . . .

"When in a democratic political society," says Professor Burgess, "the well-matured, long and deliberately formed will of the undoubted majority can be persistently and successfully thwarted, in the amendment of its organic law, by the will of the minority, there is just as much danger to the State from revolution and violence as there is from the caprice of the majority, where the sovereignty of the bare majority is acknowledged."

277. Interpretation of the Constitution of the United States. The important part played by the courts in the construction and application of written constitutions in the United States is brought out in the following:

The text of the federal constitution is legally supreme over all other forms of law within the boundaries of the United States: it goes beyond custom; it supersedes any principle of international law which collides with it; it overrides previous and subsequent state constitutions and statutes; it controls local and municipal ordinances, and the acts of all corporations, public and private. Nevertheless, few subjects are habitually so much discussed by the courts as the meaning of the federal constitution, and in like manner of state constitutions. A constitution, like a statute, is phrased in words drawn up by human and often fallible men; and there may even be two clauses of a constitution which do not agree with each other. The meaning of the words of a constitution, and especially of the federal constitution, becomes of great importance: for instance, at intervals from 1787 to 1895, the courts have without much success endeavored to discover what our ancestors meant by "direct taxes."

Yet we must know what the constitution means in order to appreciate the meaning of statutes "pursuant" to the constitution. Every person who is called upon to perform a public act must conform to the federal constitution, but in order to do so he must make up his mind what the constitution means: the president, when he issues an order, thereby assumes that he is acting within the constitution; the members of Congress in passing on a statute must act within the restrictions of the federal constitution. The courts, and especially the federal courts, are oftenest called upon to apply the constitution, because in private suits their attention is called to rivalries in meaning between that instrument and national or state statutes. Inasmuch as the courts deal continually with vested rights, they must know the traditional use of language, and the meaning of phrases in a legal sense. To the Supreme Court of the United States in the last instance belongs the mighty office of expounding the federal constitution, of showing the adjustment between its parts, and of pointing out in all varieties of law any lack of harmony with it.

The general principles of the construction of constitutions and statutes are simple: words are used in their ordinary sense, if it can be ascertained; where two clauses seem to conflict, the courts will usually so construe the words as to give effect and vitality to the whole; the intention of the framers may be consulted. The courts, however, take extraordinary precautions: they construe constitutions and laws only when they are obliged to consider them in order to decide cases actually before them; and they apply previous principles, and work out a theory of the constitution and laws, which may be carried forward from year to year. To the federal and state courts, therefore, belongs the general duty of expounding and applying the various constitutions. In the course of a century a body of connected, and on the whole coherent, doctrine has

been laid down in court decisions with regard to the meaning of the federal constitution. The state constitutions change more frequently, are much more loosely drawn, and each new one requires a new body of decisions to establish its meaning.

278. The doctrine of implied powers. The theory by means of which the Constitution of the United States has been expanded is stated in the following decision by Chief Justice John Marshall:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. . . .

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

PART II

THE ORGANIZATION OF GOVERNMENT

CHAPTER XVI

THE ELECTORATE

I. The Electorate

279. The nature of democracy. Sidgwick considers the essential characteristics of democracy and the necessary limits to its extreme application.[1]

Persons who adopt a democratic ideal sometimes put forward as the principle of democracy a proposition which is indistinguishable from what I have taken as the principle of good government: viz. that all laws and political institutions should be framed with a view to the welfare of the people at large, so that no privileges should be given to any particular individual or class except on grounds of public utility. I conceive, however, that this principle not only might but would be universally conceded by the modern advocates of every form of civilized government: so that to treat it as a characteristic principle of democracy introduces fundamental confusion. . . .

Limiting ourselves then for the present to the consideration of the structure of government, let us ask how, in this department, we are to define the fundamental principle of democracy. There are, I think, two competing definitions; . . . one of these . . . is "that government should rest on the active consent of the citizens"; the other is "that any one self-supporting and law-abiding citizen is, on the average, as well qualified as another for the work of government." . . .

However this may be, we may agree that the principle of democracy requires the constitution of government, and the general line of its action in reference to the common interests of the whole, to have the active consent of at least a majority of the citizens. . . . Hence, strictly taken, the principle excludes any fundamental laws which it requires

[1] By permission of The Macmillan Company.

more than a bare majority to alter; if such laws are establisned — as in most modern constitutions — the application of the principle of democracy must be conceived to be limited in the interest of stability. And it is to be observed that this limitation may conceivably be so stringent as practically to nullify the operation of the principle: *i.e.* the majority required for changing the laws of the constitutional code may be so large that change is practically precluded.

But further, when we say that a democratic government must be supported by the consent of at least a majority of the citizens, we do not ordinarily mean that this consent should be necessary to the validity of every governmental decision. . . . At any rate we may take it as most commonly admitted that the democratic principle must practically be limited by confining the authoritative decisions of the people at large to certain matters and certain periodically recurring times, and committing the great majority of governmental decisions to bodies or individuals who must have the power . . . of deciding without the active consent of the majority and even against its wish.

The question then arises on what principle, in a democracy, the particular persons should be selected to whom this large part of the work of government which cannot advantageously be undertaken by the people at large is to be intrusted.

280. Development of the electorate. A brief statement of the evolution of popular suffrage follows:

In primitive horde life there was a sort of rude democracy. Though control was practically in the hands of the elders, yet these did not form an hereditary class. Each had attained the honor through merit or the wisdom of age. . . . The same idea holds in the tribal democracy of pastoral life. A nomadic, warring stage of existence is not suited to hereditary aristocratic government. Power goes to the one who best can wield it. In patriarchal agricultural life the situation was somewhat different. Class distinctions based on birth and wealth had developed. Hence arose a leisure class trained in a more generous environment than that of the common man. They were keener and more intelligent, and were dominating in personality. Power naturally belonged to them. Yet after all they were in close touch with the freemen of the community. All were akin and trod the routine of life together; hence the leaders truly represented the ideas and interests of the entire community as well as though they had been elected representatives. But when the era of commerce began, and the population of the community multiplied through the influx of aliens and merchants, the hereditary heads of the community would not adequately represent the differing interests of the

growing city or city state. Hence a demand for representation, not of persons as in modern democracy, but of interests and localities. Such demands and their satisfaction are illustrated by the reform legislation of Solon and of Servius Tullius, who arranged that wealth and occupation should have a share in governmental power. The culmination of this movement in classic times is best known through the struggle of the plebeians against the patricians in Rome, which finally resulted in the bestowal on every citizen of a voice, however slight, in the affairs of government. This voice was expressed by formal vote cast on stated days.

When citizens, as such, meet in a formal way, and at a set time, and in a definite place and manner, express their choice by vote for representatives or for governmental measures, they form in effect an *electorate*, which term may be defined as that body of citizens legally authorized to participate in the exercise of some of the sovereign powers of the state. Feudalism and medievalism minimized the necessity for this democratic device, except in the commercial centers of Italy and Germany, but with the fifteenth and sixteenth centuries the rising tide of democracy once again brought the notion of an electorate to the front. Its philosophic expression was in the famous social-contract theory. In religion it voiced itself in the teaching that before God all men are equal and responsible. Its economic equivalent was voiced by Adam Smith in free competition and *laissez faire*.

281. The Reform Act of 1832. The following extract contains the preamble and one of the most important clauses of the famous act that extended the franchise and reformed the representation in the British House of Commons.

WHEREAS it is expedient to take effectual measures for correcting divers abuses that have long prevailed in the choice of members to serve in the commons house of parliament, to deprive many inconsiderable places of the right of returning members, to grant such privilege to large, populous, and wealthy towns, to increase the number of knights of the shire, to extend the elective franchise to many of His Majesty's subjects who have not heretofore enjoyed the same, and to diminish the expense of elections: Be it therefore enacted . . .

XIX. That every male person of full age, and not subject to any legal incapacity, who shall be seised at law or in equity of any land or tenements of copyhold or any other tenure whatever except freehold, for his own life, or for the life of another, or for any lives whatsoever, or for any larger estate, of the clear yearly value of not less than 10£ over and above all rents and charges payable out of or in

respect of the same, shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament.

282. Arguments for woman suffrage. In an address by George W. Curtis, delivered before the New York constitutional convention of 1867, the following arguments for woman suffrage were used:[1]

I wish to know, sir, and I ask in the name of the political justice and consistency of this State, why it is that half of the adult population, as vitally interested in good government as the other half, who own property, manage estates, and pay taxes, who discharge all the duties of good citizens and are perfectly intelligent and capable, are absolutely deprived of political power, and classed with lunatics and felons. . . .

Or shall I be told that women, if not numerically counted at the polls, do yet exert an immense influence upon politics, and do not really need the ballot? If this argument were seriously urged, I should suffer my eyes to rove through this chamber and they would show the many honorable gentlemen of reputed political influence. May they, therefore, be properly and justly disfranchised? . . .

There is nothing more incompatible with political duties in cooking and taking care of children than there is in digging ditches or making shoes or in any other necessary employment. . . .

When the committee declare that voting is at war with the distribution of functions between the sexes, what do they mean? Are not women as much interested in good government as men? Has the mother less at stake in equal laws honestly administered than the father? . . . Are they lacking in the necessary intelligence? But the moment that you erect a standard of intelligence which is sufficient to exclude women as a sex, that moment most of their amiable fellow citizens in trousers would be disfranchised. . . .

But if people with a high and holy mission may innocently sit bare-necked in hot theaters to be studied through pocket telescopes until midnight by any one who chooses, how can their high and holy mission be harmed by their quietly dropping a ballot in a box?

283. Acquirement and loss of citizenship in the United States. The methods by which American citizenship may be secured are as follows:

Membership in the community is acquired either by birth, by naturalization, or by annexation. In the practice of modern nations, one of two rules is usually followed: by the *jus sanguinis*, the children of citizens

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born abroad are thereby born citizens of the home country; by the *jus soli*, all persons born within a country are citizens, no matter what the nationality of the parents.

(1) While we adhere in general to the English doctrine of the *jus soli* for the children of aliens born in the United States, we claim for the children of Americans born abroad the *jus sanguinis*. . . .

(2) The doubtful cases of citizenship almost all come from naturalization, which is the process of transferring personal allegiance and political membership from one nation to another. . . . The federal constitution of 1787 gave to the federal government the sole right to fix conditions of naturalization, and successive statutes have laid down the method and terms of citizenship. . . .

Naturalization is not the right of all races: no alien Mongolian, especially no Chinese, can be naturalized in the United States; and no member of our own Indian tribes can get citizenship by naturalization, though he may by leaving the tribe. . . .

A curious class called "heimathlosen," or "homeless ones," have lost the citizenship of one country without acquiring that of another: thus the German who has lived in the United States five years without being naturalized loses his German citizenship, yet does not become an American. . . .

(3) The third method by which citizenship may be acquired is the annexation of the country in which the foreigner resides: thus, when Louisiana and Florida came into the Union, it was provided by treaty that the inhabitants of the territory should be admitted as soon as possible to all the rights and advantages and immunities of citizens of the United States. . . .

In some foreign countries there is a system called the civil death, by which a person convicted of a serious crime loses his citizenship and thus can no longer hold property or act as a member of the community; and many foreign countries banish their own citizens. Absolute loss of citizenship as a penalty for crime does not prevail anywhere in the United States, and it is doubtful whether any state can legally expel one of its citizens.

284. Results of the restrictions on negro suffrage in the South. The results of the disfranchisement of the negro in the southern commonwealths of the United States are thus stated by Hart:

In the first place, the recent statutes and constitutional amendments are not perfectly sincere, their end is clouded and concealed for the simple reason that to avow their purpose would bring them into collision with the Fifteenth Amendment, and might cause a diminution of the number of representatives in Congress under the Fourteenth Amendment.

In the second place, this entire exclusion of a large number of negroes together with a small number of whites, leaves a proletariat of people who have no direct way of relieving their discontent. The main argument for universal suffrage is that everybody has his "day in court," his opportunity to express his opinion by his ballot. The Southern method is the reversal of a process which has been going on for a century in the American commonwealths.

In the third place, it is an attempt to set up a privileged class. The "grandfather clause" creates an hereditary right to vote, which exists nowhere else in the United States. If the restrictions were administered in good faith all but this discrimination would disappear, for both negroes and whites would find their way into the electorate through education; but it is not the intention of the South to permit any considerable number of negro voters at any time in the future. The basis of the suffrage in the South is, "This is a white man's government."

In the next place the precedent of restricting the effective suffrage to the whites is very likely to develop into a restriction to Anglo-Saxons. The South needs foreign laborers, who would go far toward settling the labor troubles of that section. Is it likely that a community which admits only a few of the most intelligent negroes to the suffrage will open it to foreigners as ignorant as the poor whites? If the Italians are allowed to vote, eventually they will control whole communities; if they are not allowed to vote, they will go elsewhere.

285. An educational test. An article added to the constitution of Connecticut, October, 1897, provides the following educational test for voters.

ARTICLE XXIX

Every person shall be able to read in the English language any article of the Constitution or any section of the Statutes of this State before being admitted an elector.

286. Restriction on the suffrage of military forces. An organic law on the election of deputies in France excludes from the suffrage soldiers and sailors in active service.

ART. 2. The soldiers of all ranks and grades, of both land and naval forces, shall not vote when they are with their regiment, at their post, or on duty. Those who, on election day, are in private residence, in non-activity or in possession of a regular leave of absence, may vote in the commune on the lists of which they are duly registered.

287. The exercise of the suffrage. Numerous reasons for failure to exercise the right of suffrage are given by Hart.

. . . these are the stay-at-homes, and they are about one sixth of all the voters. . . .

Yet the absence of one sixth is a serious evil if it can be avoided; there are many reasons for it. . . . Old men have a proverbial dislike of showers, cold air, confusion, and fatigue. . . . Next comes the army of sick. . . . Another very large body is made up of those away from home on election day. A chapter of pure accidents accounts for about one per cent. more. . . . At least one man in a hundred who means in the morning to vote finds that the polls have closed without his vote. . . .

An appreciable number of votes is lost through technical objections to their reception. . . .

Bad weather keeps many thousands of voters at home. . . .

Another group is made up of those who will not mix in "dirty politics"; who think all parties "packs of scoundrels," and who wish to be left to their comfortable private life. . . .

Much larger numbers neglect to vote because they know their party to be in a hopeless minority, and that their votes can make no possible difference. . . .

One large class of abstainers . . . is the men who are public-spirited and who know that they ought to vote, but who are too busy, and who think that their duty will be performed by some one else. . . .

Next comes the class, unhappily too large, of those who neither know nor care anything about the election, the candidates, or the result, but who do care to sell their votes. . . .

This brings us to the last and most important class of absentees, those who deliberately withhold their votes because they think that they can exert more influence on public affairs in that way than by casting them.

288. The injustice of equal voting. The following represents the point of view that considers democracy unnatural and unwise:

A primary lesson of physical science is the fact of the natural inequality of men, of races, of nations. A primary principle of political science is the inequality of right resulting from this fact. If men are unequal physically, morally, intellectually, most clearly they should not be equal in the body politic. Mill was assuredly well founded when he wrote, "Equal voting is in principle wrong"[1] — well founded, indeed, in a deeper sense than the words bore for him. By "wrong" he meant

[1] "Considerations on Representative Government," p 173.

merely inexpedient. Sovereignly inexpedient equal voting certainly is. But that is not the only or the chief reason why it is wrong. It is wrong because it is contrary to the nature of things, which is ethical; because it is *unjust*. It is unjust to the classes, for it infringes their right as to persons to count in the community for what they are really worth; it is "tyrannously repressive of the better sort." It is unjust to the masses, for it infringes their right to the guidance of men of light and leading, and subjects them to a base oligarchy of vile political adventurers. It is unjust to the State which it derationalizes, making it — to borrow certain pregnant words of Green — "not the passionless expression of general right, but the engine of individual caprice, under alternate fits of appetite and fear."[1] Professor von Sybel is absolutely well warranted when he tells us, in his *History of the Revolutionary Period*, that the Rousseauan theory, which is, so to speak, incarnate in False Democracy, "raises to the throne, not the reason which is common to all men, but the aggregate of universal passions."

II. Control of Electorate over Government

289. The electorate as a governmental organ. Dealey emphasizes the fact that, in modern democracies, the electorate is a regular and important organ of government.

It is important to note that wherever an electorate exists it becomes *ipso facto* as truly a part of the government as any other department exercising political powers. The powers which an electorate may exert vary considerably in extent in different states, but the tendency in democracies is to bestow increasingly larger powers, as citizens attain greater intelligence and political capacity. The powers usually assigned are executive. That is, the electorate may be authorized to appoint candidates to certain designated offices through forms of election. These offices may be (1) executive or administrative, as in the election of a president, a governor, a mayor or the head of an administrative department; or (2) judicial, as in the case of judges elected by popular vote, the prevailing system in the commonwealths of the United States of America; or (3) legislative, as in the election of delegates to lawmaking bodies. Occasionally the electorate is authorized to aid directly in legislation through the initiative and the referendum. At times, also, the electorate secures the right to assist, through delegates chosen by lot, in judicial decisions by the performance of jury service. These are direct powers and are important in proportion to their extent. If, e.g., an

[1] "Works," Vol. III, p. 282.

electorate should directly appoint by election all important officers of the three historic departments of government, and should have a deciding voice in the formulation of the constitution, its power would be enormous. If, also, the electorate were composed of all adults in the nation, the people might well be said to be exercising full sovereign powers.

290. Evolution of elections. Jenks gives the following interesting surmise concerning the origin of election methods:[1]

We cannot suppose that, in its origin as we have seen it, *political representation* found any urgent necessity for *contested elections*. . . . Apparently, at first, the royal officials laid hold of those whom they considered to be suitable persons, and packed them off to Parliament. . . .

But, as it began gradually to dawn upon people's minds that, in some countries at least, Parliament was a very powerful institution, and membership thereof a thing to be coveted, *contested elections* began to make their appearance. . . . The old idea of the unwilling hostage had died out. The new idea of *agency*, introduced, perhaps, from the Roman Law by means of the Church, was offering a more satisfactory explanation of the position of the parliamentary representative. He was the *agent* of his constituency, therefore his constituents had a right to *choose* him. . . .

Most people, probably, have noticed that the language of elections is somewhat bloodthirsty. We speak of the "party war-chest," the "election campaign," the "enemy's stronghold," "laying siege to a constituency," "leading troops to victory," "carrying the war into an opponent's territory," and so on. Much of this is, no doubt, the decorative language of the New Journalism; but it is interesting to find that the further back we go in history, the more nearly does it tally with the actual facts. . . . The contested election was no exception. The victorious party routed its opponents, drove them from the hustings, and *carried their man*. . . .

But fighting, though it has its charms, has also its drawbacks, especially when a royal official is standing by, who may inflict fines for breach of the peace. And so it would appear that a *fiction* was gradually adopted, by which it was *assumed* that there had been a fight, and that one party had gained the victory.

But which party? Well, other things being equal, in any fight the more *numerous party* will win. And so it seems to have gradually become the custom, where party feeling was not very strong, to settle the matter by *counting heads* instead of *breaking them*. Much of the

[1] Copyright, 1900, by The Macmillan Company.

machinery of voting recalls its origin. The first test is a shout. If one party greatly preponderates, its shouts will drown the other's, and there will be no need to go further. But the shout is the old *battle cry*. If there is still doubt, the next step is *Divide*, i.e., draw up in *battle array*. . . .

Thus we see what a rough test the verdict of the *majority* is. It is not based, historically, on any ethical considerations. It makes no allowance for difference of merit in the combatants, or for generalship, both of which tell in real warfare. But it is a very simple and enormously useful practical way of settling disputes, and it has had a world-wide success.

291. Elections under the Roman Republic. The methods used by candidates in the Roman Republic are thus stated by Pliny:

. . . I have been told by some who remember those times that the method observed in their assemblies was this: the name of the individual who offered himself for any office being called out, a profound silence ensued, when, after he had spoken for himself, and given an account to the senate of his life and behavior generally, he called witnesses in support of his character. These were either the person under whom he had served in the army, or to whom he had been quæstor, or both (if the case admitted of it), to whom he also joined some of those friends who espoused his interest. They said what they had to say in his favor, in few but impressive words; and this had far more influence than the modern method of humble solicitation. Sometimes the candidate would object either to the birth, or age, or character of his competitor; to which the senate would listen with a severe and impartial attention: and thus merit was generally preferred to interest.

292. The Ballot Act. In 1872 the British Parliament passed the following act for a secret ballot at parliamentary and municipal elections:

2. In the case of a poll at an election the votes shall be given by ballot. The ballot of each voter shall consist of a paper . . . showing the names and description of the candidates. Each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face. At the time of voting, the ballot paper shall be marked on both sides with an official mark, and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil, and the voter having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding at the polling station. . . .

After the close of the poll the ballot boxes shall be sealed up, so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall, in the presence of such agent, if any, of the candidates as may be in attendance, open the ballot boxes, and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given.

293. Methods of influencing voters in the United States. Some of the devices used in America to swell the party vote are as follows:

(1) The most ordinary influence on voters is simple persuasion. In some parts of the country, especially in the South, there is joint discussion of public issues, listened to by both sides. In the Northern states, political meetings are usually attended only by members of the party that holds them. . . .

(2) The newspaper is of course of great influence over voters. . . . But, again, most Americans read only the newspapers of their own party, and hear very little of the argument of the other side. . . .

(3) Another method of influencing voters is by intimidation, — sometimes nothing more than the disapproval of a man who votes unlike his neighbors, sometimes fierce and cruel personal abuse, sometimes threat of dismissal from employment. . . .

(4) Farther down still is the brutal violence at the polls, of which there have been many examples in American history. . . .

(5) Another too frequent method is the corruption of voters. . . . The most subtle form of bribery is to pay a man on election day for peddling tickets, for getting out the voters, or for reporting the vote. Another form is the purchase of "political movements"; temporary third parties are set up for the express purpose of being bought off in a block. Another method is to hire men to stay away from the polls. . . .

(6) Perhaps the baldest form is to pay money outright for votes; candidates for offices are often assessed thousands of dollars for campaign funds; and cases have been known where they have gone from polling place to polling place, actually giving out rolls of bills to be distributed among the voters.

294. Comparison between Greek and Swiss democracy. The difference between Greek and Swiss methods of securing popular control of government is thus stated by Lowell:[1]

[1] By permission of Houghton Mifflin Company.

When the Greek spoke of democracy, he had in his mind the conduct of the administration. He meant the control by the mass of citizens of the question of peace and war, of the relations with the allies and the colonies, of the finances, the army, and the fleet. In Athens at the time of Demosthenes all these things had been placed in the hands of the assembly of the people, which managed them as far as possible directly, or by means of committees chosen for short periods by lot. But the same methods were not applied to legislation. To the Greek mind the laws were normally permanent and unchangeable. . . . In Athens, therefore, the administration was conducted directly by the people, but the power of legislation was far less under their control. Now in Switzerland precisely the reverse is true. It is hard to conceive how the control of legislation by the people could be rendered more absolute than it is made by the referendum and the initiative; but, on the other hand, the executive of the Confederation is removed as far from popular influence as is possible in a community where every public authority is ultimately based on universal suffrage. The federal councilors virtually hold office for life, and they are chosen, not by the people, but by the Assembly, whose members enjoy in their turn a singularly stable tenure.

295. Representative government. The necessity of representation in modern large-sized democracies may be stated as follows:

Another vital question is, Through what medium shall the popular will be expressed? A direct democracy in which all the participants may meet together is the simplest, and comes nearest the exercise of popular sovereignty. Such direct governments are possible only in small communities. In the canton of Appenzell, for instance, on election day ten thousand men assemble, each girt with a sword, and vote for their officers *viva voce*. The New England town meetings in colonial times and in the country towns to-day are the best examples of such a direct democracy.

No such government can possibly work in a large community, and the method of representation has been devised to permit the expression of the popular will. Representation by voting delegates was unknown in the ancient world. In the Middle Ages the imperial free cities sent delegates to the Reichstag; but they were instructed ambassadors, saying what was put into their mouths by their principals at home. Perhaps the first germs of the true representative system, in which delegates once chosen act upon their own judgment, are to be found in the thirteenth century in the introduction of county and then of city members into the English Parliament. Even then, for a long time, the intention was to

represent interests — landholders, the trading classes, and so on — rather than individuals. Only in the nineteenth century has the principle of representation been pushed to its farthest logical extent, — namely, that every aggregation of a thousand people is entitled to the same representation as every other thousand people, in local, state, and national legislatures.

296. The recall. The recent Iowa law authorizing commission government in cities makes the following provision for the removal of elective officials:

The holder of any elective office may be removed at any time by the electors qualified to vote for a successor of such incumbent. The procedure to effect the removal of an incumbent of an elective office shall be as follows: A petition signed by electors . . . equal in number to at least twenty-five per centum of the entire vote . . . shall be filed with the city clerk, which petition shall contain a general statement of the grounds for which the removal is sought. . . . If the petition shall be found to be sufficient, the council shall order and fix a date for holding the said election, not less than thirty days or more than forty days from the date of the clerk's certificate to the council that a sufficient petition is filed. . . . Any person sought to be removed may be a candidate to succeed himself, and unless he requests otherwise in writing, the clerk shall place his name on the official ballot without nomination. In any such removal election, the candidate receiving the highest number of votes shall be declared elected. At such election if some other person than the incumbent receives the highest number of votes, the incumbent shall thereupon be deemed removed from the office upon qualification of his successor. . . . If the incumbent receives the highest number of votes, he shall continue in office.

III. Initiative and Referendum

297. The origin of the referendum in Switzerland. Lowell explains as follows the conditions under which the referendum developed in Switzerland:[1]

It is curious that in Switzerland, almost alone among the countries north of the Alps, representative government did not arise spontaneously. In some other places the elected assemblies were smothered before they attained great strength, but in Switzerland they never developed at all. The fact is that owing to the absence of royal power, which

[1] By permission of Houghton Mifflin Company

was the great unifying force during the Middle Ages, the country did not become sufficiently consolidated to have a central legislature, and no one of the separate communities that made up the Confederation was large enough by itself to need a representative system. . . . Under these conditions there was no place for a true representative body either in the Confederation or the cantons, and the ancient referendum grew up in its stead.

The Confederation being a mere league of independent states, the delegates to its diet acted like ambassadors, in strict accordance with the instructions of their home governments; and, what is more, they were never given power to agree to a final settlement of matters of importance, but were simply directed to hear what was proposed and report. They were said to be commissioned *ad audiendum et referendum*. . . .

The modern institution is quite different in its form and in its effects, and is based upon abstract theories of popular rights, derived mainly from the teachings of Rousseau. This writer had a strong aversion to representative government, and remarked in his celebrated "Contrat Social," that the English with all their boasted liberty were not really free, because they enjoyed their liberty only at the moment of choosing a parliament, and were absolutely under its rule until the next election. He declared that in order to realize true liberty the laws ought to be enacted directly by the people themselves, although he saw no method by which this could be done in a state that was too large to permit of a mass meeting of all the citizens. Rousseau's ideas of popular rights sank deep into the minds of his countrymen; and when the Swiss, who as a rule is extremely practical in politics, becomes fairly enamored of an abstract theory, he clings to it with a tenacity worthy of a martyr. . . .

The advocates of the referendum were prompted by a belief that it was an essential part of the sovereignty of the people rather than by a conviction of its utility, and in many of the debates on the subject its introduction was urged to a great extent on theoretical principles of abstract right, although usually opposed on purely practical grounds, the debates resembling those one commonly hears on the question of woman's suffrage. A study of the period points, however, to the conclusion that the ultimate basis of the demand for the referendum, the real foundation of the belief in the right of the people to take a direct part in legislation, lay in the defective condition of the representative system.

298. Extension of the principles of initiative and referendum. During the past century, especially among Anglo-Saxon peoples, the use of some form of popular legislation has become widespread.

Within a few years past the Swiss institutions, the initiative and referendum, have been studied in many lands by many men who have had many different interests to serve. Wherever in Europe, west of the German Empire, representative government has already established itself on substantial foundations the next step seems to be the referendum or plebiscite, advocated either as a corrective of evils which have developed in the representative system or as a means of helping some agitator gain his ends. In France a revolutionary group has for years urged a plebiscite on the republican constitution in the hope that the people would vote against it and the way would then be opened for another form of government. The name plebiscite in French and Italian history is at once suggestive of the plebiscites of the Napoleons, and of Victor Emmanuel during the reconstruction days in Italy. . . . In Belgium, when the constitution of that kingdom was recently revised, the subject of the referendum was generally discussed throughout the country. . . .

In England the subject has received not a little attention. . . . The leaders of the Socialist and Labor party in England have expressed an interest in the referendum also. In a recent parliamentary campaign the Liberal party put forward as one of its issues a "Local Veto" bill which, had it been passed, would have introduced into England the principle of allowing the people to vote in local districts on the question of prohibiting the liquor trade, in very much the same manner as in the American States. . . . In Canada . . . there is a large fund of material for a scientific treatise on the referendum. . . . In the Anglo-Saxon communities in Australia and New Zealand the referendum has already gained considerable headway and it seems likely to enjoy a much greater development within the next few years. . . .

In our own Republic the reform has recently been given a great impetus by reason of the admiration which has been expressed for Switzerland's example. This result has been induced in some degree by a study of the subject by a large number of competent writers on constitutional questions, but it has been chiefly encouraged by a popular political movement in the West of far-reaching proportions.

299. Initiative and referendum in the United States. The various steps in the extension of popular legislation in the United States are thus given by Beard:[1]

The participation of the people in the making of constitutional law is not only on the increase, but there is also a decided tendency to extend the power of the voters to ordinary legislation as well. . . .

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As we have seen, the practice of even submitting constitutions to popular ratification was not one of the original devices of our constitutional system, only three of the eighteenth-century constitutions being submitted to the electorate for approval or rejection. Slowly, however, the idea came to be accepted that voters, in a final analysis, had the right to pass upon their own fundamental laws. . . .

The doctrine of popular referendum was also early extended to several important matters besides constitutions and amendments. . . .

It was not such a long step, therefore, from these and similar practices, to the adoption of a complete system of initiative and referendum, whereby the voters may initiate any measure or require the referendum on any legislative act. Many causes are responsible for this extension of older practices. In some instances, legislators were only too glad to shirk their responsibilities by leaving certain questions to the decision of popular vote. The practice of enlarging the state constitutions so as to include provisions of a temporary and statutory, rather than a fundamental, character led to the breaking down of the old distinction between the solemn formulation of constitutional law and the enactment of mere statutes. Perhaps the most important reason, however, was a distrust in the legislature — a distrust that filled our state constitutions with long and detailed limitations on the powers of legislatures and finally ended, in several states, in the assumption of ultimate legislative authority by the voters. It was under these circumstances that the initiative and referendum were adopted as remedies for our legislative evils. . . .

The system of initiative and referendum is being extended to local as well as to state-wide matters. . . . The advocates of this new form of government have carried their agitation to Washington, as well as to the capital of nearly every state in the Union, and in 1907 it was stated on good authority that no less than 110 members of the House of Representatives were at that time pledged to vote for the adoption of the referendum for acts of Congress or bills passed by either house, and for the establishment of the initiative for certain topics, including popular election of United States Senators, parcels post, immigration, and the regulation of interstate commerce.

300. Arguments for the referendum. The following catechism sums up the leading arguments in favor of the popular referendum:

Q. Is the Referendum un-American?

A. The Referendum is not un-American unless the principle of majority rule or rule by the people is un-American. . . . As the growth of numbers made it necessary to rely more and more on representatives, the direct vote of the people was lost, because no one thought of any

way in which it could be retained. But now that we have a plan whereby the direct vote can be taken without an assembly of the people, it is possible to go back to the original American system of actual popular sovereignty. . . .

Q. Has it made frequent elections necessary, thus greatly increasing the cost?

A. Instead of making elections more frequent and thus increasing taxation, the experience of the Swiss is the reverse. It is not worth while for politicians to attempt to squander the people's resources or for private interests to bribe them to do so when the people have it in their power upon petition of a small minority, to submit any measure passed by a legislature to a direct vote of the people and veto it if a majority so votes. . . .

Q. Does it take from the people's representatives any just rights that belong to them, or in any way limit their legitimate exercise of power?

A. The Referendum takes from the people's representatives no power that justly belongs to them. The legislators are the agents and servants of the people, not their masters. No true representative has a right or a desire to do anything his principal does not wish to have done, or to refuse to do anything his principal desires to have done. . . .

Q. Why is it imperatively demanded to-day?

A. The Referendum is imperatively demanded because there has arisen in our midst in recent years a powerful plutocracy composed of the great public-service magnates, the trust chieftains and other princes of privilege who have succeeded in placing in positions of leadership political bosses that are susceptible to the influence of corrupt wealth. . . . Against these evils the Referendum is a powerful weapon. It brings the government back to the people, destroying corruption and the mastership of the many by the few.

301. Arguments against the initiative and referendum. The leading objections to the system of popular legislation may be summarized as follows:[1]

It is not at all surprising that a system which proposes to vest the legislative power in the mass of voters, rather than in the representative branch of the government . . . should awaken considerable opposition and criticism. It is contended by the opponents of the initiative and referendum that legislation, being a difficult and technical matter demanding the attention of experts and careful deliberation, cannot be done effectively by the mere counting of heads. . . .

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The second leading argument against the initiative and referendum is the frequent lack of interest shown in propositions submitted to popular vote. . . .

The third argument advanced against the referendum is based on the ground that it is very easy for any pernicious interest in the state, affected adversely by a good law, to secure signatures to a petition demanding a referendum and thus postpone the date of the law's going into effect for a considerable period — at least until a popular vote could be taken — and, perhaps, through the indifference of the majority defeat it with a solid and active minority. . . .

Another argument against the initiative and referendum is the contention that responsibility for law-making is shifted from a definite group, known as the legislature, to a large and irresponsible group of persons who mark their ballots within the secrecy of the polling place. If the legislature makes mistakes or fails to reflect popular will, its members can be punished, if the electors are interested enough to defeat those who seek reelection; whereas it is impossible to fix any responsibility or to punish any one politically, if a badly drawn or unwise measure is passed by a popular vote.

IV. Minority Representation

302. The nature and conduct of political majorities. Giddings makes the following analysis of majorities in modern democracies:[1]

First of all, then, we must observe that a political majority is a consciously formed association for effecting a consciously apprehended purpose; yet it never is an unmixed product of perfectly independent, reasoned action on the part of all its members. Multitudes of adherents have ranged themselves by personal feeling or class prejudice, or a social instinct that prompts them to act in political matters as in other things, with this group of individuals rather than with that. Thus the membership of a political majority exhibits a complete gradation of mental development, from a quick and sensitive intelligence at the margin, where independent voting occurs, to stupid bigotry in the unstimulated interior of the mass. Consequently, there is a reasonable presumption that the temper of the whole is neither extremely radical nor ultraconservative, but very moderately progressive. . . .

A political majority of the voters of a large country, with diversified resources and occupations and a heterogeneous population, will be governed mainly by a conservative instinct and will be modified only

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very slowly by opinion. It will carefully respect the fundamental political prejudices of "slow" people. Among such prejudices are those in favor of personal liberty in the broad sense of the word, against the increase of direct taxation, against certain forms of sumptuary legislation, and against interference with such traditional political habits as have become a second nature. . . .

A political majority, therefore, has a nature that can be described in terms of the laws of social psychology, and its conduct is subject to natural limitations. . . . As social structure becomes more complex the difficulties of holding the diverse elements of a majority together in a working coördination rapidly increase. All other things remaining the same, the inertia of conservatism would increase, and political stagnation would bring progress to an end. . . . But other things do not and cannot remain unchanged. As the difficulties of maintaining party cohesion increase, the necessity of adhering to a positive policy becomes more imperative. . . . As voters become responsive to opinion, they become capable of independence.

303. Necessity for representing minorities. Mill argues that majority rule, regardless of minorities, is unjust and undemocratic.

That the minority must yield to the majority, the smaller number to the greater, is a familiar idea; and accordingly, men think there is no necessity for using their minds any farther, and it does not occur to them that there is any medium between allowing the smaller number to be equally powerful with the greater, and blotting out the smaller number altogether. In a representative body actually deliberating, the minority must of course be overruled; and in an equal democracy (since the opinions of the constituents, when they insist on them, determine those of the representative body), the majority of the people, through their representatives, will outvote and prevail over the minority and their representatives. But does it follow that the minority should have no representatives at all? Because the majority ought to prevail over the minority, must the majority have all the votes, the minority none? . . . In a really equal democracy, every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives, but a minority of the electors would always have a minority of the representatives. Man for man, they would be as fully represented as the majority. Unless they are, there is not equal government, but a government of inequality and privilege: one part of the people rule over the rest: there is a part whose fair and equal share of influence in the

representation is withheld from them, contrary to all just government, but, above all, contrary to the principle of democracy, which professes equality as its very root and foundation.

304. Objections to the principle of proportional representation. Some writers condemn proportional representation, believing that it leads toward confusion and anarchy, encourages class legislation, and weakens the legislative power.

The spread of the system of proportional representation during the last ten or fifteen years has been very encouraging to its advocates, but as yet it has not made good its claim to general acceptance. It is advocated by some visionary persons as a remedy for all the ills of society; and the more ultrademocratic element of the population demand it for the reason that it is a step in the direction of a more perfect democracy. Many able writers, however, condemn the principle of minority representation and maintain that the majority system is the true principle and is liable to fewer dangers. Sidgwick, for example, points out two "serious objections" to the system of minority representation. In the first place, the giving of representation to groups as such involves the loss of a valuable protection against demagogy by removing the "natural inducements which local divisions give for the more instructed part of the community to exercise their powers of persuasion on the less instructed." In the second place, representation of groups, he says, "will inevitably tend to encourage pernicious class legislation." In the third place, it will tend to reduce the standard of efficiency in the legislature by securing the election of men who represent one set of interests or opinions rather than all of them. "We want for legislators," says Sidgwick, "men of some breadth of view and variety of ideas, practiced in comparing different claims and judgments, and endeavoring to find some compromise that will harmonize them as far as possible,"[1] which can hardly be secured under a system in which the community is not locally divided for electoral purposes. "To establish the system of proportional representation," says Esmein, "is to convert the remedy supplied by the bicameral system into a veritable poison; it is to organize disorder and emasculate the legislative power; it is to render cabinets unstable, destroy their homogeneity and make parliamentary government impossible." If applied to parliamentary elections, logic and consistency, he goes on to say, require that it shall be applied to the election of executives and administrative officers, and this is but the entering wedge to anarchy.

[1] "Elements of Politics," p. 396

305. Objection to representation of classes or interests. The dangers of minority representation based on classes or interests may be stated as follows:

There is also good reason for believing that a system of class representation or representation of interests would tend to lower the character of the legislature, since each member would in some measure be the exclusive representative of particular interests or opinions rather than the representative of the interests of the state as a whole. A legislative assembly composed of so many elements would tend to become a debating society instead of a lawmaking body, and its efficiency would be diminished in proportion to the number and variety of interests represented. One of the sources of strength in the governments of Anglo-Saxon countries has been the freedom of their legislative assemblies from the presence of numerous unstable and dissolving groups with their inevitable dissensions and deadlocks. Finally, the organization of the electorate upon the basis of class distinctions, whether economic, social, or professional, would inevitably tend to multiply artificial distinctions, divide the population into groups, array each against the others, and accentuate class antagonism generally. These evils in Austria led to the abolition of the class system in that country in 1907, and they are the source of widespread and increasing popular discontent in Prussia to-day.

CHAPTER XVII

SEPARATION AND DIVISION OF POWERS

I. The Ordinary Government

306. A broader definition of government. In his recent suggestive book Dealey shows that the government proper includes a considerable number of organs.

If one were to define the term government more exactly, in harmony with this explanation of governmental organization and differentiation, it might be said to be the sum total of those organizations that exercise or may exercise the sovereign powers of the state.

Since all the sovereign powers of the state may be exercised through the following departments, singly or collectively, the government may be thus tabulated:

1. The executive, from which is differentiating
2. The administrative.
3. The lawmaking department, from which should be distinguished
4. The legal sovereign.
5. The judicial system, from which is separating (in the United States)
6. A special court for the authoritative interpretation of the written constitution.
7. The electorate, which is steadily increasing its powers at the expense of the three historic departments of government.

Doubtless for many years to come textbooks and theorists will continue to discuss the threefold division of governmental organization, but in this age of governmental differentiation it is well-nigh impossible to get a clear understanding of government, unless one considers the electorate as a fourth department. Furthermore, much more exactness in theorizing would be attained by separating, mentally at least, the legal sovereign from the other departments of government. The differentiation of administration from the executive is almost an accomplished fact on the continent of Europe. The remaining specialization is peculiar to the United States of America and deserves special attention because of its political importance, for if the supreme court of the federal department ultimately devotes itself only to final interpretations of the constitution, the party affiliations of its bench will become a matter of increasing concern.

307. Historical evolution of the separation of governmental powers. As the functions of the state became more extensive, its organization became more complex and the powers of government were distributed among distinct organs.

In every state, be it monarchic, aristocratic, or democratic, there is a tendency to distribute the principal powers of government among distinct governmental organizations.

The earliest dawn of civilization discloses, as the most primitive form of political organization, a warfaring society grouped about a victorious chief. This powerful personage is supposed to represent the fittest product of the period of barbaric liberty and self-help, which immediately preceded the period of governmental organization. The chieftain's superiority in valor convinces his superstitious admirers, as well as himself, that he is of divine descent. This superstition invests him with a halo of glory and clothes him with sovereign power. The religious sanction secures reverence for his person and obedience for his laws. He experiences no opposition in immediately exercising all governmental powers. He is priest, war chief, judge and legislator.

As war begets the king, so peace begets the judge and legislator. As his followers become peaceable and civilized, the king is appealed to for the enforcement of internal order and justice rather than for protection against external force. As these appeals grow numerous and the duty of satisfying them becomes more intricate, the sovereign, either as a matter of convenience, or in order to secure greater sanction for his acts and decisions, calls about him a council of wise and powerful men to hear, and to assist in determining, the questions presented, and also to advise him in the administration of his government.

This royal council, owing to the fact that the functions required in determining individual appeals differ from those required in formulating rules to be observed in the administration of government, soon develops into two distinct bodies, the legislature and the judicial court.

Notwithstanding the existence of these two advisory bodies, the king continues to execute his own will, which is still the supreme law. But the intimacy necessarily arising between the king and his advisers soon breeds contempt. The shortcomings of the sovereign disclose to the wise and powerful men whom he has invited to assist him the pious fraud which he has been exercising upon them. As they assert themselves, the sovereignty passes from the king to the lords; the state passes from the monarchic to the aristocratic form. The nobles, possessed of the sovereign power of the state, can now themselves assume, or can delegate to such authorities as they deem proper, the powers which the government

may be called upon to exercise. They generally satisfy themselves by exercising or participating in the exercise of an unlimited legislative authority. Self-interest, if not convenience, prevents them from asserting with impunity all governmental authority. They dare not abolish the courts or the kingship, lest by so doing they may reveal to the masses their own discovery of the humble origin of their king. They fear lest in the absence of a general belief in the divine source of authority, the people may be led to consider their own right to assume sovereign powers. The barons, therefore, of their own accord now employ the king as their agent to execute their laws, and they likewise employ the courts to construe them.

When at last enlightenment and education have sufficiently spread state-consciousness among the masses, and the sovereign power in fact has passed from the nobility to the people, the latter resent the power of the few to concentrate or distribute at their pleasure all governmental authority. They know that where executive, legislative and judicial power may be assumed by a single person, or body of persons, there can be no guarantee against the exertion of dreaded despotic power. Hence, in delegating and distributing governmental power, and in creating and organizing governmental agencies, they endeavor to secure themselves as far as possible against the exercise of despotic power by the government which they establish, or by any part thereof.

Whereas, in a monarchic form of state, the sovereign power is generally identified in some manner with the executive department of its government, and, in the aristocratic form of state, in some manner with the legislative department of its government, the conditions materially change when the state has become democratic, that is, when the sovereign power has passed from the nobility to the masses. Owing to the great numbers of which the democratic state is composed, it is impracticable in fact, if possible in theory, for such state to exercise governmental authority immediately, or even to be identified in any manner whatsoever with any of the departments exercising governmental powers. The democratic state accordingly delegates the powers of government to organizations distinct from its own original sovereign organization. It generally delegates the principal powers of government to the already naturally and historically developed departments, the executive, legislative and judicial departments; and it organizes and employs each of these departments as its agent. But, since neither of these departments any longer exercises sovereign powers, but only delegated authority, and since each owes its existence to the will of the state only, and not to the will of any of the other departments, each is now independent of and coördinate with the others.

II. Theory of the Separation of Powers

308. Development of the theory of separation of powers. The leading writers who have developed the theory of separation of powers are as follows:

The idea of a threefold division of governmental powers was recognized by Aristotle, Cicero, Polybius, and other ancient political writers. Aristotle, for example, classified the powers of government as: first, the *deliberative*, or those concerned with great questions of practical policy, including decisions regarding war and peace, the negotiation of treaties, the making of laws, etc.; second, the *magisterial*, or those corresponding roughly to the executive functions of a modern state; and, third, the judicial power. Although the ancient writers distinguished between three classes of governmental powers, corresponding roughly to the modern classification, yet in practice the distinction was not always observed. . . . Throughout the Middle Ages no clear distinction between legislative, executive, and judicial functions was recognized, though in a rough way the functions, especially of legislation and administration, were separated as a matter of convenience. Generally, the same magistrates exercised both executive and judicial functions. . . .

Bodin, in the sixteenth century, was the first political writer to call attention to the danger of allowing the prince to administer justice in person and to point out the advantage of intrusting the judicial power to independent magistrates. . . . In England, at the time of the Puritan Revolution, in the middle of the seventeenth century, the division of governmental powers and their exercise by separate and distinct organs became for the first time a political doctrine. Cromwell, in the constitution of the Protectorate, went to the length of separating the executive and legislative functions, but he did not fully recognize the independence of the judiciary. John Locke, the political philosopher of the English Revolution, in his famous "Two Treatises of Government," declared that the powers of government naturally divided themselves into those which were legislative in character, those which were executive, and those which were federative. By the latter functions he seems to have meant what is now understood as the diplomatic power.

The first modern political writer to dwell at length upon the separation of the powers of government and to treat it as a fundamental principle of political science was Montesquieu, in his famous work entitled "L'Esprit des Lois," published in 1748. "In every government," he said, "there are three sorts of power": the legislative, the executive, and the judiciary. . . . His views became a part of the political philosophy of

the French Revolution and were fully enunciated in the constitutions which were framed in France before the close of the eighteenth century.

In England essentially the same doctrine as that announced in France by Montesquieu was laid down by Blackstone in his "Commentaries on the Laws of England." . . .

In America, at the time of the framing of the national constitution, the influence of both Blackstone and Montesquieu was powerful and decisive, and their doctrines concerning the separation of powers became a part of the political creed of the early statesmen. Madison, in almost the very language of Montesquieu, whom he pronounced "the oracle who is always consulted and cited on the subject," defended the doctrine as essential to the protection of individual liberty. . . . George Washington, John Adams, Thomas Jefferson, Alexander Hamilton, and later Kent, Story, and Webster, all expressed similar views.

In the early state constitutions framed before the close of the eighteenth century the idea that legislative, executive, and judicial functions must be kept separate, and intrusted to distinct authorities, was expressed in no uncertain language; and their governments were organized as nearly in accordance with the theory as considerations of expediency and efficiency permitted. . . .

In various foreign constitutions, particularly those which have been framed under the influence of American ideas, the theory is embodied in similar form. In the states of Europe, where the cabinet system of government prevails, the close connection between the legislative and executive organs constitutes an important exception to the theory, yet, upon careful examination, the violation of the principle will be seen to be really less than it appears, since the functions of legislation and execution are in fact intrusted to separate organs, even though one is controlled by and is responsible to the other for the manner in which it exercises its powers. In none of them is the legislature really the executor of the law or the judge of the controversies raised in the course of its application; nor does the judiciary legislate or administer. The inconvenience and the danger, however, of such a confusion of functions is admitted by European writers as well as by those in America.

309. Montesquieu on separation of powers. The following extract from the "Spirit of the Laws" indicates Montesquieu's idea of liberty as depending upon the separation of powers:

When the legislative and executive powers are united in the same person or body there can be no liberty, because apprehensions might arise lest the *same* monarch or senate should *enact* tyrannical laws, to execute them in a tyrannical manner. . . .

There is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the *judge* would then be the legislator. Were it joined to the executive power, the judge might behave with the violence of an oppressor. There could be an end of everything, were the same man or the same body, whether of nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and that of trying the causes of individuals.

310. Blackstone on separation of powers. Blackstone's ideas were, in essence, identical with those of Montesquieu.

Wherever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty. The magistrate may enact tyrannical laws and execute them in a tyrannical manner, since he is possessed, in his quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. . . .

Were it (the judicial power) joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges whose decisions would be regulated only by their opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance of the legislative.

311. The United States Supreme Court on separation of powers. The present theory and practice of the United States has been expressed recently by the Supreme Court as follows:

It is believed to be one of the chief merits of the American system of written constitutional law that all powers intrusted to the government, whether state or national, are divided into the three grand departments, the executive, the legislative and the judicial; that the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of the system, that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department, and no others.

312. Checks and balances in the United States government. The general nature of the relations among the departments and divisions of government in the United States may be outlined as follows:

The division of the powers of government among the three departments rests on the assumption that while no one of them is in itself unlimited in authority, yet each is independent of the others. . . .

It is often said that our governmental system is one of checks and balances for the purpose of restraining the undue exercise of power by the government or its officers, the theory being that unlimited power is not vested in any department; . . . Each department of government does, in a sense, serve the purpose of a check upon the others. While the legislative department cannot directly control the action of the executive or judiciary, it can, by virtue of its sole power to provide for the raising and expenditure of money, exercise a very potent influence with reference to legislative and judicial action, and the judiciary department, by virtue of its authority in a proper case to pass upon the validity of the acts of the legislature or the executive, can restrain those departments within the scope of their proper functions. Again, the division of sovereignty between the federal and the state governments, so that the federal government has supreme power as to limited subjects of a federal nature, while the state governments have general power as to all matters not placed in the control of the federal government, makes each, to some extent, a check upon the other. But the theory of checks and balances must not be interpreted as meaning that either the state or federal government may interfere with the other in the proper discharge of the powers conferred upon it; nor with the well-established rule that in case of an apparent conflict of authority between a state and the federal government, the latter has the ultimate power to decide upon the extent of its own authority. This power is to be exercised, it is true, in accordance with the provisions and limitations of the constitution, but the necessity of providing some tribunal where such conflicts of authority may be authoritatively decided in accordance with the constitution and the law, and not by force or revolution, has dictated the wise provision that the federal judiciary is vested with this ultimate authority. In other words, the checks which federal and state governments may exercise with reference to each other, and likewise those which are vested in the departments of government, are, after all, merely the checks which, by the constitution, are imposed on each; and the whole matter comes to this, that no government, or department of government, can constitutionally exceed the authority given to it, nor act otherwise than as authorized by the constitution.

III. Criticism of the Separation of Powers

313. True meaning of the theory of separation of powers. The limitations that must be placed on the separation of powers, and the real value of the theory, are thus stated by Garner:

When we assert it to be a fundamental principle of political science that the legislative, executive, and judicial functions of government should be intrusted to separate and independent organs or departments, we are to understand the proposition as being true only in a limited sense. Both reason and experience abundantly show that no government can be organized on the principle of the absolute and complete separation of the departments among which the legislative, executive, and judicial functions are distributed. There is not now and never has been a constitution in which the three departments were not more or less connected and dependent one upon the other, and in which each exercised powers that, under a strict application of the theory, did not belong more properly to one of the others. In short, the doctrine of the separation of powers has never been anything more than a theory and an ideal. . . . The strict separation of powers is not only impracticable as a working principle of government, but it is one not to be desired in practice. . . .

While no department exercises all the power which upon a strict interpretation belongs to it, it nevertheless exercises the essential part of it. Each department exercises incidental rights of a nature intrinsically different from the mass of powers logically belonging to it, but they are such only as are necessary to enable it to perform efficiently its functions as an independent branch of the government and are in reality part of the principal power itself. In practice, therefore, the theory has never been construed to mean that all the legislative power shall be exercised by the legislative department, or all the executive power by the executive department, or all the judicial power by the judicial department. The theory otherwise understood would be impossible of practical application in any governmental system.

It is impossible to draw a strict line of demarcation between the several departments. There is a common borderland between them, within which each department must tolerate the others if government is to be efficient. No legislature can discharge entirely all those functions which under a strict interpretation of the theory are legislative. Details must be filled up and rules issued by the executive, governing the application of the law, if the government is to be conducted on practical lines. In short, functions may be separated, but not the departments themselves.

314. Modern theory of separation of powers. No recent writer has more clearly distinguished the functions of the various departments of government than has Goodnow.

This theory may be stated as follows. The action of the legislature, which is commonly called the legislative power, but which is in reality merely an expression of the governmental power by the legislature, consists for the most part in the enactment of general norms of conduct for all persons and authorities within the state; the action of the executive authority, commonly called the executive power, is the application of these norms to concrete cases; and finally the action of the judges or the courts, commonly called the judicial power, is the settlement of controversies arising between individuals or between individuals and the governmental authorities as to the application of the laws. It may further be added that experience has shown that in general it is best that these different authorities be confined to the exercise of the powers respectively assigned to them by this theory. There must, however, be important exceptions to any such rule; and these exceptions are not the same in the different states, nor should they be the same, since the political experience and needs of no two states are the same.

315. The two functions of the state. In contrast to the former idea of a separation into three departments, Goodnow points out that the functions of the state are twofold, — the formulation and the administration of its will.[1]

Political functions group themselves naturally under two heads, which are equally applicable to the mental operations and the actions of self-conscious personalities. That is, the action of the state as a political entity consists either in operations necessary to the expression of its will, or in operations necessary to the execution of that will. The will of the state or sovereign must be made up and formulated before political action can be had. The will of the state or sovereign must be executed, after it has been formulated, if that will is to result in governmental action. All the actions of the state or its organs, further, are undertaken with the object, either of facilitating the expression of this will or of aiding in its execution. This would seem to be the case whatever may be the formal character of the governmental system. . . .

The distinction between these two functions, further, is made necessary by psychological causes. In the case of a single person, who naturally both formulates and executes his will himself, it is necessary that

[1] Copyright, 1900, by The Macmillan Company.

this will be formulated before it is executed. In the case of political action it is necessary not only that the will of the sovereign be formulated or expressed before it can be executed, but also that the execution of that will be intrusted in a large measure to a different organ from that which expresses it. The great complexity of political conditions makes it practically impossible for the same governmental organ to be intrusted in equal degree with the discharge of both functions. . . .

There are, then, in all governmental systems two primary or ultimate functions of government, viz. the expression of the will of the state and the execution of that will. There are also in all states separate organs, each of which is mainly busied with the discharge of one of these functions.

IV. Division of Powers

316. The theory of division of powers. The necessity of subdividing governmental work according to the area of jurisdiction and the nature of services performed is well stated in the following:

Though the state is an indivisible union of persons within a given territory, still the people forming the state are, in all countries of any size, organized in a number of local communities which have been called into being through the simple fact that the people living within a defined district have common needs which are peculiar to themselves. If the ends which such people follow in their local organizations are recognized by the state as reaching beyond the interests of the individual then such ends become public ends, just as much as the ends which the state attempts to have realized through the central governmental organization. For the mere fact that such ends may be regarded by the state as public ends does not make it necessary that the government shall act solely or mainly in the attainment of these ends through its central organization. The state everywhere grants, directly or indirectly, to the localities powers to act in the attainment of this class of public ends and provides that its central governmental organization shall step in simply to assist and control the localities. In other words central and local government work together in the attainment of the ends of the state. . . . As to what shall be the sphere of local autonomy, whether it be fixed by the constitution or by legislation, it is impossible to lay down many general principles of universal application. . . .

Two general methods of providing for the participation of the localities in the work of administration have been adopted. By the one all the duties to be performed by the localities, both as agents of the central government and as local governmental organizations, are fixed in detail by the legislature of the central government. . . .

The other method of permitting localities to participate in the work of administration depends upon clearly distinguishing between that administrative work which needs central regulation and that which can with advantage be intrusted to the localities. The delimitation of a sphere of local action is accomplished by the determination of those matters which need for their efficient treatment uniformity in administrative action, and which should therefore be attended to by the central administration. What is left after the subtraction of these matters from the whole sphere of administration constitutes the sphere of local administrative action. . . .

As a result of these arrangements which we find in all countries, the details offering considerable variety, we conclude that not only is the function of administration largely separated from the functions of legislation and the rendering of judicial decision, and intrusted in most cases to special authorities, but also that these special administrative authorities are in all states of two kinds, *viz.*, central and local, while in some states the local authorities may further be subdivided into commonwealth and local authorities.

317. Division of powers in the United States. Nowhere has the subdivision of governmental powers been carried further than in the American federal system.

The second great American principle of government is the division of powers between the nation and the commonwealths, and within a commonwealth between the state and local authorities. The fundamental principle of our federal government is that the inherent sovereign powers in the community are normally exercised through the state governments, and therefore that any residuum of power is left to the states and not to the Union. Under our system of fixed and rigid constitutions, the division of powers is expressed, first, in the federal constitution, and then in the state constitutions; and disputed questions must usually be decided by the courts. Therefore, if we wish to know what in practice are the limits between national and state powers, and also between powers exercised directly by the states and indirectly by the local governments springing from the states, we must search the recorded judicial decisions.

To the national government, and hence to the national officials, are committed the immense powers of war and peace, finances for national purposes, foreign relations, control over all territory not actually organized as states and over all commerce which does not begin and end within the boundaries of a single commonwealth.

The larger body of legislation is left to the states, which regulate most of the relations of individual to individual, which create and regulate

corporations, which have control of property rights, land tenure, inheritances, education, and religion, supervise by far the greater volume of all business and commerce, administer almost the whole of criminal law, and care for the weak and dependent. In most respects the states come nearer to the individual than does the federal government.

Local governments are less separated from the state governments than the states from the national government, because their form is entirely dependent upon easily alterable state legislation; but the habits of the people are such that all the states practically concede to the localities and to the cities the immediate personal care of the population. In their hands are the streets, water, lighting, education to a large degree, many dependent classes, local transportation, and the maintenance of public order.

To sum up, questions of health, cleanliness, and morality, the questions which most closely and most frequently touch the individual, are given to the local governments; business and criminal relations to the states; national defense and foreign relations to the nation. The national control of foreign and interstate commerce makes the division of commercial powers indefinite and disputed.

318. Expansion of federal power in the United States. The difference between the theory of division of powers in the United States constitutional system, and the actual expansion of the national government in practice is brought out by Wilson.[1]

For all practical purposes the national government is supreme over the state governments, and Congress predominant over its so-called coordinate branches. Whereas Congress at first overshadowed neither President nor federal judiciary, it now on occasion rules both with easy mastery and with a high hand; and whereas each State once guarded its sovereign prerogatives with jealous pride, and able men not a few preferred political advancement under the governments of the great commonwealths to office under the new federal Constitution, seats in state legislatures are now no longer coveted except as possible approaches to seats in Congress; and even governors of States seek election to the national Senate as a promotion, a reward for the humbler services they have rendered their local governments.

What makes it the more important to understand the present mechanism of national government, and to study the methods of congressional rule in a light unclouded by theory, is that there is plain evidence that the expansion of federal power is to continue, and that there exists, consequently, an evident necessity that it should be known just what to do

[1] By permission of Houghton Mifflin Company.

and how to do it, when the time comes for public opinion to take control of the forces which are changing the character of our Constitution. There are voices in the air which cannot be misunderstood. The times seem to favor a centralization of governmental functions such as could not have suggested itself as a possibility to the framers of the Constitution. Since they gave their work to the world the whole face of that world has changed. The Constitution was adopted when it was six days' hard traveling from New York to Boston; when to cross East River was to venture a perilous voyage; when men were thankful for weekly mails; when the extent of the country's commerce was reckoned not in millions but in thousands of dollars; when the country knew few cities, and had but begun manufactures; when Indians were pressing upon near frontiers; when there were no telegraph lines, and no monster corporations. Unquestionably, the pressing problems of the present moment regard the regulation of our vast systems of commerce and manufacture, the control of giant corporations, the restraint of monopolies, the perfection of fiscal arrangements, the facilitating of economic exchanges, and many other like national concerns, amongst which may possibly be numbered the question of marriage and divorce; and the greatest of these problems do not fall within even the enlarged sphere of the federal government; some of them can be embraced within its jurisdiction by no possible stretch of construction, and the majority of them only by wresting the Constitution to strange and as yet unimagined uses. Still there is a distinct movement in favor of national control of all questions of policy which manifestly demand uniformity of treatment and power of administration such as cannot be realized by the separate, unconcerted action of the States; and it seems probable to many that, whether by constitutional amendment, or by still further flights of construction, yet broader territory will at no very distant day be assigned to the federal government.

319. Division of powers in the German Empire. The nature of the distribution of authority between imperial and commonwealth organs in Germany is as follows:[1]

The German Empire is not a league of princes. It is a State constructed out of States. In becoming a member of the *Bund* each several State gave up its sovereignty, receiving therefor, as Bismarck expressed it, a "share in the joint sovereignty of the Empire." Since there can be no limitation of sovereignty and no division of it, these States are not sovereign "in their own sphere." But the individual State takes a part in

[1] Copyright, 1906, by The Macmillan Company.

forming the power that stands over it. The German States are not subjected to the domination of any one of them, nor to any foreign sovereign, but rather to a corporate State builded out of themselves. "The German States are as a totality sovereign." Sovereignty, according to the German jurists, is not an essential element of a State. It may constitute the basis of recognition in international law, but from the standpoint of constitutional law it is an insufficient test of statehood. The true mark of a State consists in its possession of original and underived power. This mark belongs to each of the German States. There is a large field in which the State is left free to govern itself. The powers of the Empire are specifically defined. It may enlarge those powers, but until it does the State enjoys a free hand. This independence is not granted to it by the Empire. It forms no part of the imperial powers. It is State power, pure and simple. The State wields it as of right and not by concession. It existed before the founding of the Empire. It survives that act. It is that autonomous area of power belonging to the State which has not yet been invaded by the Empire. . . .

By Art. 4 of the Imperial Constitution the Empire is given the power of supervision and legislation with reference to a number of matters which affect more or less the general interests of the country. In all such matters the action of the States is excluded and their power is renounced in favor of the *Bund*. The field covered by imperial legislation and oversight is quite extensive. . . .

What, then, remains as the exclusive field of State legislation? Every State has the absolute control of its own organization. It determines the laws of succession and settles questions which arise over its internal administration in accordance with its own constitution. It has the right to determine what that constitution shall be, subject only to the condition that there shall be nothing in its organic law that is contrary to the Imperial Constitution. It makes its own budget and its legislative bodies enact laws governing a large part of its internal affairs. Police regulations touching public meetings; fire and building regulations; water rights; road laws, so far as these do not fall within the competence of the Empire; matters of ordinary credit not represented by the banks; the regulation of the domestic agricultural situation; the breeding of cattle; forestry; mines; hunting and fishing; the relation of church and state; the control of public instruction — all these matters fall within the competence of the individual State, and are provided for by State legislation. . . .

Turning to the executive sphere, we find a wholly different principle at work. In the division of competence between the Empire and the several States, a strong unitary tendency is seen. In matters of military

control, naval affairs, and of justice, the legislative authority is taken wholly from the States and is vested in the Empire. In finance about two thirds, and in affairs touching the internal administration of the country about one half, are removed from State legislation. . . .

In matters pertaining to foreign affairs, however, as well as in regard to the navy and fortifications, the control of the Empire is quite supreme. Here the Empire exercises not alone the legislative authority, but the administrative as well. The ambassadors to foreign lands are imperial officers, while the consuls and officials in the protectorates are imperial appointees. . . .

With regard to the army there is a dual arrangement. The authority of the Empire goes farther than the mere right of oversight. It regulates directly all the activity of the officers in command. On the other hand, the subordinate officers are under the control of the several States and the whole system of military organization, instruction, religious care, and justice is left in their hands. . . .

So far as the execution of the laws is concerned, the powers of the individual States exceed that of the Empire, and in the division of competence the federal principle is strongly carried out. The Empire has but a fragment of the general executive powers, save in the matter of foreign affairs. It is practically excluded from the judicial, financial, and internal administration. In the German Empire we have a strongly unitarian power to legislate joined to a strongly federal power to execute.

CHAPTER XVIII

THE LEGISLATURE

I. Structure of Legislatures

320. Development of the lawmaking department. The general process through which the modern representative legislature developed has been summarized as follows:

As the wealth and population of a state increase, it becomes more and more difficult to govern along autocratic lines. Numerous interests arise which do not receive adequate attention from the rulers; men whose capacity and attainments deserve recognition are slighted, and the private interests of ruling classes absorb most of their energy, to the neglect of public interests. Under such conditions there are historically several possibilities of action:

(1) The *status quo* may be maintained and discontent suppressed by force, in which case the state would probably slowly decay until absorbed by some rival after defeat in war.

(2) A system of decentralization may be encouraged, and each important province be allowed to regulate its own affairs subject to general supervision and tribute, the provinces being held together by mutual interests.

(3) The central authority may retain its power but gradually develop a system of representation whereby important interests and persons may receive due recognition.

This last possibility involves a national application of the idea contained in the organization of a primitive horde or village community. All interests and persons of importance were included in the small gatherings of these early groups. Even in confederate tribal life the idea had survived in the periodic gatherings of heads of tribes and districts to administer general business. So in the assemblies of the city states of the classic period, every important citizen was able to make his influence felt in the assembly if he were so inclined. The difficulty was to apply the principle to a great national system, and no ancient state ever proved equal to the emergency. Local representation was

common enough, and representation of privileged classes in great councils was known, but no system was devised whereby the interests of all the people might be represented in government.

Through a series of events natural enough in themselves, there developed in England during the thirteenth century an assembly of delegates who represented the common people and petty nobility, as distinguished from the usual assembly of the higher nobility and clergy. Such an assembly was by no means an anomaly at that time. A rude form of representation existed among the Scandinavian people as early as the ninth century. About the tenth century the Icelandic Althing and the Tynwald of the Isle of Man (which still survives) were established. These were made up of elected delegates who prepared laws, which were promulgated as the law of the land. Similar bodies may be traced in other countries of Europe, but they did not attain political importance. The English assembly came when that country was breaking away from agriculture and developing commerce and manufactures, and when kings, ever engaged in war or the suppression of rebellion, were forced to rely more and more upon the support of the common people and on taxes raised from urban centers. So constantly was the king in need of money grants and military support, that the first two hundred years of the history of the assembly of the commons marked an almost steady growth in its power and prestige. During the sixteenth century the historic council of nobles and clergy, who formed the house of lords, was relatively weak. This was due to its depletion in numbers owing to the civil wars and to the nationalization of the church, which deprived that body of much of its power and representation. In consequence the two houses during the Tudor period were fairly equal, and were firmly welded together into a parliament. The rapid development of commerce and manufactures under the Tudors and Stuarts (1485–1688) gradually transferred the balance of power from the lords to the commons as the representatives of these interests, and the rise of England to world supremacy in the nineteenth century made the commons supreme in governmental policy.

The political importance of this development lies in the fact that it revolutionized men's notions of governmental machinery. The ancient principle of governing through privileged classes, basing their claims on noble birth and landed wealth, was superseded by a system of government through persons who represented all the important interests of the state, and who had influence in proportion to the weight of interests and the proportion of the population they represented. The economic advantages of such a system were so plainly manifest that other nations found it expedient to imitate it, modifying the English system to suit

their own peculiar needs. In this way developed the modern bicameral legislative body, the center and pivot of the modern democratic movement.

321. General principles of legislative organization. Burgess, analyzing the legislative departments of France, Germany, England, and the United States, finds substantial agreement on the following points:

1. We may say that modern constitutional law has settled firmly upon the bicameral system in the legislature, with substantial parity of powers in the two houses, except in dealing with the budget; and that, in the control of the finances, a larger privilege is regularly confided to the more popular house; *i.e.* the house least removed in its origin from universal suffrage and direct election. . . .

2. These four typical states are in substantial harmony upon the question of the source from which the lower houses of their legislatures proceed. In all four, the source is universal suffrage, or a suffrage very nearly universal. . . .

The four systems which we have examined agree also in the mode of electing the members of the lower houses, at least so far as the general principles are concerned. These general principles are direct ballot, district ticket and relative majority. . . .

In the construction of the upper houses, however, the same uniformity does not exist. No two of them proceed from the same immediate source. It may be said, however, that they all proceed from the same ultimate source. . . . The manner of their choice is, in all cases, indirect. . . .

3. In regard to the principles of representation, there is more harmony in these four systems than is at first apparent. In all four legislatures the distribution of the representation in the lower houses is made according to population. Some regard is paid to the permanent administrative or local governmental divisions; but the resultant modifications are concessions to convenience, merely, and do not represent any compromise of the principle of proportionality.

In all four legislatures the distribution of the representation in the upper houses is made with but little regard to the census of the population. In England and in the United States, no regard at all is paid to the principle of proportionality; in Germany, not much; in France, considerable. If there is any one controlling principle applicable to all these cases, it is the representation of local governmental organizations. . . .

Lastly, all four of these typical constitutions agree substantially upon the principle of uninstructed representation. The contrary principle is adopted in but a single case, *viz.*; in that of the German Federal Council.

322. Advantages of the bicameral system. The idea of a law-making body composed of two chambers has been almost universally accepted. The following extract indicates some of the reasons for its success:

The advantages of a second chamber may be summarized as follows: First, it serves as a check upon hasty, rash, and ill-considered legislation. Legislative assemblies are often subject to strong passions and excitements and are sometimes impatient, impetuous, and careless. The function of a second chamber is to restrain such tendencies and to compel careful consideration of legislative projects. It interposes delay between the introduction and final adoption of a measure and thus permits time for reflection and deliberation. . . .

In the second place, the bicameral principle not only serves to protect the legislature against its own errors of haste and impulse, but it also affords a protection to the individual against the despotism of a single chamber. The existence of a second chamber is thus a guarantee of liberty as well as to some extent a safeguard against tyranny. . . .

A third advantage of the bicameral system is that it affords a convenient means of giving representation to special interests or classes in the state and particularly to the aristocratic portion of society, in order to counterbalance the undue preponderance of the popular element in one of the chambers, thus introducing into the legislature a conservative force to curb the radicalism of the popular chamber. . . .

The bicameral system also affords a means of giving separate representation to the somewhat dissimilar interests of capital and labor. . . .

Finally, the bicameral system affords an opportunity, in states having the federal form of government, of giving representation to the political units composing the federation.

323. Apportionment of representatives in the United States. After the census of 1900 the following act fixed the number of members in the House of Representatives and apportioned them among the commonwealths:[1]

An Act making the apportionment of Representatives in Congress among the several States under the Twelfth Census.

[1] The admission of Oklahoma in 1907 added five members to the House.

Be it enacted . . . That after the third day of March, nineteen hundred and three, the House of Representatives shall be composed of three hundred and eighty-six members to be apportioned among the several States as follows:

Alabama 9; Arkansas 7; California 8; Colorado 3; (etc.).

SECTION 2. That whenever a new State is admitted to the Union the Representative or Representatives assigned to it shall be in addition to the number three hundred and eighty-six.

SECTION 3. That in each State . . . the number to which such State may be entitled in the Fifty-eighth and each subsequent Congress shall be elected by districts composed of contiguous and compact territory containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State shall be entitled in Congress, no one district electing more than one Representative.

SECTION 4. That in case of an increase in the number of Representatives which may be given any State under this apportionment, such additional Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until the legislature of such State in the manner herein prescribed shall redistrict such State; . . . and if the number hereby provided for shall in any State be less than it was before . . . then the whole number . . . shall be elected at large unless the legislatures of said States have provided or shall otherwise provide before the time fixed by law for the next election of Representatives therein.

324. Advantages and disadvantages of indirect election. Indirect election, in frequent use for selecting at least one legislative chamber, has the following advantages:

The principal argument in favor of the system of indirect election is that it eliminates to some extent, as has been said, the evils of universal suffrage by confining the ultimate choice to a body of select persons possessing a higher average of ability and necessarily feeling a keener sense of responsibility. Moreover, it tends to diminish the evils of party passion and struggle by removing the object of the popular choice one degree and confining the function of the electorate as a whole to the choice of those upon whom the ultimate responsibility must rest. "This contrivance," says John Stuart Mill,[1] "was probably intended as a slight impediment to the full sweep of popular feeling; giving the suffrage and with it the complete ultimate power to the many, but compelling

[1] "Representative Government," chap. ix, p. 180.

them to exercise it through the agency of a comparatively few, who, it was supposed, would be less moved than the Demos by the gust of popular passion. . . ." But experience with the indirect system of election has never worked out in practice satisfactorily. . . .

Where the party system is well developed, the indirect scheme is likely to degenerate into a cumbrous formality, since the intermediate electors will be chosen under party pledges to vote for particular candidates. . . . Manifestly, whatever may be the advantages of indirect election, a suffrage which limits the power of the voter merely to the selection of those who are to choose instead of those who are to represent him will not satisfy the masses in the present state of the world's opinion concerning the nature of representative government. The idea is out of harmony with the spirit of modern democracy. One of the chief merits of popular government comes from the fact that it stimulates interest in public affairs and increases the political intelligence of the masses. If a middleman is interposed between the voter and the object of his choice, his interest is necessarily diminished and his opportunity for political education weakened. Finally, the indirect system tends to increase the evils of bribery, because the ultimate electoral body is much less numerous and consequently more easily reached by corrupt influences than the whole mass of voters.

325. Results of election by majority in France. The evil results caused by the French law requiring an absolute majority for election to the Chamber of Deputies are thus stated by Wilson:

The law governing the election of Deputies provides against choice by plurality on the first ballot; and the result is unfortunate. If there are more than two candidates in an electoral district, an election on the first ballot is possible only if one of the candidates receives an absolute majority of all the votes cast not only, but also at least one fourth as many votes as there are registered voters in the district. If no one receives such a majority, another vote must be taken two weeks later, and at this a plurality is sufficient to elect. The result is, that the multiplication of parties, or rather the multiplication of groups and factions within the larger party lines, from which France naturally suffers overmuch, is directly encouraged. Rival groups are tempted to show their strength on the first ballot in an election, for the purpose of winning a place or exchanging favor for favor in the second. They lose nothing by failing in the first; they may gain concessions or be more regarded another time by showing a little strength; and rivalry is encouraged, instead of consolidation. France cannot afford to foster factions.

II. Comparative Power of the Two Houses

326. Relations of the two Houses in the United States. Bryce discusses the general nature of the two American Houses and their attitude to each other as follows:[1]

The respective characters of the two bodies are wholly unlike those of the so-called upper and lower chambers of Europe. In Europe there is always a difference of political complexion, generally resting on a difference in personal composition. There the upper chamber represents the aristocracy of the country, or the men of wealth, or the high officials, or the influence of the Crown and Court; while the lower chamber represents the multitude. Between the Senate and the House there is no such difference. Both equally represent the people . . . both have been formed by the same social influences: and the social pretensions of a senator expire with his term of office. Both are possessed by the same ideas, governed by the same sentiments, equally conscious of their dependence on public opinion. The one has never been, like the English House of Commons, a popular pet, the other never, like the English House of Lords, a popular bugbear. . . .

The real differences between the two bodies have been indicated in speaking of the Senate. They are due to the smaller size of the latter, to the somewhat superior capacity of its members, to the habits which its executive functions form in individual senators, and have formed in the whole body. . . .

Collisions between the two Houses are frequent. Each is jealous and combative. Each is prone to alter the bills that come from the other; and the Senate in particular knocks about remorselessly those favorite children of the House, the appropriation bills. The fact that one House has passed a bill goes but a little way in inducing the other to pass it. The Senate would reject twenty House bills as readily as one. Deadlocks, however, disagreements over serious issues which stop the machinery of administration, are not common. . . .

When each chamber persists in its own view, the regular proceeding is to appoint a committee of conference, consisting of three members of the Senate and three of the House. These six meet in secret, and generally settle matters by a compromise, which enables each side to retire with honor. . . .

In a contest the Senate usually, though not invariably, gets the better of the House. It is smaller, and can therefore more easily keep its majority together; its members are more experienced; and it has the

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great advantage of being permanent, whereas the House is a transient body. The Senate can hold out, because if it does not get its way at once against the House, it may do so when a new House comes up to Washington. The House cannot afford to wait, because the hour of its own dissolution is at hand. Besides, while the House does not know the Senate from inside, the Senate, many of whose members have sat in the House, knows all the "ins and outs" of its rival, can gauge its strength and play upon its weaknesses.

327. The House of Lords and money bills. The following discussion of the authority of the House of Lords over finance is especially pertinent in view of the recent crisis over the Budget in England:[1]

Since the House of Lords is a coördinate branch of the legislature, every act of Parliament requires its assent, and although in practice it is far less powerful than the House of Commons, the only subject on which the limitations of its authority can be stated with precision is that of finance. As far back as 1671 the Commons resolved "That, in all aids given to the King, by the Commons, the Rate or Tax ought not to be altered by the Lords"; and in 1678 they adopted another resolution that all bills granting supplies "ought to begin with the Commons. And 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; which ought not to be changed, or altered by the House of Lords." The Commons have clung to this principle ever since, enforcing it by a refusal to consider bills in which the Lords have inserted or amended financial provisions; and although the Lords have never expressly admitted the claim, they have in fact submitted to it. . . .

It might be supposed that the Commons could carry any piece of legislation by tacking it to a money bill. This was formerly done; but the Lords have long had a standing order forbidding such a practice, and no attempt has been made of late years to revive it. Moreover the rule about money bills is not strictly enforced where the financial provision is merely incidental to general legislation. The Lords are free to omit such a clause altogether, or if it is so interwoven with the rest of the measure that it cannot be treated separately, the Commons have often waived their rights and taken into consideration amendments made by the Lords. . . .

The rule about money bills applies only to measures actually before Parliament. It does not prevent the House of Lords from expressing

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an opinion upon financial matters either in debate or by resolution, or from inquiring into them by means of select committees.

328. Nature of the German "Bundesrath." Lowell describes as follows the unique position of the German upper House:[1]

The Bundesrath is in its nature unlike any other body in the world, and its peculiarities can be explained only by a reference to the Diet of the old Germanic Confederation. It is not an international conference, because it is part of a constitutional system, and has power to enact laws. On the other hand, it is not a deliberative assembly, because the delegates vote according to instructions from home. It is unlike any other legislative chamber, inasmuch as the members do not enjoy a fixed tenure of office, and are not free to vote according to their personal convictions. Its essential characteristics are that it represents the governments of the States and not their people, and that each State is entitled to a certain number of votes which it may authorize one or more persons to cast in its name, these persons being its agents, whom it may appoint, recall, or instruct at any time. The true conception of the Bundesrath, therefore, is that of an assembly of the sovereigns of the States, who are not, indeed, actually present, but appear in the persons of their representatives.

III. Internal Organization and Procedure

329. General method of legislation. In comparing legislative procedure in France, Germany, England, and the United States, Burgess finds the following general similarities and differences:

Upon this subject, or at least upon its main features, the four systems under examination are in substantial harmony. They agree in conferring the initiation of legislation upon each house; in requiring the approval of both houses to the validity of a project; in making the vote of a majority of the members voting upon the project, a quorum being present, necessary and sufficient; and in according to the executive certain influence and power upon the course of legislation. These are the general principles. . . .

The exceptions are as follows. In all these systems, except the German, the initiation of financial legislation is vested, wholly or partly, exclusively or primarily, in the lower houses. In the German Federal Council certain bills cannot be passed without the consent of the Prussian representatives, and certain other bills cannot be passed without

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the consent of the commonwealth particularly affected. In the French Senate a majority of the whole number of voices to which the body is legally entitled must vote upon the project in order to effect its passage. . . .

Upon the general principle of executive participation all these systems are in accord; but they differ as to the manner of the participation. The English system legally vests both the initiation and the veto of legislation in the executive; in practice the initiation is almost exclusive, but there is no veto. The system of the United States vests in the executive a limited veto, but no initiation. The French system vests in the executive a right of initiation and power to require reconsideration. In Germany, neither initiation or veto is directly vested in the Emperor; but in his quality of Prussian King, he exercises both powers indirectly — a general power of initiation and a partial veto.

330. Procedure in the House of Lords. Because of its peculiar position in the English constitutional system, the procedure in the House of Lords is less rigid than in most legislative bodies.[1]

The Lords have no constituents to impress, and hence there are not so many members as in the Commons who want to take part in debate. Moreover, they are not obliged to devote a large part of their time to supply and to the budget; and as their chamber is not the place where the great political battles are fought, the Opposition does not oppose at every possible step. They can, therefore, get through their work at leisure. They make use, indeed, of select and sessional committees in much the same way as the Commons; but, having time enough to consider every bill in Committee of the Whole, they do not need time-saving machinery like the Standing Committees on Law and Trade. For the same reason, and because there is no disposition to willful obstruction, they do not require and do not have a closure to cut off debate. Their sittings also are short. On Wednesday and Saturday they seldom meet at all, while on other days their usual hour of meeting is half-past four, and they rarely sit after dinner time.

On the other hand, the very fact that the fate of ministers does not hang upon their votes renders possible a much larger freedom of action than in the Commons. There is not the same need of precaution against hasty, ill-considered motions, or against votes that might embarrass the government without implying a real lack of confidence. Hence there is no restriction upon the motions that can be brought forward, save that notice must be given beforehand; and any question to a minister may be followed by a general debate, provided again that notice of the question has been given in the orders of the day.

[1] Copyright, 1908, by The Macmillan Company.

331. Seating of members in the House of Commons. The arrangement in the House of Commons lends itself to the continuous existence of two rival party groups.

Down the center of the hall in which the House sits runs a very broad aisle. The Speaker's seat stands, upon an elevated place, at the farther end of this aisle, and below it are the seats and tables of the clerks and a great table stretching some distance down the aisle, for the reception of the Sergeant's mace and various books, petition boxes, and papers. The benches on either side of the aisle face each other. Those which rise, in tiers, to the Speaker's right are occupied by the majority, the Cabinet ministers, their leaders, sitting on the front bench by the great table. This front bench is accordingly called the "Treasury Bench," — the Treasury being the leading Cabinet office. On the benches which rise to the Speaker's left sit the minority, their leaders also (the "leaders of the Opposition," — the minority being expected, generally with reason, to be opposed to all ministerial proposals) on the front bench by the table, and so directly facing the ministers, only the table intervening.

332. The French Chamber a tumultuous body. The lower House in France has acquired a reputation for disorder and noisy debate.[1]

Every large body of men, not under strict military discipline, has lurking in it the traits of a mob, and is liable to occasional outbreaks when the spirit of disorder becomes epidemic; but the French Chamber of Deputies is especially tumultuous, and, in times of great excitement, sometimes breaks into a veritable uproar. Even the method of preserving order lacks the decorum and dignity that one expects in a legislative assembly. The President has power to call a refractory member to order and impose a penalty in case he persists; but instead of relying on this alone, he often tries to enforce silence by caustic remarks. The writer remembers being in the Chamber a few years ago when M. Floquet was presiding, — the same man who fought a duel with General Boulanger and wounded him in the throat. A deputy who had just been speaking kept interrupting the member who was addressing the Chamber, and when called to order made some remark about parliamentary practice. The President cried out, "It is not according to parliamentary practice for one man to speak all the time." "I am not speaking all the time," said the deputy. "At this moment you are overbearing everybody," answered the President. This incident is related,

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not as being unusual or humorous, but as a fair sample of what is constantly occurring in the Chamber. Even real sarcasm does not seem to be thought improper. Thus in a recent debate a deputy, in the midst of an unusually long speech, was continually interrupted, when the President, Floquet, exclaimed, "Pray be silent, gentlemen. The member who is speaking has never before approached so near to the question." These sallies from the chair are an old tradition in France, although, of course, their use depends on the personal character of the President. One does not, for example, find them at all in the reports of debates during the time Casimir-Perier was presiding over the Chamber. When the confusion gets beyond all control, and the President is at his wits' end, he puts on his hat, and if this does not quell the disturbance, he suspends the sitting for an hour in order to give time for the excitement to subside.

333. Interpellations in the French Chamber of Deputies. The following describes a form of procedure of grave importance in the French legislative system:

. . . questions are addressed to the ministers by members who really want information. But another kind of question has also developed, which is used not to get information, but to call the cabinet to account, and force the Chamber to pass judgment upon its conduct. This is the interpellation. In form it is similar to the question, but the procedure in the two cases is quite different. A question can be addressed to a minister only with his consent, whereas the interpellation is a matter of right, which any deputy may exercise, without regard to the wishes of the cabinet. . . . But by far the most important difference consists in the fact that the author of the question can alone reply to the minister, no further discussion being permitted, and no motion being in order, while the interpellation is followed both by a general debate and by motions. These are in the form of motions to pass to the order of the day, and may be orders of the day pure and simple, as they are called, which contain no expression of opinion, or they may be what are termed orders of the day with a motive, such as "the Chamber, approving the declarations of the Government, passes to the order of the day." Several orders of this kind are often moved, and they are put to the vote in succession. The ministers select one of them (usually one proposed by their friends for the purpose), and declare that they will accept that. If it is rejected by the Chamber, or if a hostile order of the day is adopted, and the matter is thought to be of sufficient importance, the cabinet resigns. This is a very common way of upsetting a ministry,

but it is one which puts the cabinet in a position of great disadvantage, for a government would be superhuman that never made mistakes, and yet here is a method by which any of its acts can be brought before the Chamber, and a vote forced on the question whether it made a mistake or not. Moreover, members of the opposition are given a chance to employ their ingenuity in framing orders of the day so as to catch the votes of those deputies who are in sympathy with the cabinet, but cannot approve of the act in question. . . .

The frequency with which interpellations are used to upset the cabinet may be judged by the fact that out of the twenty-one ministries that have resigned in consequence of a vote of the Chamber of Deputies since the cabinet has been responsible, ten have fallen on account of orders of the day moved after an interpellation, or in the course of debate. . . .

The large part that interpellations play in French politics is shown by the fact that they arouse more popular interest than the speeches on great measures; and, indeed, the most valuable quality for a minister to possess is a ready tact and quick wit in answering them.

334. Organization of the German "Reichstag." The German lower House chooses its officers as follows:

The initial constitution of a newly elected *Reichstag* is interesting. It comes to order under the presidency of the oldest member; it then elects its president, two vice presidents, and secretaries; the president and vice presidents for a term of only four weeks. At the end of these four weeks a president and vice presidents are elected for the rest of the session. There is no election of officers for the whole legislative term, as in England and the United States: at the opening of each annual session a new election takes place. It is only at the first, however, that there is a, so to say, experimental election for a trial term of four weeks.

335. The Speaker of the House of Representatives. The following extract discusses the general nature of this office, one which is at present the source of much controversy in the United States:[1]

In the beginning of our federal government the Speaker was regarded as a mere moderator, but as the House grew in size and the business to be transacted increased enormously, it became impossible for him to sit passively and see the measures of his party delayed or defeated by the dilatory tactics of the minority. Hence it has come about that the

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Speaker is now a party leader holding the minority in such control as will enable the majority to carry its principal measures. . . .

The Speaker, according to constitutional law, is chosen by the House of Representatives, but in fact he is selected at a caucus of the majority party, and the House merely ratifies the selection. The office always falls to some member of long service who has had not only an opportunity to master the intricate details of parliamentary procedure, but also has learned the fine art of political manipulation — of securing support, skillfully distributing favors, and thwarting opposition. . . . Nevertheless, he is in a very real sense a party leader and the success of his party at elections depends in a considerable measure on his policy and conduct in office.

The elements of control in the hands of the Speaker are undoubtedly powerful. He appoints, as we have seen, the committees of the House and names the chairman of each (except the rules committee, which was made elective on March 19, 1910, and authorized to choose its own chairman); until that date he was ex-officio chairman of the committee on rules, which directs a considerable portion of the business of the House, but at that time the House resolved to remove the Speaker from that committee; he may refuse to put dilatory motions; he may recognize whomsoever he pleases on the floor of the House; and he decides questions of parliamentary procedure subject to appeals from his decisions.

336. Committees in the House of Representatives. Probably in no legislative body are committees of so much importance as in the lower chamber in the United States.

The House has so many standing committees that every representative is a member of one or another of them, — but many of the committees have little or nothing to do. Some of them, though still regularly appointed, have no duties assigned to them by the rules. One of the most important committees is that on Appropriations, which has charge of the general money-spending bills introduced every year to meet the expenses of the government, and which, by virtue of its power under the rules to bring its reports to the consideration of the House at any time, to the thrusting aside of whatever matter, virtually dominates the House by controlling its use of its time. Special appropriation bills, which propose to provide moneys for the expenses of single departments, — as, for example, the Navy Department or the War Department, — are, by a recent rule of the House, taken out of the hands of the Committee on Appropriations and given to the committees on the special departments concerned. Scarcely less important than the Committee on

Appropriations, though scarcely so busy as it, is the Committee on Ways and Means, which has charge of questions of taxation. It is, of course, to the appointment of such committees that the Speaker pays most attention. Through them his influence is most potent.

Some members of the House are considered to be entitled, because of their long service and experience in Congress, to be put on important committees, and on every committee there must, by imperative custom, be representatives of both parties in the House. But these partial limitations upon the Speaker's choice do not often seriously hamper him in exercising his preferences.

337. Results of the committee system in the House of Representatives. Bryce criticizes the power of committees in the American system as follows:[1]

It destroys the unity of the House as a legislative body. Since the practical work of shaping legislation is done in the committees, the interest of members centers there, and they care less about the proceedings of the whole body. . . .

It prevents the capacity of the best members from being brought to bear upon any one piece of legislation, however important. . . .

It cramps debate. . . .

It lessens the cohesion and harmony of legislation. Each committee goes on its own way with its own bills just as though it were legislating for one planet and the other committees for others. . . .

It gives facilities for the exercise of underhand and even corrupt influence. In a small committee the voice of each member is well worth securing, and may be secured with little danger of a public scandal. . . .

It reduces responsibility. . . .

It lowers the interests of the nation in the proceedings of Congress. Except in exciting times, when large questions have to be settled, the bulk of real business is done not in the great hall of the House but in this labyrinth of committee rooms and the lobbies that surround them. . . .

The country of course suffers from the want of the light and leading on public affairs which debates in Congress ought to supply. . . .

It throws power into the hands of the chairmen of committees, especially, of course, of those which deal with finance and with great material interests. . . .

It enables the House to deal with a far greater number of measures and subjects than could otherwise be overtaken; and has the advantage

[1] By permission of The Macmillan Company.

of enabling evidence to be taken by those whose duty it is to reshape or amend a bill. . . .

It sets the members of the House to work for which their previous training has fitted them much better than for either legislating or debating "in the grand style." They are shrewd, keen men of business, apt for talk in committee, less apt for wide views of policy and elevated discourse in an assembly. . . .

On the whole, it may be said that under this system the House dispatches a vast amount of work and does the negative part of it, the killing off of worthless bills, in a thorough way.

338. The "previous question" in the House of Representatives. One of the most effective rules developed for the purpose of controlling debate is described in the following:

The great remedy against prolix or obstructive debate is the so-called previous question, which is moved in the form, "shall the main question be now put?" and when ordered closes forthwith all debate, and brings the House to a direct vote on that main question. On the motion for the putting of the main question no debate is allowed; but it does not destroy the right of the member "reporting the measure under consideration" from a committee, to wind up the discussion by his reply. This closure of the debate may be moved by any member without the need of leave from the Speaker, and requires only a bare majority of those present. When directed by the House to be applied in committee, for it cannot be moved after the House has gone into committee, it has the effect of securing five minutes to the mover of any amendment, and five minutes to the member who first "obtains the floor" (gets the chance of speaking) in opposition to it, permitting no one else to speak. A member in proposing a resolution or motion usually asks at the same time for the previous question upon it, so as to prevent it from being talked out.

Closure by previous question is in almost daily use, and is considered so essential to the progress of business that I never found any member or official who thought it could be dispensed with. Even the senators, who object to its introduction into their own much smaller chamber, agree that it must exist in a large body like the House. To the inquiry whether it was abused, most of my informants answered that this rarely happened. This is attributed to the fear entertained of the disapproval of the people, and to the sentiment in the House itself in favor of full discussion, which sometimes induces the majority to refuse the previous question when demanded by one of their own party, or on behalf of a motion which they are as a whole supporting.

IV. Functions of Legislatures

339. Proper functions of lawmaking bodies. The danger of overlegislation and some other functions which lawmaking bodies may perform to advantage are indicated in the following:[1]

The political philosopher of these days of self-government has, however, something more than a doubt with which to gainsay the usefulness of a sovereign representative body which confines itself to legislation to the exclusion of all other functions. Buckle declared, indeed, that the chief use and value of legislation nowadays lay in its opportunity and power to remedy the mistakes of the legislation of the past; that it was beneficent only when it carried healing in its wings; that repeal was more blessed than enactment. And it is certainly true that the greater part of the labor of legislation consists in carrying the loads recklessly or bravely shouldered in times gone by, when the animal which is now a bull was only a calf, and in completing, if they may be completed, the tasks once undertaken in the shape of unambitious schemes which at the outset looked innocent enough. Having got his foot into it, the legislator finds it difficult, if not impossible, to get it out again. . . .

Legislation unquestionably generates legislation. Every statute may be said to have a long lineage of statutes behind it; and whether that lineage be honorable or of ill repute is as much a question as to each individual statute as it can be with regard to the ancestry of each individual legislator. Every statute in its turn has a numerous progeny, and only time and opportunity can decide whether its offspring will bring it honor or shame. Once begin the dance of legislation, and you must struggle through its mazes as best you can to its breathless end, — if any end there be.

It is not surprising, therefore, that the enacting, revising, tinkering, repealing of laws should engross the attention and engage the entire energy of such a body as Congress. It is, however, easy to see how it might be better employed; or, at least, how it might add others to this overshadowing function, to the infinite advantage of the government. Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from the body which kept all national concerns suffused in a broad daylight of discussion. . . .

An effective representative body, gifted with the power to rule, ought, it would seem, not only to speak the will of the nation, but also to lead it to its conclusions, to utter the voice of its opinions, and to serve as its eyes in superintending all matters of government.

[1] By permission of Houghton Mifflin Company.

340. Difficulties preventing intelligent legislation. Some of the obstacles preventing wise lawmaking in modern large representative bodies are suggested in the following:

The shortcomings of our present system may be said to be lack of responsibility, lack of expert advice, and lack of principle.

1. *Responsibility.* We know how much our jurisprudence has gained through the system of written opinions published in reports, through which the work of every judge of an appellate court is subjected to the scrutiny of the legal profession. But how can the responsibility for a bad piece of legislation be brought home to any one?

Any member of the legislature may introduce any bill he pleases, and his doing so does not even necessarily mean that he assumes any responsibility for its form or contents. In the German reichstag it requires the support of fifteen members to introduce a bill that does not come from the government, and practically all privately initiated measures are backed by some political party. It has been suggested that it might be well to limit each member of a State legislature to a small number of bills, to induce him to exercise some care and discrimination. . . . The lobby as a recognized and regulated institution might be made to serve the same end. All this could be accomplished by rules of the legislature. The publication of bills in advance of their introduction would be even more desirable. . . .

2. *Expert Advice.* There are two distinct kinds of advice that the legislature stands in need of, the first as to the content of legislation, the second as to its legal form.

As to the first, the theory is that the legislature is acquainted with the circumstances and needs of the people, just as the old jury was presumed to know of all open and public occurrences within the county. But as a matter of fact, most of the information necessary for intelligent legislation cannot be acquired without special study or even special training. In the case of subjects generally recognized as technical the legislature naturally relies upon experts. . . . Where the subject to be legislated on is one not supposed to be technical, the legislature commonly acts upon the vaguest impressions, reflecting popular beliefs and prejudices. . . .

As regards the correct legal form of expressing the subject matter of legislative proposals, it is recognized that this is a task requiring technical learning. Giving due recognition to the large amount of painstaking legal work embodied in any volume of our session laws, and without magnifying the blunders that occur too frequently, it is obvious that a systematic plan of dealing with this aspect of legislation would bring a much-needed improvement. . . .

3. Intelligent legislation based upon expert advice may be expected in course of time to bring some remedy for the third of the defects that I have mentioned: *lack of principle.* By principle I understand the permanent and nonpartisan policy of justice in legislation, the observance of the limits of the attainable, the due proportion of means to ends, and moderation in the exercise of powers which by long experience has been shown to be wise and prudent, though it may be temporarily inconvenient or disappointing in the production of immediate results.

341. The powers of Congress in the United States. The following specific powers are granted to Congress by the Constitution. Much difference of opinion has existed regarding their strict or liberal construction.

The Congress shall have power:

1. 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;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post offices and post roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and,

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof.

342. Functions of the German "Bundesrath." Wilson outlines the wide range of services performed by the upper House in Germany.

The *Bundesrath* occupies a position in the German system in some respects not unlike that which the Roman Senate held in the government of Rome. It is, so to say, the residuary legatee of the constitution. All functions not specifically intrusted to any other constitutional authority remain with it, and no power is in principle foreign to its jurisdiction. It has a composite character, and is the presiding organ of the Empire. It is at one and the same time an administrative, a legislative, and a judicial body.

In its *legislative* capacity, it presides over the whole course of law-making. The *Reichstag* has the right to originate measures, but, as a matter of practice, originates very few. Most bills first pass the *Bundesrath* and go with its sanction to the *Reichstag*. If passed by the people's house, they are returned to the *Bundesrath* and there once more adopted. All the more important legislation, moreover, is framed by the imperial officials and presented to the *Bundesrath* by the Chancellor, who is not only president of the federal chamber but also chief of the Prussian delegation. . . .

The *administrative* function of the federal chamber may be summed up in the word *oversight*. It considers all defects or needs which discover

themselves in the administrative arrangements of the Empire in the course of the execution of the laws, and may, in all cases where that duty has not been otherwise bestowed, formulate the necessary regulation to cure such defects and meet such needs. It has, moreover, a voice in the choice of some of the most important officers of the imperial service. . . .

The *judicial* functions of the *Bundesrath* spring in part out of its character as the chief administrative council of the Empire. When acting as such a council, many of its conclusions partake of the nature of decisions of a supreme administrative court of appeal.

343. Danger of overlegislation in the United States. The following extract from a series of lectures delivered recently at Columbia University suggests an important problem. Many causes tend to multiply local and private bills in the United States, and an enormous amount of lawmaking results.

A chief danger in a democratic country like the United States is overlegislation. Our legislators are naturally ambitious to make a record before their constituents. Many individuals, corporations, or localities desire certain special privileges which may appear to be in their own interest but which may well be opposed to the general interest. There seems to be difficulty in placing a sufficient check upon the efforts of interested parties. On the other hand, however, we need to keep in mind the danger of general regulations, which tend to check individual initiative. Possibly nowhere else in the world, with the exception of some of the British colonies, are the conditions so favorable for securing individual initiative, for encouraging independent thinking and action, as in the United States. Indeed this may be looked upon as one of the chief excellencies, if not even the chief excellence of our political system. We need, therefore, to be extremely cautious about making laws which may restrict individual activity further than is necessary to protect the general public.

344. Impeachment. A peculiar function of legislatures, developed in England to meet conditions there and imitated later in other states, is that of impeachment.

The method of impeachment seems to have been necessary in England because the English law did not allow a civil or criminal suit to be brought against the highest officers of state except with extreme difficulty. It was thus developed mainly to fill up a gap in the judicial control. A further reason for its development is to be found in the impossibility of obtaining

a conviction of the great nobles before the ordinary courts and in the necessity of some means of legislative control in the days when the principle of the parliamentary responsibility of the ministers had not been developed. Since its development in England it has been adopted to some extent in almost all constitutional countries, and in some cases is made use of against not only the ministers but also all civil officers of the government.

CHAPTER XIX

THE EXECUTIVE

I. The Executive Head

345. Forms of executive organization. The main types of executive — hereditary and elective, actual and nominal — and the basis of this classification are concisely described in the following:[1]

From what has been said it will be seen that the divisions of executive into hereditary and elective, nominal and actual, lie crosswise of each other. A hereditary sovereign may be nominal, as in the case of the British king, or he may be an actual ruler, as is the king of Prussia. Similarly an elected executive such as the President of the United States is actual, while the president of the French Republic is only nominal. The distinction between nominal and virtual executives leads to the consideration of the most fundamental of all questions in regard to the executive, namely, its connection with the legislature. . . . The governments of modern states are divided between two rival systems of operation. Of these the one is commonly termed "parliamentary," "responsible," or "cabinet" government; the other, for which no satisfactory designation can be found, has been variously styled "nonresponsible," "presidential," or "congressional" government. In a parliamentary government the tenure of office of the virtual executive is dependent on the will of the legislature; in a presidential government the tenure of office of the executive is independent of the will of the legislature. Parliamentary government is always found in connection with the presence of a nominal executive. But it is to be remembered that this nominal executive need not be a hereditary titular sovereign. In France the government is parliamentary, but the nominal head of the state is an elected officer. Similarly the presidential system is always found in connection with a real or virtual executive; but this real executive need not be an elected president, as the instance of Prussia clearly shows.

[1] By permission of Houghton Mifflin Company.

346. Relation of the executive to Congress in the United States. In the national government of the United States the constitutional adjustment of executive and legislature and their customary relations in practice may be stated as follows:

The only provisions contained in the Constitution concerning the relation of the President to Congress are these: that "he shall, from time to time, give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient"; and that "he may, on extraordinary occasions, convene both houses, or either of them," in extra session, "and, in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. . . ."

Washington and John Adams interpreted this clause to mean that they might address Congress in person, as the sovereign in England may do: and their annual communications to Congress were spoken addresses. But Jefferson, the third President, being an ineffective speaker, this habit was discontinued and the fashion of written messages was inaugurated and firmly established. Possibly, had the President not so closed the matter against new adjustments, this clause of the Constitution might legitimately have been made the foundation for a much more habitual and informal, and yet at the same time much more public and responsible, interchange of opinion between the Executive and Congress. Having been interpreted, however, to exclude the President from any but the most formal and ineffectual utterance of advice, our federal executive and legislature have been shut off from coöperation and mutual confidence to an extent to which no other modern system furnishes a parallel. In all other modern governments the heads of the administrative departments are given the right to sit in the legislative body and to take part in its proceedings. The legislature and executive are thus associated in such a way that the ministers of state can lead the houses without dictating to them, and the ministers themselves be controlled without being misunderstood, — in such a way that the two parts of the government which should be most closely coördinated, the part, namely, by which the laws are made and the part by which the laws are executed, may be kept in close harmony and intimate cooperation, with the result of giving coherence to the action of the one and energy to the action of the other.

347. Classes of presidential candidates in the United States. Bryce divides the candidates for the American presidency into the following classes:[1]

[1] By permission of The Macmillan Company.

Aspirants hoping to obtain the party nomination from a national convention may be divided into three classes, the two last of which, as will appear presently, are not mutually exclusive, viz:

FAVORITES DARK HORSES FAVORITE SONS

A Favorite is always a politician well known over the Union, and drawing support from all or most of its sections. He is a man who has distinguished himself in Congress, or in the war, or in the politics of some State so large that its politics are matter of knowledge and interest to the whole nation. He is usually a person of conspicuous gifts, whether as a speaker, or a party manager, or an administrator. The drawback to him is that in making friends he has also made enemies.

A Dark Horse is a person not very widely known in the country at large, but known rather for good than for evil. He has probably sat in Congress, been useful on committees and gained some credit among those who dealt with him in Washington. Or he has approved himself a safe and assiduous party man in the political campaigns of his own and neighboring States, yet without reaching national prominence. Sometimes he is a really able man, but without the special talents that win popularity. Still, speaking generally, the note of the Dark Horse is respectability, verging on colorlessness; and he is therefore a good sort of person to fall back upon when able but dangerous Favorites have proved impossible. That native mediocrity rather than adverse fortune has prevented him from winning fame is proved by the fact that the Dark Horses who have reached the White House, if they have seldom turned out bad presidents, have even more seldom turned out distinguished ones.

A Favorite Son is a politician respected or admired in his own State, but little regarded beyond it. He may not be, like the Dark Horse, little known to the nation at large, but he has not fixed its eye or filled its ear. He is usually a man who has sat in the State legislature; filled with credit the post of State governor; perhaps gone as senator or representative to Washington, and there approved himself an active promoter of local interests. Probably he possesses the qualities which gain local popularity — geniality, activity, sympathy with the dominant sentiment and habits of his State; or while endowed with gifts excellent in their way, he has lacked the audacity and tenacity which push a man to the front through a jostling crowd. More rarely he is a demagogue who has raised himself by flattering the masses of his State on some local questions, or a skillful handler of party organizations who has made local bosses and spoilsmen believe that their interests are safe in his hands. Anyhow, his personality is such as to be more effective with neighbors than with the nation. . . .

A Favorite Son may be also a Dark Horse; that is to say, he may be well known in his own State, but so little known out of it as to be an unlikely candidate. But he need not be. The types are different, for as there are Favorite Sons whom the nation knows but does not care for, so there are Dark Horses whose reputation, such as it is, has not been made in State affairs, and who rely very little on State favor.

348. Utility of the crown in England. Lowell states the advantages of the English hereditary monarchy as follows:[1]

Bagehot's views upon the utility of the monarchy have become classic. Recognizing the small chance that any hereditary sovereign would possess the qualities necessary to exert any great influence for good upon political questions, he did not deem the Crown of great value as a part of the machinery of the state; and he explained at some length how a parliamentary system of government could be made to work perfectly well in a republic, although up to that time such an experiment had never been tried. But he thought the Crown of the highest importance in England as the dignified part of the government. . . . According to his conception of English polity the lower classes believed that the government was conducted by the Queen, whom they revered, while the cabinet, unseen and unknown by the ignorant multitude, was thereby enabled to carry on a system which would be in danger of collapsing if the public thoroughly understood its real nature. . . . To-day the social and ceremonial functions of the Crown attract quite as much interest as ever; but as a political organ it has receded into the background, and occupies less public attention than it did formerly. The stranger can hardly fail to note how rarely he hears the name of the sovereign mentioned in connection with political matters; and when he does hear it the reference is only too apt to be made by way of complaint. . . . In general the growth of the doctrine of royal irresponsibility has removed the Crown farther and farther out of the public sight, while the spread of democracy has made the masses more and more familiar with the actual forces in public life. One may dismiss, therefore, the idea that the Crown has any perceptible effect to-day in securing the loyalty of the English people, or their obedience to the government.

On the other hand, the government of England is inconceivable without the parliamentary system, and no one has yet devised a method of working that system without a central figure, powerless, no doubt, but beyond the reach of party strife. European countries that had no kings have felt constrained to adopt monarchs who might hold a scepter which

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they could not wield; and one nation, disliking kings, has been forced to set up a president with most of the attributes of royalty except the title. If the English Crown is no longer the motive power of the ship of state, it is the spar on which the sail is bent, and as such it is not only a useful but an essential part of the vessel.

The social and ceremonial duties of the Crown are now its most conspicuous, if not its most important, functions. There can be no question that the influence of the Queen and her court was a powerful element in the movement that raised the moral tone of society during the first half of the last century. . . .

In its relation to the masses royalty may be considered in another aspect. Within a generation there has been a great growth of interest in ceremony and dress. Antiquated customs and costumes have been revived, and matters of this kind are regarded by many people as of prime importance. A kindred result of the same social force has been a marked increase in what Bagehot called the spirit of deference, and what those who dislike it call snobbishness — a tendency by no means confined to the British Isles. All this has exalted the regard for titles and offices, and enhanced the attractiveness of those who bear them. . . .

A century or more ago people who had learned nothing from the history of Greece or Rome, and above all of Venice, were wont to assert that the sentiment of loyalty requires a person for its object. No one pretends that the English would be less patriotic under a republic; and yet with the strengthening conception of the British Empire, the importance of the Crown as the symbol of imperial unity has been more keenly felt. . . .

Whatever the utility of the Crown may be at the present time, there is no doubt of its universal popularity.

349. Position of the president in France. The following extract indicates the conditions in France that make the position of her president difficult:[1]

Unlike the President of the United States, the French President is not free to use his powers according to his own judgment, for in order to make him independent of the fate of cabinets, and at the same time to prevent his personal power from becoming too great, the constitutional laws declare that he shall not be responsible for his official conduct, except in case of high treason, and that all his acts of every kind, to be valid, must be countersigned by one of the ministers; and thus, like the British monarch, he has been put under guardianship and can do no wrong. . . .

[1] By permission of Houghton Mifflin Company.

Sir Henry Maine makes merry over the exalted office and lack of power of the President. "There is," he says, "no living functionary who occupies a more pitiable position than a French President. 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 he does not reign. It has been reserved for the President of the French Republic neither to reign nor yet to govern." At first sight the situation does, indeed, appear somewhat irrational. When the head of the state is designated by the accident of birth it is not unnatural to make of him an idol, and appoint a high priest to speak in his name; but when he is carefully selected as the man most fit for the place, it seems a trifle illogical to intrust the duties of the office to some one else. By the constitution of Sieyès an ornamental post of a similar character was prepared for the first Consul, but Napoleon said he had no mind to play the part of a pig kept to fatten. In government, however, the most logical system is not always the best, and the anomalous position of the President has saved France from the danger of his trying to make himself a dictator, while the fact that he is independent of the changing moods of the Chambers has given to the Republic a dignity and stability it had never enjoyed before. It is a curious commentary on the nature of human ambition, that in spite of the small power actually wielded by the President in France, the presidential fever seems to have nearly as strong a hold on public men as in this country.

II. Heads of Departments

350. Members in modern cabinets. The cabinets in leading modern states are composed of the following heads of departments. The general similarity in administrative organization is at once evident.

England

1. Prime Minister and First Lord of the Treasury
2. Lord President of the Council
3. Lord High Chancellor
4. Secretary of State for Foreign Affairs
5. Secretary of State for India
6. Secretary of State for the Home Department
7. Chancellor of the Exchequer
8. Secretary of State for the Colonies and Lord Privy Seal
9. Secretary of State for War

10. First Lord of the Admiralty
11. Chief Secretary to the Lord Lieutenant of Ireland
12. President of the Board of Trade
13. President of the Local Government Board
14. President of the Board of Education
15. Secretary for Scotland
16. President of the Board of Agriculture and Fisheries
17. Postmaster-General
18. Chancellor of the Duchy of Lancaster
19. First Commissioner of Works

The United States

1. Secretary of State
2. Secretary of the Treasury
3. Secretary of War
4. Secretary of the Navy
5. Secretary of the Interior
6. Postmaster-General
7. Attorney-General
8. Secretary of Agriculture
9. Secretary of Commerce and Labor

France

1. President of the Council, Minister of the Interior, and Public Worship
2. Minister of Finance
3. Minister of War
4. Minister of Justice
5. Minister of Marine
6. Minister of Colonies
7. Minister of Public Instruction
8. Minister of Foreign Affairs
9. Minister of Commerce
10. Minister of Agriculture
11. Minister of Public Works, Posts, Telegraphs, and Telephones
12. Minister of Labor

Germany

1. Chancellor of the Empire
2. Ministry for Foreign Affairs
3. Imperial Home Office and "Representative of the Chancellor"
4. Imperial Admiralty
5. Imperial Ministry of Justice
6. Imperial Treasury
7. Imperial Post Office
8. Secretary for the Colonies

And, in addition, the following presidents of imperial bureaus:

9. Railways
10. Imperial Exchequer
11. Imperial Invalid Fund
12. Imperial Bank
13. Imperial Debt Commission
14. Administration of Imperial Railways
15. Imperial Court-Martial

351. Responsible and irresponsible ministries. The importance of the form of relation existing between cabinet and legislature is thus stated by Burgess:

Responsibility or irresponsibility of the ministry to the legislature leads to very essential differences in the working of government. Ministerial responsibility will inevitably bring party government and the subordination of the executive to the popular branch of the legislature. Party government may occur when the ministers are irresponsible; but it is not, as in the other case, inevitable; and where the ministers are not responsible to the legislature, the independence of the executive may be far more easily preserved. There is no doubt that there are periods in the life of a state when it is most advantageous that the legislature and executive should agree in political views and policies. The active, creative epochs require, we might almost say, this relation. There are, however, periods in the life of the state when such agreement would not be advantageous. After an active, creative period, a season of comparative rest is natural, in order that new institutions, laws, and policies may make their cycle and prove their qualities. In such periods, a more deliberate movement of government is advantageous. During such periods, difference of political view between the legislature and executive is more likely to prove beneficial than sameness of view. In systems where both the legislature and executive are elective, we may fairly expect that the same party will possess both branches of the government in active and critical periods of development; while in the ordinary periods of rest, there is some likelihood, at least, that this will not be the case. . . .

Ministerial responsibility to the legislature will be advantageous when the electorate and the legislature are of so high character intellectually and morally as to be practically incapable of forming an erroneous opinion or of doing an unjust thing. The checks and balances of double or treble deliberation by independent bodies will then be no longer necessary, will be rather hurtful than necessary. The natural age of compromise will have been passed. Until something like this condition shall arrive, however, the responsibility of the ministry to the legislature for governmental policy tends to the production of crude measures, and, in general, makes government radical.

352. Development of the cabinet in England. A brief summary of the leading phases in the evolution of the British cabinet follows:

(1) First we find the Cabinet appearing in the shape of a small, informal, irregular *Camarilla*, selected at the pleasure of the Sovereign from the larger body of the Privy Council, consulted by and privately

advising the Crown, but with no power to take any resolutions of State, or perform any act of government without the assent of the Privy Council, and not as yet even commonly known by its present name. This was its condition anterior to the reign of Charles I.

(2) Then succeeds a second period, during which this Council of advice obtained its distinctive title of Cabinet, but without acquiring any recognized status, or *permanently* displacing the Privy Council from its position of *de facto* as well as *de jure* the only authoritative body of advisers of the Crown. (Reign of Charles I and Charles II, the latter of whom governed during a part of his reign by means of a Cabinet, and towards its close through a "reconstructed" Privy Council.)

(3) A third period, commencing with the formation by William III of a ministry representing, not several parties, as often before, but the party predominant in the state, the first ministry approaching the modern type. The Cabinet, though still remaining, as it remains to this day, unknown to the Constitution, had now become *de facto*, though not *de jure*, the real and sole supreme consultative council and executive authority in the state. It was still, however, regarded with jealousy, and the full realization of the modern theory of ministerial responsibility, by the admission of its members to a seat in Parliament, was only by degrees effected.

(4) Finally, towards the close of the eighteenth century, the political conception of the Cabinet as a body, — necessarily consisting (*a*) of members of the Legislature; (*b*) of the same political views, and chosen from the party possessing a majority in the House of Commons; (*c*) prosecuting a concerted policy; (*d*) under a common responsibility to be signified by collective resignation in the event of parliamentary censure; and (*e*) acknowledging a common subordination to one chief minister, — took definitive shape in our modern theory of the Constitution, and so remains to the present day.

353. Nature and functions of the English cabinet. Lowell describes as follows the actual working of the cabinet in England:[1]

The conventions of the constitution have limited and regulated the exercise of all legal powers by the regular organs of the state in such a way as to vest the main authority of the central government — the driving and the steering force — in the hands of a body entirely unknown to the law. The members of the cabinet are now always the holders of public offices created by law; but their possession of those offices by no

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means determines their activity as members of the cabinet. They have, indeed, two functions. Individually, as officials, they do the executive work of the state and administer its departments; collectively they direct the general policy of the government, and this they do irrespective of their individual authority as officials. Their several administrative duties, and their collective functions are quite distinct; and may, in the case of a particular person, have little or no connection. . . .

The essential function of the cabinet is to coördinate and guide the political action of the different branches of the government, and thus create a consistent policy. Bagehot calls it a hyphen that joins, a buckle that fastens, the executive and legislative together; and in another place he speaks of it as a committee of Parliament chosen to rule the nation. More strictly, it is a committee of the party that has a majority in the House of Commons. The minority are not represented upon it; and in this it differs from every other parliamentary committee. . . .

The cabinet is selected by the party, not directly, but indirectly, yet for that very reason represents it the better. Direct election is apt to mean strife within the party, resulting in a choice that represents the views of one section as opposed to those of another, or else in a compromise on colorless persons; while the existing indirect selection results practically in taking the men, and all the men, who have forced themselves into the front rank of the party and acquired influence in Parliament. The minority of the House of Commons is not represented in the cabinet; but the whole of the majority is now habitually represented, all the more prominent leaders from every section of the party being admitted. In its essence, therefore, the cabinet is an informal but permanent caucus of the parliamentary chiefs of the party in power — and it must be remembered that the chiefs of the party are all in Parliament. Its object is to secure the cohesion without which the party cannot retain a majority in the House of Commons and remain in power. The machinery is one of wheels within wheels; the outside ring consisting of the party that has a majority in the House of Commons; the next ring being the ministry, which contains the men who are most active within that party; and the smallest of all being the cabinet, containing the real leaders or chiefs. By this means is secured that unity of party action which depends upon placing the directing power in the hands of a body small enough to agree, and influential enough to control. There have, of course, been times when the majority was not sufficiently homogeneous to unite in a cabinet; when a ministry of one party has depended for its majority upon the support of a detached group holding the balance of power . . . but such a condition of things is in its nature temporary and transitional, and usually gives place to a coalition ministry, followed by party amalgamation.

354. Power of the ministers in France. The dangers inherent in the French system of cabinet government are emphasized in the following:[1]

When we consider the paternal character of the government, the centralization of the state, and the large share of authority vested in the executive department, we cannot fail to see that the ministers in whose hands this vast power is lodged must be either very strong or very weak. If they are able to wield it as they please, and are really free to carry out their own policy, they must be far stronger than any officer or body in Great Britain, and immeasurably stronger than any in our federal republic. But, on the other hand, the very immensity and pervasiveness of their power, the fact that it touches closely every interest in the country, renders them liable to pressure from all sides. It becomes important for every one to influence their action, provided he can get a standpoint from which to bring a pressure to bear. This standpoint is furnished by the Chamber of Deputies, for the existence of the ministry depends on the votes of that body. The greater, therefore, the power of the minister, and the more numerous the favors he is able to bestow, the fiercer will be the struggle for them, and the less will he be free to pursue his own policy, untrammeled by deputies, whose votes he must win if he would remain in office. A Frenchman, who is eminent as a student of political philosophy, and has at the same time great practical experience in politics, once remarked to the author, "We have the organization of an empire with the forms of a republic." The French administrative system is, indeed, designed for an empire, and would work admirably in the hands of a wise and benevolent autocrat who had no motive but the common weal; but when arbitrary power falls under the control of popular leaders, it can hardly fail to be used for personal and party ends; for, as a keen observer has truly said, the defect of democracy lies in the fact that it is nobody's business to look after the interests of the public.

355. The imperial chancellor in Germany. The extensive powers of the German chancellor are indicated in the following:

The head and center of the German administration is the Imperial Chancellor, an officer who has no counterpart in any other constitutional government.

(1) Looked at from one point of view, the Chancellor may be said to be the Emperor's responsible self. If one could clearly grasp the idea of a responsible constitutional monarch standing beside an irresponsible constitutional monarch from whom his authority was derived, he would

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have conceived the real, though not the theoretical, character of the Imperial Chancellor of Germany. . . .

(2) Still further examined, the chancellorship is found to be the center, not only, but also the source of all departments of the administration. Theoretically at least the chancellorship *is* the Administration: the various departments now existing are offshoots from it, differentiations within its all-embracing sphere. . . .

(3) A third aspect of the Chancellor's abounding authority is his superintendency of the administration of the laws of the Empire by the states. With regard to the large number of imperial laws which are given into the hands of the several states to be administered, the Empire may not only command what is to be done, but may also prescribe the way in which it shall be done: and it is the duty of the Chancellor to superintend the states in their performance of such behests. . . .

(4) When acting in the capacity of chairman of the *Bundesrath*, the Chancellor is simply a Prussian, not an imperial, official. He represents there, not the Emperor, for the Emperor as Emperor has no place in the *Bundesrath*, but the king of Prussia.

III. The Civil Service

356. Importance of subordinates in government service. The following example illustrates the important part played by minor administrative officials in every governmental system:

In our discussion of governmental affairs we often fail to realize how much work must, in fact, be left to subordinates, and in consequence how careful we should be in their selection. The necessity of trusting subordinates to a great degree is one of the weaknesses of any executive work, especially of government service, where it is more difficult to secure a personal check than in the case of a private business. Take, for example, the case of the President of the United States. He receives hundreds, even thousands of letters some days. It is utterly impossible that he can read or even know anything about a very large percentage of them. They must be read and sorted by his secretaries, and in most cases the proper action must be taken without consulting him. Likewise, he has hundreds of callers every day under such circumstances that he is compelled to see most of them even though for only a few seconds. There must therefore be a sifting through his subordinates of the people who have access to him, as well as a sifting of the material that comes before him for decision. . . . Most of this sifting must be done by subordinates; the most important cases he will decide for himself.

In most cases also the subordinate must read the letters, forecast the decision, prepare the reply, and present it to the chief for signature. In all routine matters, if the subordinates are faithful, this course of procedure is safe. Often, however, the chief has to hear a case and determine it in perhaps a minute or two. The whole case is presented, the important argument put before him in a letter written by his subordinate; he must make his decision. Under these circumstances, mistakes will of course be made. . . . In any event the subordinate is more likely to be neglectful and to do the wrong thing than is his superior; nevertheless he must usually be trusted. If people knew how much had to be left to subordinates, they would often wonder at the real success of the government of any great country.

357. The civil service in England. In contrast to the American "spoils system," the organization of the civil service in England has many advantages.[1]

The British civil service comprises a staff of about 80,000 officials. This includes the officers of the royal household, a large number of officials connected with the foreign, home, and colonial offices, the admiralty, the treasury, etc., officials serving under the local government board, the patent office, the emigration office, the diplomatic and consular corps, collectors of customs and excise, postmasters, etc. The fundamental principle in the conduct of the service thus constituted is permanence in office, and the dissociation of tenure of office from the changes of government caused by the cabinet system. The only officers of a political complexion are the heads of the departments, together with certain chief secretaries and assistants who are known collectively as the ministry, and who number in all about fifty persons. . . . The permanent tenure of office contributes greatly to the efficiency and integrity of the British civil service. Its origin is to be traced to the fact that in earlier times public office in England was a species of real property held by the incumbent for life or in fee. There still exist in the British civil service a few offices which are held, like the judicial positions, for life or good conduct. In the case of the great majority of official positions in the civil service the crown retains the right of dismissal. This right is exercised, however, only in cases of incompetence or dereliction of duty, and never for political reasons or to make room for a necessitous office seeker. For entry into the service use is made, in most of the British departments, of the principle of open competition.

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358. Patronage of office in France. The nature of the French governmental system places a premium upon extensive use of appointment for party purposes, at the same time placing a check upon wholesale removals.

The patronage of office, indeed, threatens to become even more of a menace to good government in France than it has been to good government in our own country under the federal system of appointment. The number of offices in the gift of the ministers in France is vastly greater than the number within the gift of the President of the United States; and the ministers' need to please the Chambers by favors of any and all kinds is incomparably greater than our President's need to please Congress, since they are dependent upon the good will of the Chambers for their tenure of office, while he is not dependent on Congress for his.

There have never yet been in France, however, any such wholesale removals from office upon the going out of one administration and the coming in of another as we have seen again and again in this country; because there has really been no radical change of administration in France since the days of MacMahon. In this country, as in England, there are two great national parties, and the government is now in the hands of one and again in the hands of the other. But in France a change of cabinet means nothing more than a change from the leadership of one group of Republicans to the leadership of another, — or, at most, a change from the leadership of Republicans to the leadership of Radicals, who are simply extreme republicans. . . . One group of Republicans, therefore, succeeds another, one faction goes out of office, another comes in. Generally a new cabinet, just come in, is composed in part of men who held office also in the cabinet just thrust out. It is a change only of chief figures. And so wholesale removals from office do not take place.

359. The spoils system at its height. The following scathing denunciation of the spoils system indicates its chief evils in the United States before the civil service reform began:

It has come to pass that the work of paying political debts and discharging political obligations, of rewarding personal friends and punishing personal foes, is the first to confront each President on assuming the duties of his office, and is ever present with him even to the last moment of his official term, giving him no rest and little time for the transaction of other business, or for the study of any higher or grander problems of statesmanship. He is compelled to give daily audience to those who personally seek place, or to the army of those who backed them. . . .

The Executive Mansion is besieged, if not sacked, and its corridors and chambers are crowded each day with the ever-changing, but never-ending throng. Every Chief Magistrate, since the evil has grown to its present proportions, has cried out for deliverance. Physical endurance, even, is taxed beyond its power. More than one President is believed to have lost his life from this cause. The spectacle exhibited of the Chief Magistrate of this great nation, feeding, like a keeper, his flock, the hungry, clamorous, crowding, jostling multitude which daily gathers around the dispenser of patronage, is humiliating to the patriotic citizen interested alone in national progress and grandeur. Each President, whatever may be his political associations, however strong may be his personal characteristics, steps into a current, the force of which is constantly increasing. He can neither stem nor control it, much less direct his own course, as he is buffeted and driven hither and thither by its uncertain and unmanageable forces.

The malign influence of political domination in appointments to office is widespread, and reaches out from the President himself to all possible means of approach to the appointing power. It poisons the very air we breathe. No Congressman in accord with the dispenser of power can wholly escape it. It is ever present. When he awakes in the morning it is at his door, and when he retires at night it haunts his chamber. It goes before him, it follows after him, and it meets him on the way. It levies contributions on all the relationships of a Congressman's life, summons kinship and friendship and interest to its aid, and imposes upon him a work which is never finished and from which there is no release. Time is consumed, strength is exhausted, the mind is absorbed, and the vital forces of the legislator, mental, as well as physical, are spent in the never-ending struggle for offices.

360. The United States Civil Service Act. The act of January 16, 1883, is the basis of the present federal civil service in the United States. It removed from partisan control a large number of subordinate and clerical offices. The leading provisions of the act follow:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three Commissioners shall constitute the United States Civil Service Commission. . . .

SEC. 2. That it shall be the duty of said Commissioners:

First. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect. . . .

Second. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

Third, appointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things, a statement, under oath, setting forth his or her actual bona fide residence at the time of making the application, as well as how long he or she has been a resident of such place.

Fourth, that there shall be a period of probation before any absolute appointment or employment aforesaid.

Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.

Seventh, there shall be noncompetitive examinations in all proper cases before the Commission, when competent persons do not compete, after notice has been given of the existence of the vacancy, under such rules as may be prescribed by the Commissioners as to the manner of giving notice.

Eighth, that notice shall be given in writing by the appointing power to said Commission of the persons selected for appointment or employment from among those who have been examined, of the place of residence of such persons, of the rejection of any such persons after probation, of transfers, resignations, and removals, and of the date thereof, and a record of the same shall be kept by said Commission.

361. Acceptance of office. After selection, the acceptance of office is sometimes optional, sometimes compulsory.

While as a general thing no obligation to assume a professional office is imposed upon its citizens by any government, it is not unfrequently the case that the law compels the citizen to take an honorary office whose duties are not so arduous as to require the entire time of the incumbent. This seems to have been the original rule in England, where acceptance of a municipal office might be compelled by means of the writ of mandamus, and where failure to assume office might generally be punished by indictment. The strictness of this rule has been somewhat relaxed in this country, where the rule has been retained. . . .

Further it has been held that the holding of one office will relieve from the obligation of accepting another. Finally where acceptance of the office is not obligatory some formality indicative of the intention to assume the office seems to be necessary in order that the office may be regarded as filled. Qualifying for the office is regarded as the best evidence of acceptance. Refusal, and neglect to qualify will be regarded as a refusal, will operate to extinguish any right which the officer has to the office; although mere delay will not have this effect.

In France it is almost never the case that the acceptance of office is obligatory. In Germany the rule is very much the same as in the United States, but where the obligation to serve does exist, the penalty for refusal to serve is much more severe. In England the old rule of obligatory service has been much modified. Much more reliance is placed on voluntaryism than formerly.

IV. Functions of the Executive

362. The nature of administration. The functions included in the administration of modern states may be classified as follows:

Administration in this narrowest of senses, which is the proper sense for it as indicative of a function of government, is the activity of the executive officers of the government. The government administers when it appoints an officer, instructs its diplomatic agents, assesses and collects its taxes, drills its army, investigates a case of the commission of crime, and executes the judgment of a court. Whenever we see the government in action as opposed to deliberation or the rendering of a judicial decision, there we say is administration. . . . The directions in which this action manifests itself depend upon the position of the state and the duties of the government.

In the first place, the state occupies a position among other states; it is a subject of international law, and as such has rights and duties over against other states and must enter into relations with them. The management of these relations calls for certain executive action. This action constitutes a branch of the general function of administration, *viz.*, the Administration of Foreign Relations.

In the second place, the state must have means at its command to repel any attempts which may be made against its existence or power by other states or against its peace and order by its own inhabitants. In other words, it must have an army and in most cases a navy. The executive action made necessary by the existence of a military force constitutes another branch of administration, *viz.*, the Administration of Military Affairs.

In the third place, every government must do something to decide the conflicts which arise between its inhabitants relative to their rights. This duty makes the existence of courts necessary; and they in turn require executive action, which forms a third branch of administration, *viz.*, the Administration of Judicial Affairs.

In the fourth place, in order that the government may perform all its duties, it must have pecuniary means. The management of its financial resources forms another and fourth branch of administration, *viz.*, the Financial Administration or the Administration of Financial Affairs. The theories of some political philosophers would almost confine the action of government to these branches of administration; but no government was ever so confined by its constitution; and every modern state has recognized that it is the duty of the government to further directly the welfare, both physical and intellectual, of its citizens. This it does by the formation and maintenance of a system of means of communication, of an educational system, of a system of public charity, *etc* . . . The duties performed by the government in furthering the welfare of its citizens may be classed together as internal affairs; and the executive action of the government necessitated by the performance of these duties forms a fifth branch of administration, *viz.*, the Administration of Internal Affairs.

These five branches of administration embrace all the functions which the government is called upon to discharge whatever may be its form of organization.

363. The executive power. The executive power may be roughly classified under the following heads:

First, that which relates to the conduct of foreign relations and which we may denominate the diplomatic power.

Second, that which has to do with the execution of the laws, and the administration of the government; this may be denominated the administrative power.

Third, that which relates to the conduct of war and which may be described as the military power.

Fourth, the power to grant pardons to persons charged with or convicted of crime; this may be called the judicial power of the executive.

Fifth, that which relates to legislation, or the legislative power.

364. Functions of the German emperor. The interrelation of the powers of the German executive as king of Prussia and as emperor are well brought out in the following:[1]

The Emperor has, therefore, very little power as such, except in military and foreign matters. His authority as Emperor, however, is vigorously supplemented by his functions as King of Prussia. Thus as Emperor he has no initiative in legislation; and indeed he is not represented in the Reichstag at all; for the Chancellor, strictly speaking, appears there only as a member of the Bundesrath. But as King of Prussia the Emperor has a complete initiative by means of the Prussian delegates to the Bundesrath whom he appoints. As Emperor he has no veto, but as King he has a very extensive veto, — for it will be remembered that the negative vote of Prussia in the Bundesrath is sufficient to defeat any amendment to the constitution, or any proposal to change the laws relating to the army, the navy, or the taxes. His functions as Emperor and as King are, indeed, so interwoven that it is very difficult to distinguish them. As Emperor he has supreme command of the army and appoints the highest officers. As King of Prussia he appoints the lower officers, and has the general management of the troops over most of Germany. As Emperor he instructs the Chancellor to prepare a bill. As King he instructs him to introduce it into the Bundesrath, and directs how one third of the votes of that body shall be cast. Then the bill is laid before the Reichstag in his name as Emperor, and as King he directs the Chancellor what amendments to accept on behalf of the Bundesrath, or rather in behalf of the Prussian delegation there. After the bill has been passed and become a law, he promulgates it as Emperor, and in most cases administers it in Prussia as King; and finally as Emperor he supervises his own administration as King. This state of things is by no means so confusing to the Germans as might be supposed; for it is not really a case of one man holding two distinct offices,

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but of the addition of certain imperial functions to the prerogatives of the King of Prussia. The administration of the country is vested in the sovereigns of the States, among whom the King of Prussia is *ex officio* president; and until one has thoroughly mastered this idea, it is impossible to understand the government of Germany.

365. Powers of the President of the United States. In addition to granting to the President the general executive power and a limited veto, the federal Constitution outlines his powers and duties as follows:

The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

366. The veto power. The reasons for vesting the power of veto in the executive may be stated as follows:

The principal purposes of the veto are to prevent hasty and ill-considered action by the legislature, and to furnish the executive with a means of defense against the encroachments of the legislature. . . . Without the power of negative the executive might be gradually stripped of his authority and even annihilated by successive resolutions of the legislature. The possibility of this danger is all the greater in a country like the United States, where the executive has neither the right of adjournment, of prorogation, nor of dissolution. . . .

The veto power, said Alexander Hamilton, not only serves as a "shield to the executive," but it furnishes an additional security against the enactment of unwise legislation and establishes a salutary check upon the evil effects of faction, precipitancy, and want of consideration. . . .

Replying to the objection sometimes urged against the veto power, that it is not to be presumed that a single man will possess more virtue and wisdom than the entire legislature, Hamilton said, "The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the executive; but upon the supposition that the legislature will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of the other members of the government; that a spirit of faction may sometimes pervert its deliberations; and that impressions of the moment may sometimes hurry it into measures which itself would condemn." To the argument sometimes advanced that the veto power of the executive may be employed to prevent the enactment of good laws as well as bad ones, it may be replied that the power cannot be effectually exercised if an unusual majority of the legislature is favorably disposed toward the law vetoed.

CHAPTER XX

THE JUDICIARY

I. Evolution of the Judicial Department

367. The evolution of state justice. The transition from private vengeance to public judicial authority has taken place through several fairly well-defined phases.

The earliest notion of justice, as distinct from mere indiscriminate revenge, that we find among the Teutonic peoples is, undoubtedly, the blood feud. Barbarous as such an institution appears to us, we have but to think for a moment, to realize its immense importance, as a step in human progress. A man receives a wound from another, is perhaps killed. Instantly the passion for slaughter awakes. All who are in any way interested in the dead man — those who worshiped his gods or fought by his side, are eager to avenge his death on any person who may be supposed to be connected with his murderer. General carnage is the result; no man's life is safe. But, if it can once be established, that the right of vengeance belongs only to a limited circle of the dead man's relatives, and may be exercised only against the immediate relatives of the offender, the area of vengeance is substantially narrowed, the evil of the deed proportionately decreased. This is the work of the blood feud. . . .

To the blood feud, then, succeeds the *wer* or money payment as compensation for the injury inflicted. Here again we are in the dark as to the origin of the change, which may, possibly, have taken place before the introduction of coined money into the Teutonic world, but was probably almost contemporary with that event. It is, of course, highly probable that Christianity, with its hatred of bloodshedding, may have had much to do with the substitution of payment for corporal revenge. . . .

But two points in connection with the system of pecuniary compositions require careful attention. To begin with, it seems to have been a purely voluntary system. It is difficult, in fact, to see how the Clan, an organ destitute of anything like an executive machinery, could have enforced the acceptance of the *wer*, without bringing down upon itself that state of general disturbance which the *wer* was designed to avoid. . . .

In the second place, it was always admitted that there were some offenses for which the money payment could not atone. . . . For these the offender is banished, and his goods forfeited.

These are our two starting points for the history of State justice. The king comes to the help of the Clan by compelling the avenger to accept the *wer* and by compelling the offender to pay it. He likewise takes upon himself the punishment of bootless crimes.

But the cooperation of the king in the enforcement of the *wer* brings about one very important by-result. The king's officer does not work for nothing. . . . And so we get the beginning of that double element in legal proceedings — the claim of the Party and the claim of the State — which has had so much influence on legal development.

368. Evolution of forms of punishment. The following extract indicates the fundamental changes that have taken place in the method and purpose of punishment:

(1) The first period is that of revenge. Penalty in all its forms was savage and cruel. Man's nervous system was in primitive times less highly organized and endured pain more easily, human sympathy was lacking and belief in the sacredness of human life hardly existed. Punishment was ruthless, often out of all proportion to the crime, and frequently involved the innocent with the guilty, under the ancient theory of collective responsibility either of family, clan, or fraternity.

(2) As notions of justice developed in men's minds, the desire for revenge became modified into the principle of retaliation. Every offense was to be atoned for by a similar punishment. It was the period of *lex talionis*, an eye for an eye, a tooth for a tooth, no more, no less. This system also was cruel, but yet in its attempt to secure justice it was an improvement over the vindictive system of the earlier stage.

(3) With the rise of personal property there came a strong tendency to atone by the payment of a fine for all but the worst crimes, blood penalty being exacted only from the worst criminals or from those who were unable to pay fines. Under this system there was a carefully graded list of offenses, each valued at a particular fine, varying in amount with the social rank of the injured person. The fine in early times was paid partly to the injured and partly to the state. Confiscation of property is simply a variation of this form of punishment. With the development of slavery, punishment for crime might in default of fine result in the sale of the criminal, and perhaps of his family also, into slavery for a term of years or for life. As slavery disappeared, this form of punishment survived in sentences that condemned men to labor

in mines or on governmental works, to serve in the army or navy, or as servants to private citizens who employed this convict labor on plantations or in various industries.

(4) Another stage of punishment developed when the courts undertook to deter men from crime by the infliction of cruel punishments. This was effected by imprisonment in noisome dungeons, by burning, mutilation, whipping, branding, and torture developed to its highest pitch by human ingenuity. . . .

In medieval Europe, as well as throughout the Orient, a belief in the efficacy of torture resulted in its use in the case of persons strongly suspected of crime, against whom, however, there was insufficient evidence to convict, or whose evidence it was thought might inculpate others. These persons were put to the torture on the theory that persons suffering bodily anguish will tell the truth. . . . A peculiar form of punishment developed in many parts of the world and in early Europe as the result of religious ideas. When men desired to do justice and yet realized how imperfect judicial machinery was in the detection of crime, it occurred to them that the guilt or innocence of the accused might safely be left with God. In consequence there developed a system of ordeals, oaths, and judicial combats, the outcome of which determined the punishment or acquittal of the accused. . . .

The penal systems of the nineteenth century present a complex of many former stages. Hanging for murder is a form of *lex talionis*. Hanging for other crimes and solitary confinement aim to deter the commitment of such crimes. The system of fines carefully graded to fit each offense is still in vogue but reserved for minor crimes. More serious offenses are usually punished by imprisonment, not so much to deter others from crime as to segregate criminals from social life.

369. The people and the courts. The strong support of public opinion behind the courts, especially in time of peace, in contrast to the frequent fear of executive or legislative power, is worth noting.

Usually in this country and in most modern states, the judges have been strongly inclined to conserve the rights and privileges of the common people as opposed to the executive or to the legislature, which at times seem inclined to encroach upon the rights of the people. On that account the judges have usually in both ancient and modern times enjoyed special honor and respect from the citizens as upholders of right and justice. It is, therefore, considering these facts, — and I think the facts are undeniable, — natural that we should expect that in times of peace our judges will find their influence strengthened as compared with

the power of the executive and of the legislature. In times of emergency, such as that of war, the executive has the opportunity, as has been said, to strengthen his power at the expense of the courts and of the legislature. But in times of peace, as the course of events normally move, the courts in their power of interpreting the law, overruling the legislature, controlling the executive, become the conservators of the rights of the people, and the people seeing that their power is strengthened by the judges, often make it evident that in times of peace they hold the courts to be the most trusted if not the most powerful branch of government.

II. Functions and Requisites of the Judiciary

370. The judicial function. The general nature of the judicial power in modern states may be indicated as follows:

The chief function of the judicial department is to interpret the law and to apply its penalties and remedies in all cases brought before the courts for their decision. This power is fundamental to the successful workings of government, which by nature is coercive and must have authority to enforce by penalty its decisions. Such a power is essentially executive and was originally wielded by the elders or, in earlier states, by the king. In modern states judicial authority has differentiated into two great branches, one exercised chiefly by the executive department and the other by a separate department devoted to judicial functions only. This latter department is concerned chiefly with alleged infractions of the law by private persons and with disputes between private persons in regard to property rights. That part of the judicial function residing in the executive department is concerned mainly with the enforcement of discipline in the army and navy, in the civil service, and in the settlement of disputes arising under administrative rules.

371. Jurisdiction of courts. Courts can decide questions only when cases over which they have authority are properly brought before them.

The functions of the judicial department are discharged by courts created by law, and courts can only decide cases which are properly brought before them. A case brought before a court is said to be within the jurisdiction of the court if it is one which by law the court is authorized to try, and which, in the particular instance, is so submitted to it that it may be tried. It is often said that, to authorize the determination of a case in a court, the court must have jurisdiction of

the subject matter and of the parties. But by such a statement is simply meant that the case must be one of a class of cases which by law the court has authority to determine; and that the particular case is brought by one having the right to sue in the court, and that the party against whom a decision is asked is served with notice or otherwise brought into court in such way that he is bound to present his defense.

372 Methods of choosing judges in the United States commonwealths. The relative advantages of the different methods used in choosing judges in the commonwealths of the United States are thus stated in a recent book:[1]

There has been considerable controversy as to which of the three methods of choosing — namely, selection by the legislature, the governor, or popular vote — is the most advantageous to the cause of justice. It is generally agreed that the first is not at all desirable; the choice is only too often made by log-rolling tactics when it is intrusted to the legislature. On the other hand, there is much to be said on the merits of the other two methods — popular election and appointment by the governor. The friends of the former practice emphasize the fact that choice by the people seems to be the only democratic way of selecting important officials, for appointment by the governor renders the judges too independent of the popular will and tends to make them arbitrary. They point out also that, in the case of local judges, the people of the district are likely to know more about the qualifications of the candidates than the governor who is obliged to depend on recommendations of third parties — that is, on the recommendations of a local political machine. Finally, the champions of the elective system point to the fact that on the whole it has worked successfully and that excellent judges have been obtained under it. . . . Finally, the advocates of popular election point out that in so far as judges have the power to declare laws void their functions are political and, therefore, they should not be removed from popular control.

To offset these arguments, those who favor appointive judges say that where good judges have been obtained, they have been secured in spite of popular election, not because of it. Massachusetts, whose judges have always been distinguished for their high character and legal learning, is always cited as the state in which the appointive system has proved eminently successful. It is contended that the people do not have the capacity to pass upon qualifications required for a successful judge and often select the most popular man rather than the one most fit. Making

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the judge an elective officer, the advocates of the appointive system continue, renders him dependent on political leaders; party service — not fitness — is made a test for the office; in order that the republican form of government may be a success and justice done between man and man, the judiciary must be absolutely independent; the judge must feel that he need not come up for a renomination before the leaders of his party; he must not be afraid to render an unpopular decision which may perhaps cause his defeat if he is candidate for reëlection. Therefore, they conclude, the appointive system is the only one which puts the judges in such a position.

373. Barristers and solicitors in England. Lowell describes as follows the distinction between two branches in the practice of law which, although uncommon in the United States, is usual in England and the continent:[1]

In the face of a legal education until recently very unsystematic, the excellence of English law as a body of jurisprudence has been promoted by the method of recruiting both the bar and the bench. As in most European countries, the practice of law is divided into two branches, that of the barristers, and that of the solicitors or attorneys. The solicitor or attorney alone comes into direct relations with the clients. He is their confidential adviser and friend; draws up their legal papers; carries on for them business of all sorts that may have only an incidental connection with law; does the preliminary work of preparing a case for trial, and can himself conduct the trial before inferior courts. A man is admitted by the court to practice as an attorney only after an apprenticeship and a series of examinations. These last are conducted by the Incorporated Law Society, an association composed of solicitors, which has done much to raise the standard of legal education in the profession. Other forces have, indeed, worked in the same direction; for in England, as elsewhere, the business side of law has grown in importance, and the great firms of solicitors have attained a position lucrative and dignified to a degree that would hardly have been thought possible a century ago.

The barrister gives the solicitor opinions on doubtful points of law; and has the exclusive privilege of conducting trials and making arguments before the higher courts. Unlike the solicitors, who are scattered over the country, the barristers are mainly concentrated in London. . . . The barristers have, in fact, a rigidly aristocratic organization. They all belong to one or other of the four Inns of Court; the Inner Temple, The Middle Temple, Lincoln's Inn and Gray's Inn, each Inn being

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governed by a body of Benchers, who fill their own vacancies from the leading or senior men at the bar. Having almost uncontrolled power to admit or expel members of the Inns, the Benchers hold the keys to the profession; although in fact they very rarely refuse admission to any one who eats the dinners and passes the moderate examination required. An organization of this kind, of which, by the way, the judges continue to be members, gives to the bar a great solidarity and capacity to maintain its traditions.

The late Lord Coleridge, Chief Justice of the Queen's Bench, expressed the opinion that the separation of the two branches of the profession was better for the development of law, while the American habit of combining them was probably better for the client. From the standpoint of perfecting the law the English system has two advantages. Instead of expending much of their time on business affairs, the counsel who assist the court by arguing cases have their minds engrossed by legal principles, and by the practice of law as a distinct art, and they are selected and retained by solicitors who are themselves lawyers by profession, instead of by clients with whom a business connection, a cheap notoriety, or engaging manners may have more influence than a profound knowledge of the law.

374. Importance of lawyers in the United States. Burgess emphasizes the part which lawyers have played in our constitutional development and points out the responsibilities resting upon the profession.

This consciousness has been awakened and developed by the fact that the political education of the people has been directed by the jurists rather than by the warriors or the priests; and it is the reflex influence of this education that upholds and sustains, in the United States, the aristocracy of the robe. I do not hesitate to call the governmental system of the United States the aristocracy of the robe; and I do not hesitate to pronounce this the truest aristocracy for the purposes of government which the world has yet produced. I believe that the secret of the peculiarities and the excellencies of the political system of the United States, when compared with those systems founded and developed by priests, warriors, and landlords, is the predominant influence therein of the jurists and the lawyers. . . .

But government by lawyers has its weak points and its dangers. If the lawyers separate law from history and jurisprudence, and jurisprudence from ethics, they will inevitably and speedily lose that spiritual influence over the consciousness of the people, which is the sole basis of their

power. Let this once happen, and the courts will be unable to stand between the constitution and the legislature. The legislature will become almighty. That branch of the government in which, especially under universal suffrage, party blindness and passion are most sure to prevail, and in which the least sense of personal responsibility exists, will have at its mercy those individual rights which we term civil liberty. The student of political history knows only too well that the despotism of the legislature is more to be dreaded than that of the executive, and that the escape from the former is generally accomplished only by the creation of the latter.

I think there is reason to fear that the legal profession of to-day in the United States does not appreciate its position, and is not sufficiently impressed with its duty to preserve the ideal source of its power. There is reason to fear that law is coming to be regarded by the mass of lawyers too much as an industry; and if this be true of them, it will surely follow that it will be so regarded by the mass of the people. It rests with the lawyers and the teachers of law to determine for themselves whether they will divest themselves of their great spiritual power over the consciousness of the people; whether they will give up the commanding influence which their predecessors have held in the making of this great republic, and which those predecessors exercised with such beneficent results to the welfare of the whole people.

III. Relation of Judiciary to Executive

375. Necessity of judicial independence. Judicial independence of executive control has been found essential to individual liberty.[1]

First, we may note the need of rules reducing within the narrowest possible limits the power of the executive to imprison private citizens before trial. The most important provisions under this head are (a) that no one shall be arrested except on a definite charge of having committed a certain offense; (b) that the person arrested shall be brought as soon as possible before a judicial functionary who shall decide whether the charge is made on grounds *prima facie* reasonable, and whether the offense charged is sufficiently grave to render it needful to keep the accused in confinement until the trial; (c) that if the charge is of this grave kind the accused shall be brought to trial as soon as possible, and that if it is of a lighter kind, he shall be set at liberty on bail. In order that these latter provisions may be effective, it is clearly desirable that

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the judicial functionary before whom the accused person is brought should be distinct from the executive and independent of its influence. This independence is further required to secure an impartial trial in any case in which the conduct of private persons which is alleged to be illegal is certainly inconvenient to the executive. It is also required to secure the effectiveness of another of the constitutional bulwarks of freedom to which I above referred, — the right of suing or prosecuting government officials for any illegalities committed by them in performance of their functions. For if the conduct of one member of the executive had to be judged by another, or by a judge practically under its control, the *esprit de corps* which may be presumed to exist in the executive as a body, and its natural tendency to resist any restriction on its powers, would diminish the complainant's chance of obtaining an impartial hearing and adequate redress.

376. Advantages and disadvantages of separate administrative courts. The European method of a distinct system of courts for officers of the administration has certain advantages and disadvantages.

The chief advantage claimed for the system is that the subjection of the public authorities to the continual control and interference of the judicial courts is detrimental to prompt and efficient administration. Administrative controversies are somewhat peculiar in their nature and involve questions which for proper consideration require a special and technical knowledge not ordinarily possessed by judges whose training and experience have been confined to the field of private law, and whose education has been academic rather than practical Such judges are likely to have exaggerated notions of the rights of private individuals, as against those of the public; they are inclined to a natural timidity in deciding issues between individuals and the government adversely to the claims of the individual; and with their disposition to adhere strictly to legal rules and traditions they sometimes unnecessarily hamper and obstruct the legitimate operations of the government. . . .

The chief objection that has been urged against the European method of relieving the public authorities from the control of the regular courts of justice and intrusting the determination of so-called administrative controversies to special tribunals, is that it destroys to a large extent the legal protection of the individual against the acts of the administrative authorities. The legal remedies which are allowed by these courts for the infringement of individual rights by the authorities are quite different

from, and, it is asserted, less effective than, those afforded by the regular judicial courts in other cases. Moreover, their responsibility is to a class of tribunals made up largely of administrative officials who, being a part of the government themselves, are apt to be less favorable to individual rights than are judges of the regular judicial courts. This may be due partly to their natural zeal for the rights of the administration, or the result of pressure on the part of the government itself.

IV. Relation of Judiciary to Legislature

377. The great writs. Courts issue certain writs which affect fundamentally the rights of citizens.[1]

1. The first and most famous of these writs is that of habeas corpus. This writ is designed to secure to any imprisoned person the right to have an immediate preliminary hearing for the purpose of discovering the reason for his detention. . . .

2. The second writ is the writ of mandamus which is used against public officials, private persons, and corporations for the purpose of forcing them to perform some duty required of them by law. The mandamus is properly used against executive officers to compel them to perform some ministerial duty. Where the duty is purely discretionary and its performance depends upon the pleasure of the official or upon his own interpretation of the law, the court will not intervene. . . . The writ of mandamus is also often used to compel an inferior court to pass upon some matter within its jurisdiction which it has refused to hear or act upon.

3. The third great writ is the writ (or bill) of injunction. This writ may be used for many purposes. Sometimes it takes the form of a mandatory writ ordering some person or corporation to maintain a *status quo* by performing certain acts. Thus, for example, the employees of a railway may be forbidden to refuse to handle the cars of some company which they wish to boycott; in other words, may be ordered to continue to perform their regular and customary duties while remaining in the service of their employer. Sometimes the injunction takes the form of a temporary restraining order forbidding a party to alter the existing condition of things in question until the merits of the case may be decided. Sometimes the writ is in the form of a permanent injunction ordering a party not to perform some act the results of which cannot be remedied by any proceeding in law.

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378. Judicial power over legislative acts. The various ways in which the judiciary modifies or shares in lawmaking may be stated as follows:

In every state there must be some authority empowered to declare what the law is when its meaning in a particular controversy is drawn in question. Thought is subtler than expression, and owing to the deficiencies and ambiguities of language it is difficult to reduce rules of conduct to written form so as to convey exactly the same meaning to different minds. The meaning of the written law, therefore, is frequently a matter of dispute; and when parliamentary draftsmen are careless or incompetent and the law must be applied under conditions and circumstances which could never have been contemplated by even the most imaginative legislator, the possibility of disputes is greatly increased. In such circumstances the courts are accustomed not only to assume the right of discovering the hidden meaning of the law but, if possible, of giving effect to the presumable intention of the lawmaker, even if this does involve a subordinate power of lawmaking and is in conflict with the theory of the separation of powers. . . .

In all systems of law known to history the courts by interpretation and instruction have worked out an extensive system of jurisprudence popularly described as "judge-made" law. Thus the Roman jurists developed an immense body of private law from the meager fabric of the Twelve Tables, and the English and American judges have done likewise from the body of written law, statutory and constitutional. This must necessarily happen in any legal system which grows and expands to meet the changing necessities of society. . . .

Whether the judiciary in the exercise of its undoubted right of interpretation, that is, of discovering the meaning of the written statute which it is called on to apply, may, if in its opinion the statute is inconsistent with some superior law, refuse to apply such a statute and treat it as null and void, is a question which has been much mooted by jurists and political writers. Outside the United States the practice and, to a large extent, the opinions of commentators have been adverse to the assumption of such a power on the part of the courts. On the continent of Europe the general principle prevails that the lawmaking body itself is the only judge of the validity of its acts. . . .

In the United States the doctrine of the right of the judiciary to set aside and refuse to be bound by legislative acts which in its opinion contravene the supreme law has been acted upon from colonial times and has been a familiar one in American jurisprudence.

379. Disallowance of a colonial bill. An early example of the annulment of a legislative statute — a forerunner of the American practice of declaring laws invalid — is contained in the following report of the Lords Commissioners for Trade and Plantations for the American colonies:

The Lords of the Committee of your Majesty's most honorable Privy Council for Plantation Affairs having by their Order of the 10th of Nov: last directed us to report to them Our opinion upon a Bill passed in May 1769 by the Council and House of Representatives of your Majesty's Council of New York for emitting £ 120,000 in paper notes of Credit upon loan, to which Bill your Majesty's late Governor had refused his assent without having first received your Majesty's directions for that purpose. . . .

It is Our duty, however, to observe to your Majesty that notwithstanding their intimation given to the Lieutenant Governor a new bill in no material points differing from that now before your Majesty has been proposed in the Assembly of this Colony & having passed that house and been concurred in by the Council Your Majesty's said Lieutenant Governor did think fit by their advice to give his assent to it on the 5 day of January last and therefore it becomes necessary for us to lose no time in humbly laying this Act which was received at Our Office yesterday before Your Majesty to the end that if Your Majesty shall be pleased to signify your disallowance of it, either upon the ground of the doubts in point of law which occurred to the former Bill, or upon a consideration of so irregular a proceeding as that of entering upon a proposition of this nature & passing it into an Act pending the consideration of it before Your Majesty in Council there may be no delay in having Your Majesty's Pleasure thereupon signified to the Colony, so as to reach it before that part of the Act which authorizes the emission of the Bills can take effect. . . .

380. Declaring laws unconstitutional. What really happens when a law is declared "unconstitutional" is strikingly stated in the following:[1]

If it were the duty of the courts to give effect to the wishes of the people upon constitutional questions, our government would be a truly absurd one. The judicial body would then be a sort of additional legislature extremely ill-fitted for its task. . . . But, in fact, the duty of the courts is almost the reverse of this, because the popular desire for a law

[1] By permission of Houghton Mifflin Company.

may very well be presumed from the fact that it has been passed by the legislature, and the courts are given power to treat a statute as invalid in order that they may thwart the popular will in cases where that will conflicts with the provisions of the Constitution. Now, the Constitution is always older than the law in question, and may be more ancient by a century, so that the court, in deciding that a law is unconstitutional, declares, in effect, that the present wishes of the people cannot be carried out, because opposed to their previous intention, or to the views of their remote ancestors. All our constitutions have a safety valve, no doubt, in the power of amendment, so that any of them can be changed by a sufficient proportion of the voters, if they persist long enough in the same opinion; but this, while modifying, does not do away with the fact that it is often the duty of our courts to defeat the immediate wishes of a majority of the people. Stated in such a form, the power of our judiciary is certainly very startling.

V. Organization of the Judiciary

381. Influence of the justices of the peace in England. The historic position and present importance of the English "squire" is brought out in the following:[1]

One might almost say that in spite of a democratic electorate, the counties are governed by common consent, or rather by a small number of people who take an active interest in the subject.

Apart from the general character of rural populations, there is a special reason why this should be true in England. Until 1888 the counties were governed by the justices of the peace, who belonged mainly to the landowning gentry, and although these men were not free from the prejudices and interests of their class, their administration was honest, sound, and not unpopular, while their possession of the land gave them a strong economic hold upon the whole countryside. In the agricultural portions of the kingdom, that is in the greater part of the districts that elect councilors, men of this kind have retained their influence, and they are still the principal figures in most of the county councils. Occasionally they form a large majority of the council, and other people are considered so extraneous an element that one hears them referred to as "imported members." In other counties the landed gentry, although furnishing a large contingent, are a minority in the council, but in these cases they usually occupy the leading positions.

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382. Organization of justice in Germany. The judicial organization in the German federal system differs markedly from that of the United States.

In the administration of justice, as in so many other undertakings of government, the Empire superintends, merely, and systematizes. The state courts are also courts of the Empire: imperial law prescribes for them a uniform organization and uniform modes of procedure: and at the head of the system stands the Imperial Court (*Reichsgericht*) at Leipzig, created in 1877 as the supreme court of appeal. The state governments appoint the judges of the state courts and determine the judicial districts; but imperial laws fix the qualifications to be required of the judges, as well as the organization that the courts shall have. The decisions of the court at Leipzig give uniformity to the system of law.

383. Growing distrust of the Supreme Court in the United States. The following extract accuses the Supreme Court of ultra-conservatism and undue regard for the rights of vested interests:[1]

This comparative freedom from criticism which the Supreme Court has enjoyed until recent years does not indicate that its decisions have always been such as to command the respect and approval of all classes. It has from the beginning had the full confidence of the wealthy and conservative, who have seen in it the means of protecting vested interests against the assaults of democracy. That the Supreme Court has largely justified their expectations is shown by the character of its decisions.

During the first one hundred years of its history two hundred and one cases were decided in which an act of Congress, a provision of a state constitution or a state statute, was held to be repugnant to the Constitution or the laws of the United States, in whole or in part. . . . In fifty-seven instances the law in question was annulled by the Supreme Court on the ground that it impaired the obligation of contracts. In many other cases the judicial veto was interposed to prevent what the court considered an unconstitutional exercise of the power to regulate or tax the business or property of corporations.

These decisions have been almost uniformly advantageous to the capital-owning class in preserving property rights and corporate privileges which the unhindered progress of democracy would have abridged or abolished. . . . There is a much more numerous and more important class of cases in which the Supreme Court, while not claiming to exercise this power, has virtually annulled laws by giving them an interpretation

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which has defeated the purpose for which they were enacted. The decisions affecting the powers of the Inter-State Commerce Commission may be cited as an illustration. This body, created by Congress for the purpose of regulating the railway traffic of the country, has, as Mr. Justice Harlan observes, "been shorn by judicial interpretation, of authority to do anything of an effective character." . . .

It is not, however, in the laws which have been annulled or modified by interpretation that we find the chief protection afforded to capital, but rather in the laws which have not been enacted. The mere existence of this power and the certainty that it would be used in defense of the existing social order has well-nigh prevented all attacks on vested rights by making their failure a foregone conclusion.

It is but natural that the wealthy and influential classes who have been the chief beneficiaries of this system should have used every means at their command to exalt the Supreme Court and thereby secure general acquiescence in its assumption and exercise of legislative authority. To the influence of these classes in our political, business, and social life must be attributed in large measure that widespread and profound respect for the judicial branch of our government which has thus far almost completely shielded it from public criticism.

There are many indications, however, that popular faith in the infallibility of the Supreme Court has been much shaken in recent years. . . .

With the progress of democracy it must become more and more evident that a system which places this far-reaching power in the hands of a body not amenable to popular control, is a constant menace to liberty. It may not only be made to serve the purpose of defeating reform, but may even accomplish the overthrow of popular rights which the Constitution expressly guarantees.

384. Defense of the Supreme Court. The following extract from a speech made in the House of Representatives indicates the general American attitude of pride and trust in our federal judiciary:

We live under a peculiar government, due to its dual character and limited power. We have to determine in this country not only what we ought to do, but what we can do, because we have a government, limited both as to which sovereignty shall exercise the power and limited also as to what matters can be dealt with at all. The one important original idea contained in the Constitution of the United States is the supremacy given to the judiciary. The thing that makes our constitution unique from every one in the world is the fact that the Supreme Court of the United States is given power to say whether the other branches of the

government have exceeded their power; has the right to declare null and void an act of the legislature of the national Government; has the right to have disregarded the action of the executive when it is beyond his power; and has the further right to say when the states have exceeded their sovereign powers. That is the greatest power ever given to a tribunal and it is as I have said the one great characteristic of the American constitution, and to it we owe more of the stability and grandeur of this country than to any other provision in that instrument. . . .

There have been times when the decisions of this court in the performance of its great functions have aroused great excitement and at times great indignation; but with the exception of the Dred Scott case nearly every decision of that court undertaking to lay down the limits of national and state power has met with the final approval of the American people; and to-day it may not be inappropriate when it has become the fashion of some of those in high places to criticize the judiciary, to call attention to these facts. Certainly, no man from my section of the country should ever care to utter a condemnation of the judiciary, for when passion ran riot, when men had lost their judgment, when the results of four years of bitter war produced legislation aimed not at justice, but frequently at punishment, it was the Supreme Court that stood between the citizen and his liberties and the passion of the hour and I trust the day will never come when the American people will not be willing to submit respectfully and gladly to the decrees of that august tribunal. Temporarily they may seem to thwart the will of the people but in their final analysis they will make as they have made for orderly government, for government of laws and not of men, and we may be sure that the Supreme Court in the pure atmosphere of judicial inquiry that has always surrounded it will arrive at a better interpretation of the powers of both state and national governments than can be possibly hoped for in a forum like this where popular prejudice and the passions of the hour affect all of us whether we will or no.

385. The Supreme Court in the future. Justice Brewer outlines the following as the most important questions with which the Supreme Court must deal in the future:

As admitted by all careful students of history, the Supreme Court, whose organization and powers constitute the most striking and distinguishing feature of the Constitution, has been a most potent factor in shaping the course of national events. It stands to-day a quiet but confessedly mighty power, whose action all wait for, and whose decisions all abide. Turning to the future, every thoughtful man wonders what is

coming to the republic, and many inquire what the Supreme Court will do in shaping that future, and how its decisions may affect the national life.

The questions which now seem likely to arise and to be pressed upon judicial attention may be grouped in four classes: First, those growing out of the controversies between labor and capital; second, those that will spring from the manifest efforts to increase and concentrate the power of the nation and to lessen the powers of the States; third, those arising out of our new possessions, separate from us by so long distances and with so large a population, not merely of foreign tongue, but of a civilization essentially different from that of the Anglo-Saxon; and, fourth, those which will come because our relations to all other nations have grown to be so close and will surely increase in intimacy.

CHAPTER XXI

POLITICAL PARTIES

I. Functions of Political Parties

386. Functions of political parties. Bryce outlines as follows the aims of party organization:[1]

The aims of a party organization, be it local or general, seem to be four in number —

Union — to keep the party together and prevent it from wasting its strength by dissensions and schisms.

Recruiting — to bring in new voters, *e.g.* immigrants when they obtain citizenship, young men as they reach the age of suffrage, newcomers, or residents hitherto indifferent or hostile.

Enthusiasm — to excite the voters by the sympathy of numbers, and the sense of a common purpose, rousing them by speeches or literature.

Instruction — to give the voters some knowledge of the political issues they have to decide, to inform them of the virtues of their leaders and the crimes of their opponents.

These aims, or at least the first three of them, are pursued by the party organizations of America with eminent success. But they are less important than a fifth object which has been little regarded in Europe, though in America it is the mainspring of the whole mechanism. This is the selection of party candidates: and it is important not only because the elective places are so numerous, far more numerous than in any European country, but because they are tenable for short terms, so that elections frequently recur. Since the parties, having of late had no really distinctive principles, and therefore no well-defined aims in the direction of legislation or administration, exist practically for the sake of filling certain offices, and carrying on the machinery of government, the choice of those members of the party whom the party is to reward, and who are to strengthen it by the winning of the offices, becomes a main end of its being.

387. Relation of party strength to governmental organization. Goodnow points out the functions performed by political parties in

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remedying too great separation or division of governmental powers, their strength depending in large degree upon the unity or lack of unity in the governmental system:[1]

In what has already been said, the attempt has been made to show that the two primary functions of the state were to express and execute its will, and that if the expression of this will were to be something more than a philosophical statement of belief, a counsel of perfection, there must be a coördination of these functions, *i.e.* that the execution of the will of the state must be subjected to the control of the body which expresses it. This coordination, it has been shown, may be brought about in the governmental system by subjecting all administrative offices to the control of a superior governmental authority which is intrusted ultimately with the expression of the will of the state. In order that this control may be effective and may be found in the governmental system, the administrative system must be considerably centralized. If this coördination of the expression and the execution of the will of the state is not brought about in the governmental system, it must be provided for outside of the government. Where it is found outside of the government, it is to be found in the political party. It must of necessity be found there if the administrative system is not considerably centralized and under ultimate and effective legislative control.

If provision is not made for this coordination in the governmental system, the work of the party is much greater than it is where the governmental organization provides for this coordination. Inasmuch as the party organization is in all cases formed in order to do the work which is devolved upon it by the governmental system, the party organization will be much less complicated and much less centralized under a governmental system which is so formed as to permit the body, charged ultimately with the expression of the will of the state, to exercise an effective control over the agents charged with its execution. . . .

Further, if in a given state the relations of central and local government are such that the localities have largely in their hands the execution of state laws, the state parties must, if they are to discharge their necessary functions, have to do not merely with the expression and execution of the state will by state officers, but also with the execution of that will by local authorities. State parties must, in such a case, concern themselves with local politics. The differentiation of state and local parties, if such differentiation is ever possible, is conditioned upon a differentiation of state and local politics. Such a differentiation is possible only where local bodies cease to act as independent state agents. . . .

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Party organization is thus based on the character and amount of the work the party has to do; and the work the party has to do depends very largely on the relations existing both between the different organs of the central government and between the central and the local governments. If the system of government is at the same time unconcentrated from the point of view of the relations of the different departments of the general government, and decentralized from the point of view of the relations of the central and the local governments, the work of the party is very great, and to do this work the party organization must be correspondingly strong and permanent.

388. The function of third parties. While usually considered undesirable and dangerous, third parties perform services of some value.

Much has been said with reference to third parties and their desirability. In the great democratic countries, — England and the United States, — two chief parties exist. If a special issue comes up, such as slavery, or the prohibition of the liquor traffic, or special labor legislation, and neither of the great parties finds it wise or convenient to take up this issue, the question arises as to whether a third party ought to be organized. In many instances the best way to promulgate an idea is to organize a third party and to work as vigorously as possible to get into power. If the issue is really one of prime importance, as was the question of the extension of slavery into the territories before the Civil War, the third party is likely to secure such influence that either the question must be taken up by one of the existing large parties, or the third party becomes the dominant one as did the Republican party after the outbreak of the Civil War. But unless the third party within a comparatively short time becomes itself very prominent or has its policies adopted by one of the great parties, it is a reasonable assumption that its issue is not of prime importance. Under those circumstances is it worth while to devote one's time and energies and money to further discussion of the question, or would it be better, after the matter has been fully tested for a few years, to relinquish one's efforts for the time being and to devote one's energies rather to carrying through one of the issues of the day which is prominent enough so that one's influence may count? This question ought to be very seriously considered by persons of unselfish, devoted natures who try year after year to carry their ideas into effect and find that they are making practically no headway. May it not well be true that energy so expended is thrown away and that a person by following this small third party may be practically wasting his time instead of using

it wisely? There may be hope fifty years hence for the special issue. This suggestion is not a condemnation of a third party; that is perhaps the best way in which to get a new problem of the day before the people. The question is that of the true function of a third party in a country like the United States as a means to bring forward and urge a new issue until that issue has been thoughtfully tested before the country.

II. History of Political Parties

389. Development of parties in England. A brief outline of party history in England follows:

Parties may be traced as far back as the reign of Elizabeth, when the Puritans appear as a body of men holding the same views on definite religious and political questions, and trying to secure their establishment in opposition to the wishes of the Queen and her ministers. Definite *Parliamentary parties* date from the Long Parliament of 1641, which contained men "opposed to one another in the House of Commons . . . on a great principle of action, which constituted a bond between those who took one side or the other." The opponents of arbitrary government in Church and State became known as Roundheads, while the supporters of the King received the name of Cavaliers. At the Restoration, the Cavaliers were entirely in the ascendant, but by the time of the dispute on the Exclusion Bill, 1679, the other party had revived, and the two opposing factions obtained the names of "*Petitioners*," *i.e.* those who petitioned the King to summon a new Parliament as soon as possible, and "*Abhorrers*," who were the supporters of the Crown, and expressed their abhorrence of the petitions, as calculated to coerce the King. Shortly afterwards these two parties received the names of Whigs and Tories. . . . Roughly speaking, the Tories were the upholders of absolute monarchy, the Whigs desired a monarchy limited by Parliament. . . . After the Revolution of 1688, the more extreme Tories developed into Jacobites, who continued to disturb the country until after the crushing of the rebellion in 1745. After that, the Tory party became the supporters of the King of England. Party government, however, cannot be said to have been established until the reign of George I; although William III, between 1693 and 1696, chose his ministers from the Whigs, the ministry, from their unity, being popularly known as "the Junto," yet, on the loss of their majority at the election of 1698, they refused to resign. By degrees, however, the present ministerial system became established by which, as the nation, and consequently the Parliament, is divided broadly into two great parties,

one of which must have the control of the executive, the ministers are bound to be of the same party as the majority in the House of Commons, and to stand or fall together.

390. Origin of parties in the United States. The following letter, written by John Adams, shows the existence of fundamental differences from the beginning of American political life:

You say, "Our administrations, with the exception of Washington's, have been party administrations." On what ground do you except Washington's? If by party you mean majority, his majority was the smallest of the four in all his legislative and executive acts, though not in his election.

You say, "our divisions began with federalism and antifederalism." Alas! they began with human nature; they have existed in America from its first plantation. In every colony, divisions always prevailed. In New York, Pennsylvania, Virginia, Massachusetts, and all the rest, a court and country party have always contended. Whig and Tory disputed very sharply before the revolution, and in every step during the revolution. Every measure of Congress, from 1774 to 1787 inclusively, was disputed with acrimony, and decided by as small majorities as any question is decided in these days. We lost Canada then, as we are like to lose it now, by a similar opposition. Away, then, with your false, though popular distinctions in favor of Washington.

In page eleventh, you recommend a "constitutional rotation, to destroy the snake in the grass"; but the snake will elude your snare. Suppose your President in rotation is to be chosen for Rhode Island. There will be a federal and a republican candidate in that State. Every federalist in the nation will vote for the former, and every republican for the latter. The light troops on both sides will skirmish; the same northern and southern distinctions will still prevail; the same running and riding, the same railing and reviling, the same lying and libeling, cursing and swearing, will still continue. The same caucusing, assemblaging, and conventioning.

391. Fundamental oppositions in American politics. Bryce finds two general lines of cleavage forming party divisions throughout our entire national history.[1]

Two permanent oppositions may, I think, be discerned running through the history of the parties, sometimes openly recognized, sometimes concealed by the urgency of a transitory question. One of these

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is the opposition between a centralized or unified and a federalized government. In every country there are centrifugal and centripetal forces at work, the one or the other of which is for the moment the stronger. There has seldom been a country in which something might not have been gained, in the way of good administration and defensive strength, by a greater concentration of power in the hands of the central government, enabling it to do things which local bodies, or a more restricted central government, could not do equally cheaply or well. Against this gain there is always to be set the danger that such concentration may weaken the vitality of local communities and authorities, and may enable the central power to stunt their development. Sometimes needs of the former kind are more urgent, or the sentiment of the people tends to magnify them; sometimes again the centrifugal forces obtain the upper hand. English history shows several such alternations. But in America the Federal form of government has made this permanent and natural opposition specially conspicuous. The salient feature of the Constitution is the effort it makes to establish an equipoise between the force which would carry the planet States off into space and the force which would draw them into the sun of the National government. There have always therefore been minds inclined to take sides upon this fundamental question, and a party has always had something definite and weighty to appeal to when it claims to represent either the autonomy of communities on the one hand, or the majesty and beneficent activity of the National government on the other. The former has been the watchword of the Democratic party. The latter was seldom distinctly avowed, but was generally in fact represented by the Federalists of the first period, the Whigs of the second, the Republicans of the third.

The other opposition, though it goes deeper and is more pervasive, has been less clearly marked in America, and less consciously admitted by the Americans themselves. It is the opposition between the tendency which makes some men prize the freedom of the individual as the first of social goods, and that which disposes others to insist on checking and regulating his impulses. The opposition of these two tendencies, the love of liberty and the love of order, is permanent and necessary, because it springs from differences in the intellect and feelings of men which one finds in all countries and at all epochs. There are always persons who are struck by the weakness of mankind, by their folly, their passion, their selfishness: and these persons, distrusting the action of average mankind, will always wish to see them guided by wise heads and restrained by strong hands. Such guidance seems the best means of progress, such restraint the only means of security. Those on the other hand who think better of human nature, and have more hope in their own tempers, hold

the impulses of the average man to be generally towards justice and peace. They have faith in the power of reason to conquer ignorance, and of generosity to overbear selfishness. They are therefore disposed to leave the individual alone, and to intrust the masses with power. Every sensible man feels in himself the struggle between these two tendencies, and is on his guard not to yield wholly to either, because the one degenerates into tyranny, the other into an anarchy out of which tyranny will eventually spring. The wisest statesman is he who best holds the balance between them.

III. Present Political Parties

392. Present tendencies in English politics. In his recent book on the government of England, Lowell indicates the position of the leading English parties as follows:[1]

The two great parties are separated to-day by no profound differences in general principles or political dogmas. But this does not mean that they are not marked by distinct tendencies, and still more by a tradition of tendencies. There is a theory held by the Liberals — although denied by their opponents — that they are more democratic, that they have more trust in the people, and more real sympathy with the workingmen. After enfranchising the middle class, and winning its support, they felt that any further extension of the suffrage must have a similar result. They considered the lower strata of society as their protectorate, or at least within their particular sphere of influence, and they still regard an alliance between the Conservatives and any fraction of the working classes as unnatural. This feeling is shared by the Labor leaders, and one sometimes hears them say that the Liberals favor labor legislation from conviction, the Conservatives only to get votes. Nevertheless that belief is by no means universal among workmen, many of whom have been said to support the Conservatives on the ground that owing to their control of the House of Lords they are really the most effective party in enacting labor laws.

There is another theory to the effect that Liberals believe in peace, and reform, and are less inclined than the Conservatives to an aggressive foreign policy. There is truth in all this; although foreign policy depends to a great extent upon the personal views of the minister who has the principal charge of it. . . . In regard to retrenchment or economy, it is certain that national expenditure has increased

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very rapidly, and if the Liberals have been more cautious in spending money, they have followed the Tory lead, although like the hind legs of the stag, at some distance.

Again there is a theory that the Liberals give greater weight to local opinion, that they have more regard for the wishes of Scotland, Ireland, and Wales, and that they are generally more favorably disposed toward local control. This also is not without foundation, but it is hardly a general political principle, and was certainly not applied in the case of the recent Education Bill.

On the other hand, there is a theory that the Conservatives have more respect for existing institutions, and dread to disturb venerable things. The impression is partly true, partly a tradition, and to some extent exaggerated. It was, in fact, the Conservatives who swept away, by the County Councils Act of 1888, the local government of the counties by justices of the peace, certainly a venerable institution, and if not in harmony with the spirit of the age, by no means moribund or indefensible. It was they, a dozen years earlier, who recast the judicial system, making the greatest single change in the courts that had been made for centuries. The Conservatives, no doubt, talk far less about attacking institutions, and the same act raises less of a storm if done by them than if done by the Liberals. The vested interests of the country are, indeed, more affected by a dread of what the Liberals may do than by what they have actually done.

All these tendencies have some effect in shaping the policy of the parties, and in determining their position on current questions; but the differences are in degree rather than in kind, and are liable to present strange shapes under the stress of party warfare.

The most marked and permanent tendencies in which the parties differ are found in their attitude toward certain powerful interests in the community. The Conservatives tend strongly to favor the claims of the Church of England, of the landowners and now of the publicans, while the Liberals are highly sensitive to the appeals of the Nonconformist conscience. These again are tendencies, and must not be stated in too absolute a form.

393. Political parties in France. The general nature of political parties in France is indicated in the following:

The parties and factions in the French parliament are bewildering in number. The election of 1906 sent to the Chamber of Deputies representatives of the following groups: radicals, socialist radicals, dissident radicals, independent socialists, unified socialists, republicans of the left, progressivists, nationalists, monarchists, and Bonapartists, and a few

other minor groups. With the exception, of course, of the monarchists and Bonapartists, they all agree that the republic shall be maintained, and they have been able to unite upon many important measures, such as those relating to education and the relations of the State to the Church, but they differ on other questions of reform which are constantly coming up. Some are pretty well satisfied with things as they are, while others, especially the various socialist groups, would like to see the government undertake a complete social and economic revolution for the benefit of the laboring classes. The State should, they believe, take possession of lands, mines, mills, and other sources of wealth and means of production, and see that they are used for the benefit of those who do the work and no longer serve to enrich men who seem to them to sit idly by and profit by the labor of others. . . .

In England and the United States there are two great parties, one of which is ordinarily in unmistakable control. In France there are so many parties that no single one can ever long command a majority of votes in the Chamber of Deputies. As a result measures cannot be carried simply because the leaders of one party agree on them, but they must appeal to a number of groups on their own merits. Minorities, consequently, have an opportunity to influence legislation in France, and there is little chance for machine politics to develop. It is true that French ministries rise and fall at very short intervals, but nevertheless the laws which do pass receive more careful attention, perhaps, than they would if pushed through as party measures.

394. Political parties in Germany. A brief statement of party division in the German Empire follows: Refer to

Of the ten parties in the German Reichstag besides the Socialist and the Catholic Center, four stand for different shades of liberalism, three are conservative, one is anti-Semitic, and the rest represent race feeling. The Polish representatives from the eastern provinces of Prussia, the one Danish representative from Schleswig, and most of the representatives from Alsace-Lorraine are standing protests against the attempts to crush their respective nationalities by the compulsory introduction of the German law and language. Besides these there are two or three distinct South German parties; and indeed the great "Center" is to a large extent a sectional South German delegation. South Germany (Bavaria and Württemberg in particular) has opposed bitterly all attempts to increase the army and navy; and the feeling of the vivacious people in these districts toward the severe, stern Prussian is one of the most serious factors of present German politics.

395. Political parties in Hungary. The party system in Hungary is unusual. Nowhere else is one party constantly in power.[1]

The lack of a division into two great parties, such as ordinarily prevails in England, will explain why the Hungarian cabinet is never upset by an opposition whose leaders are ready to form a new ministry; but it does not explain why the cabinet is not constantly overthrown, as in France and Italy, by a temporary coalition of groups, and replaced by another as feeble and ephemeral as itself. To account for this, we must revert to the fact already noticed that the majority in Hungary is not composed of a number of different groups, but of one solidly united party, which furnishes the government with a stable support. The existence of a single great party, which distinguishes Hungary from all the other countries we have considered, may be attributed to three causes: first, to the long political experience of the Magyars, acquired by local self-government, which makes them understand the value of strong political organizations and the necessity of concerted action; second, to the commanding personal influence of Deak and afterwards of Tisza; third, to their position in relation to the other races. The danger to Hungary from this source is far greater than that to which Italy is exposed at the hands of the Clericals. It is a question of national life and death. If by quarrels among themselves the Magyars should lose control of the state, they would run a terrible risk of being engulfed by the flood of Slavs by which they are surrounded. It is not surprising, therefore, that a majority of the deputies should combine to support the government, and present an unbroken front to the Croats, the Serbs, and the Roumanians.

396. Danger of party divisions on class lines. Lowell points out the undesirable results of party grouping in accordance with class distinctions.

The conception of government by the whole people in any large nation is, of course, a chimera; for wherever the suffrage is wide, parties are certain to exist, and the control must really be in the hands of the party that comprises a majority, or a rough approximation to a majority, of the people. But the principle has nevertheless an important application. If the line of division is vertical, so that the party in power includes a considerable portion of each class in the community, every section of the people has a direct share in the government; but if the line is horizontal, so that the party is substantially composed of a single class, then the

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classes not represented in it are virtually disfranchised so long as that party maintains its ascendancy. Instead of a true democracy, we have government by a single class, which degenerates easily into oppression. In this case, indeed, the tyranny is likely to be far worse than it would be if the ruling class were legally the sole possessor of power, because there is a lack of all sense of responsibility toward the rest of the people, and because the alternation in power of different classes, which must inevitably occur, breeds intense bitterness of feeling. So long, therefore, as party lines are vertical, popular government is on a sound basis. But if all the rich men, or all the educated men, are grouped together, the state is in peril; and if the party lines become really horizontal, democracy is on the high road to class tyranny, which leads, as history proves, to a dictatorship. This is the meaning of the classic publicists when they speak of the natural rotation from monarchy to aristocracy, from this to democracy, and then back again to monarchy. To them, democracy meant, not government by the whole people, but the rule of the lower classes. A territorial division of parties, indeed, is not as dangerous as a horizontal division, because, although the former may lead to civil war the latter leads to social anarchy and despotism.

397. The "Ins" and the "Outs." The position which parties are forced to take depends largely upon whether they are in control of the government or constitute the opposition.

In most times we find political parties divided into the government party and the opposition, the ins and the outs. It is a good thing to have parties divided along that line; it tends toward a critical examination of policies. The party in power naturally wants the government strengthened; it is inclined to favor centralization. The opposition party normally tends toward particularism and wants the central government weakened. In most states the party in power is inclined to be conservative as it feels responsibility. The party out of power will promise almost anything, even along most radical lines, if it will help it to get in.

IV. Party Organization

398. Functions of party organization. The purposes for which party organization exists may be stated as follows:[1]

In a nation which is ruled by party the organization might conceivably extend its operation as far as those of the party itself. It might in its conventions, or by its committees, frame all the legislation, direct the

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foreign policy, and regulate the internal administration, controlling it even in the minutest details. If we regard the cabinet as an organ of party, this is precisely what happens in England, for there is nothing in the whole range of party government for which a minister is not responsible. But when we speak of party organizations we do not usually mean to include the cabinet; we are thinking of the machinery of party outside the organs of government. Using the words in this sense, the party organizations are limited to a far narrower field. Leaving out of account the details of administration, and the appointment of subordinate officials, which do not fall within the proper sphere of parties, and with which in England they fortunately do not interfere, we may say that party organizations have in general three normal functions (1) the formulation of party policy, (2) the selection of candidates for office, and (3) the effort to bring the public to their side and win a victory at the polls. In the United States, where the form of the institutions has caused a high development of party machinery outside the framework of government, the organizations exercise all three functions, but by reason of the nature of the parliamentary system, this cannot be true of the two leading parties in England.

399. Primary elections and party organization. The probable influence upon party organization of removing from party control the selection of candidates for election has been suggested by Professor Macy.

We are now in the midst of the third period of radical party readjustment to new governmental conditions, and I am requested to forecast the probable effects upon party organization. . . .

Even the legislative caucus, in State and nation, which was the first form of organization for the two great national parties, met an obvious need. The voters were already divided into two main groups of opposing opinions and party names had been assumed. Some means were required to give effect to party opinion. The voters were widely distributed. Communication was slow and difficult. At each State capital, and at the national capital, there were already gathered lawmakers chosen by the people of each locality. It was in entire harmony with the needs of the period that these representatives should assume and exercise the added function of making party nominations. . . .

The legislative caucus was always subject to criticism. Its action was viewed by many as an unauthorized assumption of power. Only in the absence of other more direct organs for giving effect to party opinion was it acceptable. Out of the experience of towns, cities, and counties

a more direct nominating process was gradually developed for the wider areas. It was customary to choose delegates in local party caucus to meet in party convention, to formulate party policy, and to nominate candidates. . . . With the advent of the convention there has come into existence a vast array of party machinery, in the form of permanent party committees. In its origin this machinery answered a real need. The voters were still widely scattered and communication was still slow and difficult. The loosely constructed system of local, State, and general government tended also still farther to separate and divide the people. In the beginning the party conventions and the party committees were effective organs for resisting disintegration and promoting national unity.

While the system of party machinery has grown, there has come into use the railway, the telegraph, the telephone, and rural postal delivery. By means of the daily press the people of the State, of the entire nation, are brought together. There is thus made possible a sort of daily session or town meeting for the whole body politic. Party organs, which in their origin were eminently serviceable, are no longer needed to bring the people together. As the newspaper and other agencies for easy and direct communication have become universal, the discarded or neglected party machinery has fallen into the hands of vested interests, whose use of our political agencies is often adverse to the public good. This condition has given rise to the present effort for the readjustment of party machinery. Direct nominations at primary elections are being substituted for the nominating conventions.

The first and most obvious change, therefore, is the tendency to eliminate the nominating convention. How far this will go is as yet only a matter of conjecture. Thus far the nomination of candidates for the presidency by popular vote has not been seriously considered, but provision is made in many States for the popular election of delegates to the national convention. Since the general government has no machinery for holding elections, the national nominating convention is likely to endure so long as distinctly party nominations are made.

The system of party conventions has served other purposes than the nomination of candidates. It has assisted in the formation and expression of party issues. The convention has given rise to the party platform. If there is no State convention, how can there be a State platform? There exists a strong tendency to retain the State convention even though its nominating function be lost. Yet, as voters become accustomed to the new nominating process, the party platform is likely to emanate more and more directly from the utterances of the successful candidates. . . .

Our system of permanent party committees also grew out of the convention. With the passing of the convention many of the functions of

the committee will disappear. The party may still maintain agents to look after registration and to guard party interests at primary elections. The functions of the campaign committee will remain. Yet even here the new method is likely to effect important changes. As the party platform passes from the convention to the candidate, so the party committee is likely to become more and more an agency of the candidate. A more important change to be effected by the primary election is found in the distinction which it enforces between State and federal politics. The earlier system of party conventions with its vast array of party machinery tended to obliterate the distinction between State and nation. The two governments which the constitution makes distinct were, in the hands of party committees, fused together in such a way as to render intelligent action on the part of the voter difficult or impossible. The new system enforces a separation and compels a distinction between State and federal politics. . . .

The new method also furnishes the means for partially removing the one instance of capital maladjustment in our Federal Constitution. I refer to the provision for the election of United States senators, which has resulted in compelling the voter, in a single act, to attempt the impossible task of expressing an opinion on the policies of two governments which the Constitution makes distinct. When he votes for men to make laws for his State, it is a mere accident if these men represent his views in national politics. Through the device of a primary election it has been found possible virtually to relieve the State legislature of the responsibility of selecting United States senators. This makes it possible to develop and maintain distinct and independent policies in the States.

V. Party Reform

400. Beginnings of the spoils system. The following letter, written to Jefferson by his postmaster-general, indicates the sentiment upon which was originally based removal from office for political reasons:

Premising that I am fully sensible of the agitations which will be produced by removals from office, that I have no connections for whom I wish office, and that I sincerely lament the existence of a state of things which require acts calculated to affect individuals, and to give pain to the feelings of the executive — I proceed to state the reasons upon which I have founded my opinion.

First, The principle cannot be controverted, that it is just, fair, and honorable that the friends of the government should have at least as

great a proportion of the honors and offices of the Government as they are of the whole people. . . .

Secondly, The general depression of the Republicans in this State, who have suffered everything, combating a Phalanx vastly superior to what can be found in any other part of the union forms a strong reason. Nothing can be lost here, and something may be gained: How far this applies to other parts of the union is not for me to judge. A knowledge that we had the real confidence of the Executive I think would have a happy effect, for already it is used as an argument to affect our elections that the President used the Democrats to ride into office, that now seated there he has evinced his contempt for them, and will rely solely on the Federalists for support. . . .

Lastly, The sacred rule that no man shall be persecuted for his opinions decently and reasonably maintained will not apply to any of our official Characters. I believe without a single exception All, and I know most have been bitter persecutors. . . .

401. Evils of the spoils system. The following extract is taken from an address delivered by Carl Schurz at the annual meeting of the National Civil Service Reform League:

Looking at the financial side of the matter alone — it is certainly bad enough; it is indeed almost incomprehensible how the spoils system would be permitted through scores of years to vitiate our business methods in the conduct of the national revenue service, the postal service, the Indian service, the public-land service, involving us in indescribable administrative blunders, bringing about Indian wars, causing immense losses in the revenue, breeding extravagant and plundering practices in all Departments, costing our people in the course of time untold hundreds of millions of money, and making our Government one of the most wasteful in the world. All this, I say, is bad enough. It might be called discreditable enough to move any self-respecting people to shame. But the spoils system has inflicted upon the American people injuries far greater than these.

The spoils system, that practice which turns public offices, high and low, from public trusts into objects of prey and booty for the victorious party, may without extravagance of language be called one of the greatest criminals in our history, if not the greatest. In the whole catalogue of our ills there is none more dangerous to the vitality of our free institutions.

It tends to divert our whole political life from its true aims. It teaches men to seek something else in politics than the public good. It puts

mercenary selfishness as the motive power for political action in the place of public spirit, and organizes that selfishness into a dominant political force.

It attracts to active party politics the worst elements of our population, and with them crowds out the best. It transforms political parties from associations of patriotic citizens, formed to serve a public cause, into bands of mercenaries using a cause to serve them. It perverts party contests from contentions of opinion into scrambles for plunder. By stimulating the mercenary spirit it promotes the corrupt use of money in party contests and in elections.

It takes the leadership of political organizations out of the hands of men fit to be leaders of opinion and workers for high aims, and turns it over to the organizers and leaders of bands of political marauders. It creates the boss and the machine, putting the boss into the place of the statesman, and the despotism of the machine in the place of an organized public opinion.

It converts the public officeholder, who should be the servant of the people, into the servant of a party or of an influential politician, extorting from him time and work which should belong to the public, and money which he receives from the public for public service. It corrupts his sense of duty by making him understand that his obligation to his party or his political patron is equal if not superior to his obligation to the public interest, and that his continuance in office does not depend on his fidelity to duty. It debauches his honesty by seducing him to use the opportunities of his office to indemnify himself for the burdens forced upon him as a party slave. It undermines in all directions the discipline of the public service.

It falsifies our constitutional system. It leads to the usurpation, in a large measure, of the executive power of appointment by members of the legislative branch, substituting their irresponsible views of personal or party interest for the judgment as to the public good and the sense of responsibility of the executive. It subjects those who exercise the appointing power, from the President of the United States down, to the intrusion of hordes of office hunters and their patrons, who rob them of the time and strength they should devote to the public interest. It has already killed two of our presidents, one, the first Harrison, by worry, and the other, Garfield, by murder; and more recently it has killed a mayor in Chicago and a judge in Tennessee.

It degrades our Senators and Representatives in Congress to the contemptible position of office brokers, and even of mere agents of office brokers, making the business of dickering about spoils as weighty to them as their duties as legislators. It introduces the patronage as an agency of corrupt influence between the executive and the legislature. It serves

to obscure the criminal character of bribery by treating bribery with offices as a legitimate practice. It thus reconciles the popular mind to practices essentially corrupt, and thereby debauches the popular sense of right and wrong in politics.

It keeps in high political places, to the exclusion of better men, persons whose only ability consists in holding a personal following by adroit manipulation of the patronage. It has thus sadly lowered the standard of statesmanship in public position, compared with the high order of ability displayed in all other walks of life.

It does more than anything else to turn our large municipalities into sinks of corruption, to render Tammany Halls possible, and to make of the police force here and there a protector of crime and a terror to those whose safety it is to guard. It exposes us, by the scandalous spectacle of its periodical spoils carnivals, to the ridicule and contempt of civilized mankind, promoting among our own people the growth of serious doubts as to the practicability of democratic institutions on a great scale; and in an endless variety of ways it introduces into our political life more elements of demoralization, debasement, and decadence than any other agency of evil I know of, aye, perhaps more than all other agencies of evil combined.

402. The machine and the boss. The process by which the machine and the boss are developed is well described in the following:

The corrupt political machine of to-day, controlled by a boss, is contrary to the American system of government, and were it not a terrible reality its creation would be deemed an impossibility. It is, in its present state of perfection, rule of the people by the individual for the boss, his relatives, and friends. It is the most complete political despotism ever known, and yet the political machine on which the boss rises as dictator and despot is based on the fundamental principle of democracy — that system of government wherein all men are supposed to be equal and every voter a sovereign. It is the multiplicity of voting sovereigns that makes the machine a necessity for concerted political action; and when sovereignty has been centralized by organization, the great majority of our constitutional rulers go about their private affairs, careless of their rights and powers until their personal or property interests are affected by the ukase of a party boss. For a century the division of the voters into political parties has been a part of our system of being governed by the man who runs the machine of the party in office. This division has been carried up or down, according to the

point of view, from national politics to the election of township constables. When the sovereigns are divided on party lines the work of partisan organization is made easy, and the majority need not think or act for themselves; they can leave all such details to the committees. The building of the political machine begins whenever a question of policy seems to demand united party action. The frame is laid in the party caucus or mass meeting, where every voter may be heard. There the necessity for organization is made apparent, and a committee is created. That is the work of the voters of a party in a particular locality, and the first committee is the creation of a majority. So far the plan of procedure is perfect. It is essentially democratic — majority rule. But the committee is too large, and a subcommittee is detailed to carry on the work of the organization. From a subcommittee the task passes to individuals — one, two, or three — and behold, in a day a political machine stands complete, awaiting the guiding hand of a boss!

The committee of the township, county, town, or city mass meetings develops into a small machine, which for a time does its work so well that the people are pleased. When the time comes for holding another mass meeting the voters do not turn out. They are busy with their own affairs, and their confidence in the committee is unshaken. Then the machine grows stronger, and the leader of the first meeting is the boss of the second, dictating nominations and dividing patronage. The smaller committees are represented in the State or city organization, and along the same lines a larger machine is built. It is merely the local and political interests and ambitions merged into one harmonious whole — the machine finished and ready for business. . . .

When civic pride and public spirit are withdrawn from the party organization, the modern political machine remains. It stands before the public disguised as a committee; but every member is there for business, and his first thought is to get all he can out of the party before he is succeeded by some one more unscrupulous. In the scramble for spoils that follows the boss is developed. He is a man with enough force of character to bend the other members of the organization to his will and make the machine a weapon of offense and defense. Once a boss is firmly established in his place his first thought is to take care of the machine, to keep it in good working order, for without it he cannot longer retain power.

403. The nature of the American boss. The characteristics of the typical boss and his attitude toward politics are thus described by Bryce:[1]

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European readers must again be cautioned against drawing for themselves too dark a picture of the Boss. He is not a demon. He is not regarded with horror even by those "good citizens" who strive to shake off his yoke. He is not necessarily either corrupt or mendacious, though he grasps at place, power, and wealth. He is a leader to whom certain peculiar social and political conditions have given a character dissimilar from the party leaders whom Europe knows. It is worth while to point out in what the dissimilarity consists.

A Boss needs fewer showy gifts than a European demagogue. His special theater is neither the halls of the legislature nor the platform, but the committee room. A power of rough and ready repartee, or a turn for florid declamation, will help him; but he can dispense with both. What he needs are the arts of intrigue and that knowledge of men which teaches him when to bully, when to cajole, whom to attract by the hope of gain, whom by appeals to party loyalty. Nor are so-called "social gifts" unimportant. The lower sort of city politicians congregate in clubs and barrooms; and as much of the cohesive strength of the smaller party organizations arises from their being also social bodies, so also much of the power which liquor dealers exercise is due to the fact that "heelers" and "workers" spend their evenings in drinking places, and that meetings for political purposes are held there. . . . A Boss ought therefore to be hail fellow well met with those who frequent these places, not fastidious in his tastes, fond of a drink and willing to stand one, jovial in manners, and ready to oblige even a humble friend.

The aim of a Boss is not so much fame as power, and not so much power over the conduct of affairs as over persons. Patronage is the sort of power he seeks, patronage understood in the largest sense in which it covers the disposal of lucrative contracts and other modes of enrichment as well as salaried places. The dependents who surround him desire wealth, or at least a livelihood; his business is to find this for them, and in doing so he strengthens his own position. It is as the bestower of riches that he holds his position, like the leader of a band of condottieri in the fifteenth century.

The interest of a Boss in political questions is usually quite secondary. Here and there one may be found who is a politician in the European sense, who, whether sincerely or not, purports and professes to be interested in some principle or measure affecting the welfare of the country. But the attachment of the ringster is usually given wholly to the concrete party, that is to the men who compose it, regarded as office-holders or office seekers; and there is often not even a profession of zeal for any party doctrine. . . . Among bosses, therefore, there is little warmth of party spirit. The typical boss regards the boss of the other

party much as counsel for the plaintiff regards counsel for the defendant. They are professionally opposed, but not necessarily personally hostile. Between bosses there need be no more enmity than results from the fact that the one has got what the other wishes to have. Accordingly it sometimes happens that there is a good understanding between the chiefs of opposite parties in cities; they will even go the length of making (of course secretly) a joint "deal," *i.e.* of arranging for a distribution of offices whereby some of the friends of one shall get places, the residue being left for the friends of the other. A well-organized city party has usually a disposable vote which can be so cast under the directions of the managers as to effect this, or any other desired result. The appearance of hostility must, of course, be maintained for the benefit of the public; but as it is for the interest of both parties to make and keep these private bargains, they are usually kept when made, though of course it is seldom possible to prove the fact.

The real hostility of the Boss is not to the opposite party, but to other factions within his own party. Often he has a rival leading some other organization, and demanding, in respect of the votes which that organization controls, a share of the good things going. . . . If neither can crush the other, it finds itself obliged to treat, and to consent to lose part of the spoils to its rival. Still more bitter, however, is the hatred of Boss and Ring toward those members of the party who do not desire and are not to be appeased by a share of the spoils, but who agitate for what they call reform. They are natural and permanent enemies, nothing but the extinction of the Boss himself and of bossdom altogether will satisfy them. They are moreover the common enemies of both parties, that is, of bossdom in both parties. Hence in ring-governed cities professionals of both parties will sometimes unite against the reformers, or will rather let their opponents secure a place than win it for themselves by the help of the "independent vote." Devotion to "party government," as they understand it, can hardly go farther.

404. Necessity for party responsibility in the United States. Goodnow states a fundamental principle in American political organization as follows:[1]

Our formal governmental system makes no provision for the coördination of the functions of expressing and executing the will of the state through the instrumentalities of government. On the contrary, it is so formed as to make that coördination impossible. That is, the work of the party is not completed when it has elected a legislature. It must elect a

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series of executive officers as well, not only for the nation and the state, but also for the localities. Further, the fact that the terms of these executive and legislative officers are not coincident makes it probable that even if one party has elected all the officers it can elect at a given election, such party does not have complete control of the government. The political storm center in the United States is therefore not in the government, but in the party. All attempts to make the boss responsible must take account of this fact. The party must be made responsible to the people. After this is done, the boss will have been attacked in his stronghold, and will be forced to capitulate. In that way, and in that way alone, can we hope to see our government conducted by party leaders amenable to popular control.

405. Legal recognition of political parties. Political parties originated as voluntary associations, outside the legal framework of the governmental system. A realization of the fact that legal control of the parties is necessary if they are to be responsible to popular will is indicated in the following preamble to a recent Oregon law:

Under our form of government, political parties are useful and necessary at the present time. It is necessary for the public welfare and safety that every practical guaranty shall be provided by law to assure the people generally, as well as the members of the several parties, that political parties shall be fairly, freely, and honestly conducted, in appearance as well as in fact. The method of naming candidates for elective public offices by political parties and voluntary political organizations is the best plan yet found for placing before the people the names of qualified and worthy citizens from whom the electors may choose the officers of our government. The government of our State by its electors and the government of a political party by its members are rightfully based on the same general principles. Every political party and every volunteer political organization has the same right to be protected from the interference of persons who are not identified with it as its known and publicly avowed members, that the government of the State has to protect itself from the interference of persons who are not known and registered as its electors.

It is as great a wrong to the people, as well as to the members of a political party, for one who is not known to be one of its members to vote or take any part at any election or other proceedings of such political party, as it is for one who is not a qualified and registered elector to vote at any State election or take any part in the business of the State.

Every political party and voluntary political association is rightfully entitled to the sole and exclusive use of every word of its official name. The people of the State and the members of every political party and voluntary political organization are rightfully entitled to know that every person who offers to take any part in the affairs or business of any political party or voluntary political organization in the State is in good faith a member of such party. The reason for the law which requires a secret ballot when all the electors choose their officers, equally requires a secret ballot when the members of a party choose their candidates for public office. It is as necessary for the preservation of the public welfare and safety that there shall be a free and fair vote and an honest count, as well as a secret ballot at primary elections, as it is that there shall be a free and fair vote and an honest count in addition to the secret ballot at all elections of public officers. All qualified electors who wish to serve the people in an elective public office are rightfully entitled to equal opportunities under the law. The purpose of this law is better to secure and to preserve the rights of political parties and voluntary political organizations, and their members and candidates, and especially of the rights above stated.

406. Primary election reform. The essential features of a satisfactory primary election law may be stated as follows:

1. The primary elections of all parties should be held together in every election precinct on the same day. The time and place of these elections should be fixed by law and not left to be determined by party committees. In this way the election day will be known, the polling places will be fixed and not precarious; machine gerrymandering and snap primaries will be prevented; and the voters of one party will be prevented from packing the Primary of the other for the purpose of nominating weak candidates for their opponents.

2. A good registration law. The party voters must be registered a certain number of days before the Primary. Careful registration always tends to promote fair elections.

3. The right to vote at a party Primary should be secured against fraud by the registration of the party affiliation, or preference of all voters who seek to vote at the Primary. No opponent of a party has a right to participate in its Primary. . . .

4. The Australian secret-ballot system of voting should be used in the Primary as in the regular election day. . . .

Other minor features urged by primary election advocates are: (1) The application of the law should be made mandatory and not left

to the option of party committees. Primary elections should be under State control, not under party control; (2) The rotation of names in the printed ballots. Any name appearing first in all the ballots would have a manifest advantage. . . .

Several objections are urged to the system of making nominations by direct primaries:

1. It tends to promote rather than to check electoral corruption. A primary election is merely another election, and as elections are now conducted we have enough of them. . . .

2. It promotes plurality nominations. A man may be nominated who represents but one third or one fourth of the party voters. . . .

3. It tends to a multiplicity of candidates and the consequent confusion of the voters. . . .

4. The primary system tends to weaken and destroy the party. It causes jealousies and divisions within the party and prevents efficient party organization.

CHAPTER XXII

LOCAL GOVERNMENT

I. Relation of Local to Central Government

407. Local and central government. Local and central government may be distinguished in several fundamental ways.[1]

The difference between local and central government is not a matter of area or of population. The distinction lies partly in their relative constitutional positions, and partly in the respective nature of the public services performed. In regard to the first point, it is true of most independent states that the local government derives its powers from the central government, and holds them at the pleasure of the latter. . . .

The other point of distinction between local and central government consists in the different nature of the services accomplished. This requires some further explanation. The various functions performed by the agencies of the state for the benefit of the citizens will roughly fall into two classes. Some of them will be in the interest of the community generally, and the benefit thereby effected will not be assignable to any single part of the country. . . . The whole class of functions thus indicated will properly fall within the province of the central government. But in addition to these, there are other state activities (for it must be recollected that both local and central government form a part of the organization of the state) of quite a different character. Here the benefit to be conferred only affects a small portion of the community, and is obviously assignable to a particular area. . . . Here it seems reasonable that the advantage, the cost, and the control of the enterprise should be looked upon as solely the concern of those who are affected by it. . . .

In spite, however, of the obvious nature of the general distinction, the functions of local and central government shade and blend into one another.

408. Degrees of centralization. The relation existing between central and local organizations falls into three general types.

Naturally and historically the various subdivisions should exercise full local powers, subject only in general matters to the larger area. . . . As,

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however, states have developed policies of centralization, they have interpreted their general powers more broadly, and have pressed their authority more and more vigorously on subordinate administrative areas. This has usually been under plea of military necessity or of needed uniformity or of general welfare. As the strength of this tendency varies with conditions, the degree of centralization varies in each particular state according to the dominant theories of militarism, uniformity, and general welfare. On the whole, three grades of centralization may be noted:

(1) That in which the subordinate areas or bodies politic are clearly regulated and supervised directly by the national administration through its own officials, as in France.

(2) That in which the subordinate areas are regulated and supervised indirectly by the national administration, as in England, where in many matters a uniform system is adopted, but the administration of it is left to the local administrative bodies.

(3) That in which the subordinate areas practically regulate all their local affairs without much interference from the national administration, as in the relation of Great Britain to its autonomous colonies, and in the United States of America.

No state conforms entirely to any one of these types; the most centralized government may allow large local powers in some matters and the most decentralized may employ large general powers in such affairs as war, diplomacy, and taxation. The test is made by the theoretical principle on which government acts, irrespective of whether at any particular time it seems expedient to use many or few powers of regulation.

II. Commonwealth Governments

409. The Swiss cantons and the union. The Swiss constitution contains distinct traces of confederation, clearly stating the doctrine of divided sovereignty.

The Constitution of Switzerland rests upon federal foundations such as our own government had during the first half century of its existence rather than upon national conceptions such as have dominated us since the war between the States. The Swiss Constitution does indeed expressly speak of the Swiss nation, declaring that "the Swiss Confederacy has adopted the following Constitution with a view to establishing the union (*Bund*) of the Confederates and to maintaining and furthering the unity, the power, and the honor of the Swiss nation"; and not even the war between the States put the word *nation* into our Constitution.

But the Constitution of Switzerland also contains a distinct and emphatic assertion of that principle of divided sovereignty which is so much less familiar to us now than it was before 1861. It speaks of the Confederation as formed by "the people of the twenty-two sovereign Cantons," and it explicitly declares that "the Cantons are sovereign, so far as their sovereignty is not limited by the federal Constitution, and exercise as such all rights which are not conferred upon the federal power"; and its most competent interpreters are constrained to say that such a constitution does not erect a single and compacted state of which the Cantons are only administrative divisions, but a federal state, the units of whose membership are themselves states, possessed, within certain limits, of independent and supreme power. The drift both of Switzerland's past history and present purpose is unquestionably towards complete nationality; but her present Constitution was a compromise between the advocates and the opponents of nationalization; and it does not yet embody a truly national organization or power.

410. The German Empire and the individual states. The nature of the German Empire and the constitutional position of its component commonwealths are indicated in the following:[1]

The German Empire is not a league of princes. It is a State constructed out of States. In becoming a member of the *Bund* each several State gave up its sovereignty, receiving therefor, as Bismarck expressed it, a "share in the joint sovereignty of the Empire." Since there can be no limitation of sovereignty and no division of it, these States are not sovereign "in their own sphere." But the individual State takes a part in forming the power that stands over it. The German States are not subjected to the domination of any one of them, nor to any foreign sovereign, but rather to a corporate State builded out of themselves. "The German States are as a totality sovereign." Sovereignty, according to the German jurists, is not an essential element of a State. It may constitute the basis of recognition in international law, but from the standpoint of constitutional law it is an insufficient test of statehood. The true mark of a State consists in its possession of original and underived power. This mark belongs to each of the German States. There is a large field in which the State is left free to govern itself. The powers of the Empire are specifically defined. It may enlarge those powers, but until it does the State enjoys a free hand. This independence is not granted to it by the Empire. It forms no part of the imperial powers. It is State power, pure and simple. The State wields it as of

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right and not by concession. It existed before the founding of the Empire. It survives that act. It is that autonomous area of power belonging to the State which has not yet been invaded by the Empire.

411. Variety and unity of commonwealth organization in the United States. In some respects the American commonwealths exhibit striking similarities; in other respects, marked differences.

The cardinal principle of the present Union is that, except in matters distinctly regulated by the federal constitution, each state is free to govern itself. Hence great variety in the form and the functions of the state governments. . . .

Such differences are not all accidental; some of them go back for centuries: of the present forty-five states eighteen formed parts of English colonies before the Revolution, and show distinct traces of colonial tradition in their governments; another group of states, from Louisiana to California, bears the impress of former Spanish and French law. Other communities, such as Arkansas and Michigan, have been founded by those settlers who first came in and brought with them familiar law from the old states.

Local conditions also account for and require a great variety of legislation: lumber states, like Maine or Wisconsin or Washington, have special laws governing forests; stock-raising states, like Colorado and Texas, legislate on wire fences and branding cattle; states with large areas of waterless lands, like Nebraska and Utah, provide for irrigation; communities like New Jersey, with hundreds of thousands of foreign immigrants engaged in manufactures, need different legislation from a community like Vermont, with a rural American population.

On the other hand, throughout the Union the state governments are very much alike, and legislation rests more on a common basis than appears on the surface. All the governments have three departments, each intended to act independently of the other two. In all, the legislature, of two houses, is the repository of governing power not otherwise granted or expressly withheld. Its legislative work is supplemented by the traditions of English common law. Most of the states elect the chief financial and other administrative and executive officers. All have a series of courts, culminating in a single supreme court. In every state large areas of public power are transferred by the legislatures to cities and localities. The legislation of the states is freely borrowed one from another; and the courts quote and follow decisions of their neighbors. Nevertheless, great confusion comes from the variety of criminal and civil legislation. . . . The advantage of the variety of state legislation

is that the people of each state establish the system and make the laws which they think best adapted for themselves, and therefore the easiest to execute.

III. Rural Local Government

412. Centralization of local government in France. The reasons for the lack of local self-government in France may be stated as follows:[1]

An explanation of the centralization of the state entails a brief survey of local government; and here we meet with a deeply rooted French tradition, for centralization was already great under the old régime, and although the first effect of the Revolution was to place the administration of local affairs under the control of independent elected bodies, the pressure of foreign war, and the necessity of maintaining order at home, soon threw despotic power into the hands of the national government. Under Napoleon this power became crystallized in a permanent form, and an administrative system was established, more perfect, more effective, and at the same time more centralized than that which had existed under the monarchy. The outward form of the Napoleonic system has been continuously preserved with surprisingly little change, but since 1830 its spirit has been modified in two distinct ways: first, by means of what the French call deconcentration, that is, by giving to the local agents of the central government a greater right of independent action, so that they are more free from the direct tutelage of the ministers; second, by a process of true decentralization, or the introduction of the elective principle into local government, and the extension of the powers of the local representative bodies. But although the successive rulers of France have pursued this policy pretty steadily, the progress of local self-government has been far from rapid. One reason for this is the habit of looking to the central authorities for guidance in all matters. Another is a fear on the part of the government of furnishing its enemies with rallying points which might be used to organize an opposition, — a fear that takes shape to-day in provisions forbidding the local elected councils to express any opinions on general politics, or to communicate with each other except about certain matters specified by law. A third cause of the feeble state of local self-government is to be found in the fact that the Revolution of 1789 destroyed all the existing local divisions except the commune, and replaced them by artificial districts which have never developed any real vitality, so that the commune is the only true

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center of local life in the republic. A fourth, and perhaps the most potent cause of all, is the dread of disorder which is constantly present in the minds of Frenchmen, and makes them crave a master strong enough to cope with any outbreak.

413. Complex character of English local government. In striking contrast to the simple multiple system of subdividing local areas in the United States are the irregularity and overlapping of English local units.

The subject of local government in England is one of extreme complexity. . . . So perfectly unsystematic, indeed, are the provisions of English law in this field that most of the writers who have undertaken to expound them, — even to English readers, — have seemed to derive a certain zest from the despairful nature of their task, — a sort of forlorn-hope enthusiasm. The institutions of local government in England have grown piece by piece as other English institutions have, and not according to any complete or logical plan of statutory construction. They are patchwork, not symmetrical network, and the patches are of all sizes, shapes, and materials.

"For almost every new administrative function," complains one writer on the subject, "the Legislature has provided a new area containing a new constituency, who by a new method of election choose candidates who satisfy a new qualification, to sit upon a new board, during a new term, to levy a new rate (tax), and to spend a good deal of the new revenues in paying new officers and erecting new buildings."

It has been the habit of English legislators, instead of perfecting, enlarging, or adapting old machinery, to create all sorts of new pieces of machinery with little or no regard to their fitness to be combined with the old or with each other. . . .

In general terms, then, it may be said, that throughout almost the whole of English history, only the very earliest periods excepted, counties and towns have been the principal units of local government; that the parishes into which the counties have been time out of mind divided, though at one time of very great importance as administrative centers, were in course of time in great part swallowed up by feudal jurisdictions, and now retain only a certain minor part in the function, once exclusively their own, of caring for the poor; and that this ancient framework of counties, towns, and parishes has, of late years, been extensively overlaid and in large part obscured: (*a*) by the combination (1834) of parishes into "Unions" made up quite irrespective of county boundaries and charged not only with the immemorial parish duty of maintaining the

poor but often with sanitary regulation also and school superintendence, and generally with a miscellany of other functions; (*b*) by the creation of new districts for the care of highways; (*c*) by new varieties of town and semi-town government; and (*d*) by the subdivision of the counties (1889) into new administrative "districts," charged with general administrative functions. The only distinction persistent enough to serve as a basis for any classification of the areas and functions of the local administration thus constructed is the distinction between Rural Administration and Urban Administration.

414. Rural local government in the United States. The general nature of local subdivision in the United States is well stated in the following:[1]

The differences in local institutions throughout the United States have been so often emphasized by writers on American government that it seems well at the outset to indicate certain fundamental principles common to them all. The first of these is that our local communities enjoy large powers of self-government through elective officers, and in the exercise of these powers are only slightly subject to the supervision and control of the state administrative officers. In the second place, the states, with one exception, are divided into counties, and counties are in turn divided into towns, townships, or districts of one kind or another. Every county, and generally speaking every subdivision of a county, is a unit for certain financial, judicial, police, and local improvement purposes which are usually carried out by elective officers and boards. In the third place, subject to the few general provisions in the commonwealth constitution, the county and its subdivisions are under the absolute control of the state legislature, which can create and abolish offices, distribute functions among the various authorities, and in other ways regulate by law even to the minutest detail the conduct of local government.

The divergences that occur among the states in local institutions may be ascribed to the manner in which local functions are distributed between the authorities of the county and of the town or township and to the manner in which the inhabitants of the county subdivisions participate in the conduct of their local matters. On this basis of differentiation our states have been classified into the three famous groups: (1) those of the New England type in which the town and its open meeting overshadow in importance the county; (2) those of the South in which the township is absent or appears only in the most rudimentary form; and (3) those of the middle type, like New York and Pennsylvania, in which

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the town, or township, as it is sometimes called, has a large and important place, but is subordinate to the county administration. These three types of local government . . . have been carried westward roughly along parallel lines and have formed, with varying emphasis, the basis for the development of local institutions west of the Alleghanies.

IV. Historical Development of Cities

415. Definition of city. Fairlie states as follows the three essential elements of a city:[1]

There are, in fact, three essential elements which must exist to form a city, and all of these must be represented in the definition: (1) the geographical fact of a definite local area on which buildings are for the most part compactly erected; (2) the sociological fact of a large community of people densely settled on the given area; and (3) the political fact of an organized local authority or authorities controlling the public affairs of the community. Combining these elements, a city may be defined as "A populous community, inhabiting a definite, compactly built locality, and having an organized public authority."

416. Causes of cities. The reasons for the recent rapid increase in the number and size of cities follow:

The only conditions where these permanent congregations of people are possible are those which both permit and require a great division of labor. No city can exist in a country where a considerable proportion of the population cannot live without direct recourse to agriculture. A considerable urban population is possible only in two cases: first, where the cities themselves are situated in a country of great fertility upon which they may rely; or, second, where the means of transportation are so highly developed that the cities may obtain with reasonable cheapness their food supply from a distance. . . .

Cities are then possible only when men may live from other pursuits than agriculture; only when from the agricultural point of view there is a large surplus population. What now are the reasons which cause this surplus population to settle in any particular spot? . . . They are: first, commercial; second, industrial; and third, political. Facilities for transportation are not merely some of the most important causes of the development of cities generally; they are as well the causes why cities grow

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up and flourish in particular places. It is to secure such facilities that cities are founded at some place on the ocean, or other great body of water, where there is a favorable situation for the receipt and shipment of merchandise. The mere shipment and receipt of such merchandise offer employment to many people. But further, the business subsidiary to commerce, such as banking, insurance, etc., aids in attracting to such commercial centers those who are looking for work.

In the second place, the use of machinery has been and now is of the greatest importance in attracting an urban population. For this reason all places which are favorably situated for the development of the power necessary to drive machinery tend to become centers of population. . . .

Finally it must be admitted that cities which are unfavorably situated for either commerce or industry still have been founded and continue to flourish. At the time of their origin they may have been so situated as to be able to share in the existing commerce and industry. Later on new commercial and industrial conditions may have sprung up to which they could not accommodate themselves. Yet other causes may have enabled them to overcome their disadvantages. This is particularly true of political centers which may continue to exist and increase in population, although situated unfavorably from the point of view of existing industrial and commercial conditions.

417. Results of the growth of cities. Among the most important consequences of the recent growth of cities may be mentioned the following:

The effects of this great concentration of population are numerous. Three may be especially mentioned. First, cities are naturally the centers of active intellectual life. It is in them that the newspapers and periodicals are published, and their inhabitants are generally more alive to current issues than the people in the country. The cities consequently exercise a much greater influence upon the policy of the government than the country. In the second place, the crowding of people into cities has raised many new problems; for example, protection from contagious diseases and from the horrors of overcrowding in habitations unfit for human beings, the adequate supply of pure water, of gas and electricity, of street-car lines and telephones, the proper paving, lighting, and cleaning of the streets, and the disposal of garbage and sewage. Thirdly, the growth of the cities, and the problems to which this growth has given rise, have rendered the city governments in many ways more important to the individual citizen than the central government.

418. Political consequences of city growth. Rowe points out the changes in political ideals and methods due to the predominance of city life.[1]

With increasing density of population new standards of governmental action are forced upon the community. One of the first effects is to make apparent the necessity of regulation in the interest of the public health and morals. The patent facts of everyday life demonstrate the evils of unrestrained individual liberty, which is the first step toward a broader interpretation of the regulative function of government. The closer interdependence of the individuals of the community, the fact that the activity of each affects the welfare of the whole at so many points, must necessarily influence the standards of individual liberty. This is the first and most important point of contact between the political ideas and the social activity of the community.

The next step in the development of a new concept of governmental action begins with the undermining of faith in the effectiveness of free competition as a guarantor of efficient service and a regulator of progress. No one who has followed the trend of opinion in the large cities of the United States can have failed to observe the gradual awakening to the limitations of free competition. The facts of corporate combination and consolidation, particularly in such quasi-public services as the street railway, gas, and water supply, have done more to bring about a truer appreciation of the relation of the community to industrial action than any amount of discussion. American communities at first dealt with every one of these services on the basis of free competition. Under this plan, short periods of low prices and indifferent service soon led to combination or consolidation, with the high cost incident to inflated capitalization. Lessons such as these have profoundly influenced the political thought of our urban communities. There is no longer the same distrust of all positive governmental action so characteristic of the early decades of the last century.

A further step in the development of political thought directly traceable to the influence of city life is closely connected with the growing appreciation of the nature of the city environment upon the population. The conditions of city life are capable of indefinite modification through the action of individuals or through the concerted action of the community. The history of every large city bears testimony to the possibilities of radical changes in environmental conditions, changes which have profoundly affected the health, morals, and welfare of the community.

[1] Copyright, 1908, by D. Appleton and Company.

419. The spirit of modern city life. The modern attitude toward the city is in striking contrast to that of the ancient or medieval period.

The medieval system of independent town units was succeeded by a period of political development in which the city was given a position fundamentally different from that which it occupied during previous periods. The change affected not merely the relation between city and state, but also profoundly influenced the attitude of the population toward the city and its government. . . .

In the cities of the ancient and medieval world the individual in all his personal and property interests was subordinated to the community. . . . Every relation of trade, industry, or commerce was dependent upon the public authority. In the medieval towns, membership in the political community was a prerequisite to the exercise of any trade or calling. In consequence the attention and interest of the population were centered in the city.

The new and distinctly modern spirit first asserts itself in an intense individualism which completely changes the concept of government. . . . The rôle of government, which in the medieval cities had been construed to include the regulation of every field of individual activity, receives a new and distinctly negative interpretation. Ideas of inherent and imprescriptible individual rights obtain general acceptance, while government is regarded as the guarantor and protector of these rights rather than as a positive factor in industrial activity. . . .

That this attitude toward government has strongly influenced the civic life of our cities is evident to every observer of American political conditions. To one section of the community the city government is a necessary evil designed to avoid the greater evil which would result from the clash of individual interests. To another it is akin to a great business corporation, justifying the use of the ordinary standards of commercial morality in obtaining favors and privileges. . . . The city's interests are rarely, if ever, identified with those of the public, and in taking advantage of incompetent or corrupt officials there is no thought of depriving the public of rights to which it is entitled. . . .

Another important influence in strengthening this negative attitude toward the city is closely connected with one of the strongest traits of American national character — the high development of the domestic virtues and the resulting intensity of home life. . . . Administrative efficiency has been attained only in those departments — such as the police and fire services — which directly affect the safety and integrity of the home. In European cities, on the other hand, those municipal

activities which contribute most to the inexclusive and social pleasures are more highly developed.

V. Municipal Government

420. Character of urban population. Goodnow draws the following conclusions from an analysis of city populations:

First. The population of cities is actuated by commercial and industrial motives. . . .

Second. This population is perforce heterogeneous in character, and the larger the city the greater is apt to be the heterogeneity. . . .

Third. City populations have as compared with rural populations no historical associations with the cities in which they live. Neighborhood feeling is not liable to be strong.

Fourth. Being composed in large measure of young people or people of middle life, city populations are radical rather than conservative in their tendencies; they are impulsive rather than reflective and are considerably more inclined than rural populations not to have regard for the rights of private property.

Fifth. City populations are more productive than rural populations. They can, therefore, endure a higher rate of taxation. With the greater productivity they also contain probably a smaller proportion of the dependent classes, though the presence in cities of such a large percentage of widows brings it about that there will be a large dependent class due to the death of the principal breadwinner of the family.

Sixth. City populations contain a greater proportion of criminals than the rural districts, but there are reasons for believing that on the whole they are not much if any less virtuous than rural populations.

Seventh. City populations are better educated than rural populations in the sense that a greater proportion of city than of country people can read and write and that their distinctly literary educational opportunities are greater. But because of their industrial character they are probably less capable of taking broad views than countrymen. . . .

Eighth. Property is much more unequally distributed in the cities than in the rural districts. We find more very wealthy and more very poor than in the country districts.

Ninth. Family life is different in the cities from family life in the rural district. In large cities a large part of the population is often crowded together. In industrial cities where a large proportion of married women work in factories, the family does not properly discharge its most important function, viz., the care and nurture of the children, and the rate of infant mortality is very high.

Tenth. The health of city populations is on the whole not so good as is that of rural populations. The death rate is almost everywhere higher in urban than in the rural districts, although the cities contain more than their due proportion of the most vigorous part of the population.

421. Democracy and city life in America. In some respects city life hinders, in other respects it facilitates, democratic development.[1]

Two or three things seem to be essential to the success of democracy. In the first place, the great body of the people must be intelligent and have a large social capacity, which means that they must be able to see beyond their own garden fences and be able to coöperate with other men of considerably different habits and ideals. Then there must be a strong interest in local institutions, in that part of political life which affects men daily in and near their homes. And, finally, the conditions of life must be such that men can give a considerable amount of time and thought to those political interests in regard to which they can personally make their wills felt. . . .

All the forces here described as affecting the conditions of life in a way unfavorable to democracy culminate in cities. The city is, indeed, the visible symbol of the annihilation of distance, and the multiplication of interests.

And yet, on the other hand, the city emphasizes locality and gives opportunity for cooperation. The city is the point where the resistance of space to men's efforts is focused, and, consequently, local interests become enormously increased. The opportunities, too, for formulating the popular will are greatly enhanced in cities by proximity of residence. People can gather in mass meetings on a few hours' notice, public opinion can find immediate expression in the press, the citizen can bring personal pressure to bear upon the official without delay. The danger is that democracy will be paralyzed by its opportunities. True local interests, though of such transcendent importance to the community, tend to go by default so far as the individual is concerned. The home and the neighborhood, the natural primary units of local organization, are weakened, and in many cases nearly destroyed. Home life is little more than a name where a hundred people, often of different nationalities, live in a single tenement house; and what is left of the neighborhood where there is a density of five hundred to the acre? Among the business and professional classes, a man's friends and intimate associates may be scattered over the whole city, while he scarcely knows his next-door neighbor's name. It is among working people and the poor that

[1] Copyright, 1904, by The Macmillan Company.

local interests retain their importance to the individual, and partly for this reason democracy appeals most directly and most safely to the masses.

422. The position of the modern city. The position of the city in the modern state may be described as follows:

The development of the past three or four centuries has brought it about that almost all powers, for the exercise of which the cities have struggled since the dawn of municipal government in the middle ages, have been recognized as powers of state rather than municipal government. The exercise of many of these powers has been assumed by the state itself, which denies to the city any participation whatever in their exercise. This is true of powers relating to foreign and military affairs and of most powers relating to judicial affairs. The exercise of another class of powers, including within them some judicial powers and such powers as relate to the preservation of the peace, the public health, the care of the poor and the schools, has not, however, been assumed exclusively by the state. The state on the contrary permits the city to share in their exercise, but regards the city as not acting exclusively or mainly in its own interest, but rather as an agent of the state government.

The massing of population in cities as a result of the changes in economic and social conditions which began at the end of the eighteenth century have made it necessary, however, to regard the city as something more than an agent of the state government; and the legislation of the nineteenth century to which reference has been made, has everywhere granted to cities large powers of a distinctly local significance. The city has, as a result of this legislation, become an organization for the satisfaction of local needs. This revival, so to speak, of the city, which has taken place during the nineteenth century has been due thus, not so much to any reversal of the decision as to the position of the city with regard to the powers which had been decided to be powers of state government, but which the cities had claimed the right to exercise, as to the belief that a new field of municipal activity had been opened which the city must occupy.

423. The mayor and the city council. Dissatisfaction in the United States with the usual working of city executive and legislature demands certain fundamental changes.[1]

If we wish to preserve the council, we must be prepared to make three changes: First, to deprive it of all participation in the appointment of executive officials; secondly, to transform it from a bicameral

[1] Copyright, 1908, by D. Appleton and Company.

organization to a single chamber, and thirdly, to reduce its membership. Unless this is done, it is safe to predict that we shall gradually move toward a system in which both executive and legislative powers will be vested in the mayor and the heads of executive departments. . . .

The traditional fear of absolutism need not deter us from making the mayor the real executive head of the city government. Correctly interpreted, this plan offers possibilities of popular control which our present system lacks. At all events, it is well for us to understand that the demand for efficiency, which the American people place above their desire for democratic rule, will inevitably lead to this concentration of executive power. The real alternative is, therefore, whether this concentration of power will be accompanied by the destruction of the city council, or whether the city council will survive as an organ of government restricted to purely legislative functions.

424. The bürgermeister in Germany. The method of selection and the general attributes of the German city executive are in striking contrast to the corresponding features in American cities.[1]

In this respect the Prussian Bürgermeister may be clearly differentiated from the administrative heads of French, English, and American cities. In all these places the mayor is almost invariably some private citizen who leaves his ordinary vocation for a year or a few years, and during this period devotes a part or the whole of his time to the service of the municipality, expecting not to make a life work of local administration, but, when his term is ended, to return to private life and do his private business. He may or may not have had some experience in municipal affairs. . . . The Bürgermeister, on the other hand, is an expert, a professional administrator, who looks upon his office as a career, who seeks the post on his public record, and who expects promotion upon this alone.

The Prussian city council selects the Bürgermeister in very much the same way as a business corporation selects its general manager or other executive head. It casts about among the smaller corporations engaged in the same sort of business, and proceeds to rob one of these of its chief official by offering him a post which is more attractive. The smaller cities sometimes advertise for applicants, but the larger ones usually find a field of choice all ready for them. If a certain city like Berlin or Frankfort or Breslau desires to fill its chief magisterial post, it naturally looks to those men who have been commanding attention by their success as Bürgermeisters or paid magistrates in cities of smaller size. It examines

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the records and qualifications of such officials, and soon eliminates all but a few names, the choice usually lying between no more than three or four candidates by the time the question comes before the council.

425. The mayor in England. In England the position of the mayor is largely honorary, his governing power being comparatively small.

The selection of a mayor is seldom a difficult problem in English municipalities; for the post is not, as it is in the cities of the United States, one of any serious administrative importance. Executive ability and experience are in no wise essential to the proper performance of mayoral duties; for these, being very largely of a social nature, make heavier demands upon the mayor's purse and personality than upon his skill as a governing authority. He must entertain distinguished visitors to the borough, must assume a prominent part in all civic ceremonies and festivities, and must, above all things, be a leader in local philanthropic enterprises, incidentally contributing with generosity to their exchequers. His only special administrative function is that of presiding at meetings of the council, and even this he need not perform if it be not to his liking. In short, to the end that he may fill his position capably and satisfactorily, the mayor of an English borough must ordinarily be a man of some wealth, preferably with leisure and social attainments.

Ordinarily the English mayor receives no stipend. The council is empowered by law to grant him from the borough funds "such remuneration as it may think reasonable"; but many boroughs pay nothing at all, and, save in the largest boroughs, those which grant remuneration rarely afford anything approaching his personal outlay in the performance of his civic functions. Tenure of the office even for a single year thus involves some financial sacrifice; but as a rule the post is satisfactorily filled without much trouble, for wealth and social aspirations are likely to be more plentiful than administrative energy and experience. It has sometimes been said that a wealthy peer makes an ideal English mayor; at any rate, if any such happens to reside within the fifteen-mile limit he is pretty certain to be invited to the post, and, if necessary, cajoled or persuaded into accepting it. In default of a peer, some opulent bourgeois who is willing to prove his liberality may have an opportunity to do so as the chief magistrate of the borough.

426. Need of experts in city administration. One of the crying needs in the administration of American cities is well stated in the following:

The adoption of a proper city plan, well-constructed sewers, convenient means of transportation, an ample supply of potable water, good housing conditions, a wise administration of an effective health and building law, and well-managed schools which teach what urban populations really need, all these things are necessary if we would have a healthy and happy city life. All these things require the organization of a permanent and intelligent administrative personnel, who shall exercise the wide powers necessarily granted to them in the interest of the city people, and who shall rigorously refrain from using these powers in the interest of particular classes or of favored individuals.

How to organize such a force is one of the great problems in city government. For if we accord an administrative force a position which is too permanent in character, i.e., too much relieved from popular control, it is apt to become arbitrary in its action and given up to red tape, and may easily degenerate into an engine of oppression, which is used to further individual interest. If we may judge from the experience of the western world we shall probably reach the conclusion that cities, unaided by the state, find it exceedingly difficult to establish and permanently retain such an expert administrative force. The cities of Great Britain, it is true, have succeeded in doing so without such aid, but in the cities of Prussia, where the administrative force is probably more efficient than elsewhere, the qualifications of city officers and their methods of appointment are fixed in great detail by state law. In the United States, on the other hand, it may be said that few if any cities have, even with the aid of the civil service laws passed by the state, succeeded in rescuing from the operation of the spoils system by which American administrative institutions have so long been cursed, any but their most unimportant employees. Even those are appointed for almost purely political reasons in most cases where such action is not forbidden by state law.

VI. Municipal Reform in the United States

427. Essential defects of city government in the United States. Some of the defects in city government arise from the nature of city populations or from the conditions of city existence, and are practically impossible to remedy. Others may be removed by intelligent public spirit.

Among the inherent defects is the rapid change in the make-up of the cities. Where population is increasing with leaps and bounds, no city government makes sufficient provision for the future. For instance,

had the people of the great cities fifty years ago foreseen the present use of pipes, they would have prevented the intolerable digging up of the streets by providing subways into which new pipes could be introduced as needed. Hardly a city in the country makes provision in advance for the growth of the school population, and hence the pitiful spectacle of thousands of children in some cities turned away on the day of the opening of school, because there is not room for them.

The shifting of population to and fro, the rise and sometimes the decay of suburbs, necessarily cause wastefulness in the expenditure of public money. The movement of people from country to town, from town to city, from city to large city, from large city to another large city, prevents the formation of a civic pride, which must be the basis of good government. The large amount of city business, the great problem of transporting literally hundreds of thousands of people to and from their avocations, the question of proper terminal facilities for steam-railroads, — these are difficulties which cannot be obviated. Furthermore, the division of powers between the nation, state, and cities, while salutary, tends to sacrifice the interests of the city to those of the state.

(1) Of the non-inherent difficulties, first in importance is the confusion of the fundamental laws for the cities. Many city charters are not well balanced or adjusted, because drafted by men who have had small experience in city government. . . .

(2) The next difficulty is the constant interference of the states in city government, not only by the altering of the charters, but by new legislation throwing additional duties upon all the cities, and by special acts expressly intended to aid or depress the political leaders of the city government for the time being. Well-intentioned legislation produces confusion, and ill-intentioned legislation sometimes paralyzes a good administration. . . .

(3) Another difficulty is adherence to bad methods of government. In most cities, both the mayor and the council have too little power; they are both too much tied up by legislative acts, and hence both work at a disadvantage; there are too many officers, elective and appointive, and their terms are too brief. . . .

(4) Another trouble very hard to prevent is occasional corruption in the city government. This may also occur in state or national affairs, but is perhaps more common in cities because it is harder to fix responsibility, and because there is so much detail in city business that it is hard to watch it.

428. Needs of city government in the United States. The fundamental changes needed in the political position and

governmental organization of cities in the United States are indicated in the following:

The attempt has also been made to show that the remedy for the evils of American city life is to be found, not so much in a change in the governmental organization of the city as in a change in its position in both the legal and the extra-legal political system. What is needed is a recognition, both in law and in political practice, that whatever else the city may be, it is also an organization for the satisfaction of local needs, and in such capacity should act largely free from state control — both the control exercised by the state government, and the control exercised by the state party. . . .

What our cities need then are large powers of local government, the exercise of which, where necessary, shall be subjected to an administrative rather than a legislative control; separate elections for municipal offices; fewer elective officers; a more compact and concentrated organization, and greater freedom than at present is usually accorded to municipal citizens to nominate candidates for municipal offices. If changes in these directions were made, it would certainly be easier for the urban population to see more clearly than they now see what city government means to them and to free themselves in their municipal politics from the domination of the state and national parties.

429. Merits and defects of the commission plan. Professor Munro makes the following generalizations based upon the brief experience of American cities with the commission plan of government:

The cardinal advantage of the system is that it affords definite hope of putting an end to the intolerable decentralization of responsibility which now characterizes American civic administration. By concentrating powers and focusing public attention upon a narrow area it will render more effective the scrutiny which the voters may apply to the conduct of men in public office. . . . It will undoubtedly facilitate the election of a higher type of men, for American municipal experience has plainly demonstrated that small bodies with large powers attract a better class of citizens than large bodies with restricted jurisdiction. . . .

Again, it is well known that municipal corruption nowadays arises as frequently from the power of municipal authorities to thwart the meritorious plans of public-service corporations as from their power to forward reprehensible projects. . . . A small commission would, indeed, simplify the task of dealing with civic franchises on a business basis. . . .

Still again, as we are frequently reminded, the work of administering the affairs of a city is in every essential respect akin to that of conducting the affairs of a private business corporation. Now, the salient characteristic of sound corporate management is the centralization of powers in the hands of a small board of directors. . . .

The system of government by commission will serve to render municipal administration more prompt and more effective in action. . . . In local administration promptness and efficiency are imperative; and it may be properly urged that, in order to secure these essential qualities, a municipality is justified in weakening its organs of deliberation and in assuming a reasonable amount of risk that concentrated power will be abused. . . .

The most common objection urged in the public press and by the rank and file of municipal politicians is that the plan is un-American and undemocratic; that it involves a radical departure from American traditions of local self-government and proposes a step in the direction of municipal dictatorships. . . .

Political education, it has been observed, consists in the exercise not only of the right to choose but of the right to be chosen — in candidacy and in service — and under the present municipal régime such education is annually afforded to a large number of citizens. The plan of government by commission proposes greatly to reduce this number. It would cut down the list of elective officers to four or five, all other posts being filled by appointment presumably for long terms. This policy, it is objected, would tend to vest the work of civic administration permanently in the hands of a very few men, and might very well assist in the development, as in the German cities, of a professional city bureaucracy. . . .

Again, objection is made that the system will serve to strengthen rather than to weaken the influence of the regular partisan organizations in civic affairs. The concentration of power and patronage in the hands of a few commissioners would, it is claimed, make it seem imperative to the party leaders that the commission should be controlled; and the party energies, now spread over a wider area, would thus be concentrated at a single point. . . .

Without a change of personnel, the substitution of government by commission for the existing system would assuredly avail but little. Indeed, a corrupt or an inefficient commission with wide powers would be much more capable of injuring the best interests of a city than an equally corrupt or inefficient set of administrative organs with powers and patronage decentralized; for the very complexity and cumbrousness of the present system serves in some degree to place an obstacle in the way of any widespread or consistent wrongdoing. . . .

Sponsors of the commission plan have sometimes urged that its adoption would insure administration by skilled experts, since appointments made by a small body would probably be dictated by reasons of merit and experience alone. It may be noted, however, that the vesting of the right of appointment in the hands of a small body, or even in the hands of a single officer, would not necessarily insure this result. . . .

An important feature of both the Galveston and Des Moines plans of city government by commission is that the "appropriating" and "spending" authorities are fused. In other branches of American government it has been the policy to keep these two jurisdictions distinct and independent. . . .

It is sometimes urged that the general adoption of the system of government by commission would encourage state intervention in municipal affairs. . . . If large municipal councils are eliminated from the framework of city government there would seem to be a danger that state legislatures would be tempted to assume for themselves some of the broader legislative functions which the councils have been accustomed to exercise.

VII. Municipal Activities

430. Municipal functions. The complexity of municipal functions and their dependence upon conditions differing from city to city make difficult all attempts at municipal reform.

Our study of city government should have shown us that the functions which must be discharged within a city are dependent upon the geographical and social conditions obtaining therein and that if those necessary for the highest development of life in the city are not performed satisfactorily by private initiative their discharge must be assumed by the city itself. No general rule can, therefore, be laid down as to the sphere of municipal activity. In some cities geographical conditions may make it necessary for the state to do work which might in other cities be left to the city government. In some cities conditions may be such that private initiative is to be preferred to governmental action on the part of either the state or the city. Again, in large cities the problem of transportation assumes an importance it can never have in cities of smaller size, and its solution may imperatively demand action which would be unnecessary elsewhere. Finally, the industrial character of a city may make it necessary for that city to take measures for the protection of infant life which would be quite unnecessary and even inexpedient in cities where the prevailing occupation does not call for the services of married women.

It must also be remembered that the character and extent of the sphere of activity of a given city will have a most important effect on its organization which must expand with the expansion of the city's sphere of activity and will undoubtedly be subject in other respects to its influence.

In other words there is only in a very general way a problem of city government. For each city is peculiar and must have an organization and discharge functions suited to its peculiar position. Its very relations to the state are peculiar and its position in the state system must depend on the capacity it has for self-government. If that is small its position will rightly be one of considerable dependence, if large, it may be intrusted with large powers of municipal home rule. What that capacity is, is for the state and not for the city concerned to decide. A city's relations to the state, however, should be such that the state will decide the question not for improper reasons but in view of the most nearly complete satisfaction of the best interests of both the state and the city.

The conditions in some cities are such, however, as to cause us to have grave doubts as to the efficacy of any change in the legal and political relations of the city. We can hardly help believing that the economic and social conditions existing in many of the cities of the United States are such as to make good popular city government extremely difficult, if not impossible of attainment, until changes in those conditions have been made. On that account attempts to reform city government in the United States should not be confined to the mere structure of city government nor to the change of its relation to the state. They should be directed as well to the improvement of the economic and social conditions of the urban population.

Almost every cause, therefore, which is dear to the hearts of a certain portion of the people has an important influence in bettering urban life. Election and nomination reform, civil service reform, financial reform, and administrative reform generally, will, if the concrete measures adopted are well considered, improve the political conditions of American cities. Charity reform, child labor and labor reform generally, and reform in housing conditions, the work of neighborhood settlements, and last but not least, the efforts of the various churches and ethical societies, will do much to ameliorate social and economic conditions. There is no improvement in political conditions which does not aid in the amelioration of social conditions; for improvement in social conditions is in many instances possible only where the political organization is reasonably good. On the other hand, there is no improvement in social conditions which does not make easier the solution of the political problem; for the difficulty of the political problem in cities is in large measure due to the social and economic conditions of the city population.

431. Difficulty of comparing municipal and private ownership. Partisans of both public and private ownership of public utilities frequently overlook the varying conditions that prevent a proper comparison of the merits of the two systems.

When we come to the consideration of the advantages or disadvantages of municipal as compared with private ownership and operation, it is difficult if not impossible to give a general answer, which is based on anything more than *a priori* reasoning. For the conditions in different countries and in different cities in the same country are so different that it is almost impossible to compare the results achieved. In countries which have made no provision for an effective supervision of private companies we may find private ownership and operation accompanied in particular instances by extremely bad conditions, as has been the case with the street railway in Chicago and New York. On the other hand we may find in a country like Great Britain, which for a long time has had an effective system of control over private corporations, instances, as in the Sheffield Gas Company and the South Metropolitan Gas Company of London, of extremely satisfactory private operation.

Again, we may find in a country like the United States, which has not developed a satisfactory system of general city government, examples of extremely inefficient municipal operation, as in the case of the Philadelphia Gas Works, while in a country like Great Britain which has a satisfactory system of city government, we may find examples of very satisfactory municipal operation, as in the case of the Glasgow tramways.

Furthermore, a comparison of good municipal plants on the one hand and good private plants on the other, which are found in the same country, is difficult. For the policy of different cities in the treatment of either private or municipal plants may be quite different. Thus one city may endeavor to make the plant a source of profit to the general treasury of the city corporation, while another may prefer to lower the price of the service when the part of the public which receives the service is benefited. . . .

It would seem, however, that, on the whole, good and efficient municipal ownership and operation are perfectly possible if certain general principles of administration are applied. These are that the management of the utility, particularly in its financial aspects, is kept separate after the manner of the Italian law from that of any other utility and from the general financial administration of the city, and is intrusted to expert officials having a reasonably permanent tenure and large powers of discretion and control over the subordinate force of employees, who are not to be appointed for political reasons.

On the other hand, it would seem that uncontrolled private operation is not much to be preferred to indifferent municipal operation, although it must be recognized that too stringent control of private operation has frequently led in the past to municipal operation because private corporations from which too much is demanded in the way of payments to the city or low rates for service rendered cannot give satisfactory service. This is particularly true where the franchise period is a short one. . . .

If the question were merely an economic one it would doubtless have to be answered in favor of private operation. But the question is not an economic but a social one. These utilities are public utilities, the operation of which is conducted not with the idea of producing wealth but of rendering social service. . . .

Therefore, the admission of the greater efficiency of private operation does not carry with it the conclusion that private operation is always desirable. For this greater efficiency may have for its effect the increase of private wealth rather than the general benefit of the community.

On the other hand, it is to be remembered that the demands on the financial resources of modern cities are so great that the budget of very few cities can stand the drain of many inefficiently and wastefully managed enterprises, no matter what may be the advantages in the direction of greater equality of distribution or greater regard for general social conditions which may be secured. A municipal government must be a very good one and private companies must be very regardless of general social needs to justify a city in undertaking the management of many of these public utilities at the same time.

CHAPTER XXIII

COLONIAL GOVERNMENT

I. Importance of Colonial Development

432. Importance of colonial dependencies. The following brief extract suggests the extent in area and the population of colonies, and therefore the present interest in colonial affairs:[1]

Taking the word colony in its widest sense to include all kinds of dependencies, we are met by the fact that the colonies of the world occupy two fifths of the land surface of the globe, and contain a population of half a billion people. . . . The political status of the communities thus controlled presents the greatest diversity. In the strict theory of the law each of them is under the absolute dominion of the sovereign state to which it "belongs." In practice they vary, from the virtual independence enjoyed by Canada and Australia to the total dependence of Gibraltar or Madagascar. The vast extent and the great natural resources of the modern colonial area indicate its importance in the future history of the world. The realization of this by the great powers has led, during the past twenty-five years, to a renewed colonial expansion, in which practically all the "unclaimed" territory of the world has been partitioned among the leading states. The subject of colonial administration, both political and economic, has taken on, in consequence, an increased interest, and attention is more and more directed to the study of the systematic management of dependencies. The recent expansion of the United States resulting from the war with Spain has rendered this portion of the study of government one of especial consequence to Americans.

433. Area and population of modern colonies. The following table may serve as the basis for a comparative study of the area and population of existing dependencies and their relative importance when compared with the homeland:[2]

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Modern States	No. of Colonies	Area (Square Miles)		Population	
		Mother Country	Colonies	Mother Country	Colonies
United Kingdom	50	120,979	11,605,238	40,559,954	345,222,339
France	33	204,092	3,740,756	38,517,975	56,401,860
Germany	13	208,830	1,027,120	52,279,901	14,687,000
Netherlands	3	12,648	782,862	5,074,632	35,115,711
Portugal	9	36,038	801,100	5,049,729	9,148,707
Spain	3	197,670	243,877	17,565,632	136,000
Italy	2	110,646	188,500	31,856,675	850,000
Austria-Hungary	2	241,032	23,570	41,244,811	1,568,092
Denmark	3	15,289	86,634	2,185,335	114,229
Russia	3	8,660,395	255,550	128,932,173	15,684,000
Turkey	4	1,111,741	465,000	23,834,500	14,956,236
China	5	1,336,841	2,881,560	386,000,000	16,680,000
United States	6	3,557,000	172,091	77,000,000	10,544,617
Total	136	15,813,201	22,273,858	850,103,317	521,108,791

434. Importance of colonization. The part played by colonization in the general progress of civilization is suggested in the following:

If elsewhere it may have seemed that colonization is sometimes regarded as a permanent condition which will continue in the coming ages, it is simply because it is deemed one of those inherent relationships arising from differences among individuals which must endure until the happy millennium of absolute equality in capacity and intelligence shall have dawned. Although in the abstract this connection may still long persist, some questions must ever be open. Whether any one people may be fitted for colonizers, or if a certain region be properly the object of their efforts, as well as whether a country has need or will find profit in colonies, and if it can confer benefits of like proportion upon its wards, must always remain within the scope of legitimate discussion. Such problems must sooner or later be presented to every progressive nation for due consideration and solution. . . .

Historically, colonization is a great theme; for from the most remote ages colonial enterprise has been potent in both the moral and the intellectual advancement of the world. If at the time the results attained have been barren or mischievous, the correction of their evils has inevitably followed. If one promoter has failed, his work has been undertaken and the better consummated by another more fortunate. One of the most pronounced features connected with all systems has been the

rise of liberty. Even under the goad of tyranny and oppression the aspiration for freedom has been cherished, until ultimately the distasteful bonds have been broken; indeed, the period of existence as a colony has generally been shortened by arbitrary repression on the part of the parent state. . . .

If the facts of history be well understood, and the principles of colonial policy be accurately appreciated and carefully observed by the statesmen of the future, the stronger, better, and more enlightened doctrines to be developed by them must inevitably inure to the truer welfare of the colony not less than to the more substantial advantage of the nation; in other words, this activity — wherever it exists and under whatever name or disguise — will then accrue to the happiness of humanity. For colonization in reality is only the expression of civilization.

435. Consequences of national imperialism. Reinsch states as follows some of the results of the recent colonial expansion of national states:[1]

The phantom of world empire is again beginning to fill men's minds with vague fears and imaginings, and is everywhere a most potent agency for the creation of international animosities. The continental nations ascribe to Great Britain the desire to Anglicize the world, while Russia is by her rivals looked upon as the relentless plotter for imperial power over all. . . . The existence, side by side, of a group of virile and powerful nations happily renders impossible, for the present at least, the consummation of such schemes of despotic imperialism with all the dead monotony and uniform decadence which it would entail. Still, if every act of a foreign nation, by which it desires reasonably to strengthen its vitality and to extend its sphere of usefulness, is to be interpreted as a deliberate attack on the liberty and civilization of other nations, far too much mutual suspicion and acrimony will be engendered in international life. This idea of world empire, therefore, though still a mere phantom, has nevertheless to be considered, if only for the purpose of showing the absurdity of the thought of its realization at the present time.

Should the unreasonable international competition which is favored by many extremists carry the day, it would ultimately lead to a world conflict. To counteract this danger we must constantly emphasize the thought that there is sufficient work for all nations in developing and civilizing primitive regions. Each one of the leading nationalities can fully develop its own character and impress its best elements on the civilization of the world, without desiring the downfall and ruin of other powers.

[1] Copyright, 1900, by The Macmillan Company.

436. Influence of foreign interests on home affairs. The danger of withdrawing public attention from home affairs, with resultant internal decay, is a phase of the colonial problem that needs consideration.

It is to be feared that the present tendency of popular interest to become concentrated on imperial questions and affairs will still further weaken the public interest in questions of home politics, which are themselves of such a nature as to be little attractive to the general public, no matter how important they may be. This danger of absorbing political energies in outside matters to the damage of domestic concerns should at least be noticed and guarded against. A nation that is rapidly expanding and is directing its energies to territorial acquisitions beyond its borders, is quite likely to suffer in its social and political well-being at home. We need but advert to the example of Rome, where, with the successive stages of imperial extension, there was a growth of social antipathies and general disintegration; a concentration of wealth with a corresponding increase in the city proletariat. Similarly, the powerful and brilliant monarchy of Spain was ultimately corrupted and ruined by territorial conquests which were used only to draw sustenance for the ever-increasing luxuries of the home country.

437. Colonies and the position of the United States. In a paper delivered before the American Political Science Association, the following were suggested as some of the effects of outlying dependencies upon the people of the United States:

The United States has advanced with giant strides, for it the era of isolation is closed; its people have begun to take a lively part in the wider interests of humanity; its opinion on a vast variety of subjects has been expressed, welcomed and respected by the great powers of which it has suddenly become one. With the acquisition of dependencies the nation has not only been brought face to face with problems purely incidental to them, but it has likewise learned that the assumption of these obligations involves, as a necessary corollary, manifold duties toward other states. While its fleets operate on the farther waters of the Western Sea, its statesmen and diplomats do not forget to confer and debate with their contemporaries to the East of the Atlantic. And here emphasis may well be laid upon the transition of which we have lately been witnesses; the step which, coincident with the opening of the twentieth century, will probably mark the advent of a new age. As the medieval era was finally closed with the frequent navigation of the Atlantic by

Europeans, so another epoch terminated when the United States and Japan began to compete for the mastery of the Pacific. The scepter of power then passed from the shores of the Mediterranean; so now the Eastern fringe of the Atlantic is apparently destined soon to lose its supremacy; for the United States at least the outlook is toward the Occident. If in council the nations of Europe still rule, the field of action lies in Asia; the East has become the West.

One of the most important doctrines of American policy, it is felt by many, is jeopardized by the expansion of American interests. The Monroe Doctrine as well as the protective tariff, our distinguished fellow-citizen Professor John W. Burgess considers doomed to annihilation. In his address at the University of Berlin he said:

"There are, for instance, two tenets which have almost come to be looked upon as sacred as articles of faith in American politics, the abandonment of which no outside power could even dare to hint at without danger of arousing the enmity of the Union. I refer to the protective tariff and the Monroe Doctrine.

"Our politicians seem not to have the slightest appreciation of the fact that both these political tenets have almost got to be antiquated, that the political, geographical, and constitutional changes among the powers of Europe, as well as the assumption by the United States of its place as a world power, have rendered both almost meaningless."

II. Historical Development of Colonies

438. Essential conditions for colonization. Successful colonization is possible only if certain requirements are more or less completely fulfilled.[1]

To render any effort or system in colonization successful, certain well-defined conditions must exist, not only in the land to be colonized, but likewise in the parent state. . . . In the first instance, the connection implies power on the one side and weakness on the other; it necessarily involves superiority and inferiority. This principle not only applies to the form of government and the code of civil conduct, but also equally as well to individuals. The colonizing nation must be strong, possess a well-developed social organism, and be inhabited by men of intellect and education. The region to be brought under control must, on the contrary, be without a recognized method of rule, or with an administration very imperfectly constituted; its society must be more or less crude and

[1] Copyright, 1900, by Henry C. Morris.

uncultured, while its people must, as a race, be untrained in the higher type of civilization and inexperienced in manufactures, commerce, and statecraft. Just as soon as the colonists approach a degree of culture similar to that of the mother country, the association between the two becomes irksome and difficult to sustain, unless, indeed, the latter practically renounces all participation and intervention in colonial affairs.

While power, then, is a prime necessity in the parent state, not the less is density of population. There must be excessive competition in some lines of occupation and trade; a surplus of labor and a want of work; hence a certain degree of discontent, a desire for new fields of exertion, a feeling that there is not any further chance at home; the belief must prevail that the avenues of advancement are there closed before many individuals will be found ready to go to the ends of the earth to gain their livelihood. . . .

The essential of power on the part of the mother country likewise implies the element of wealth. That a poor nation cannot afford the luxury of colonies is almost an economic maxim. Vast expense is requisite for the maintenance of an army and navy, and without adequate military and sea forces any possessions would be of brief duration. Money is also necessary to the utilization of colonial resources; to the clearance of forests, to the tillage of fields, to the operation of mines, to the improvement of harbors, rivers, and watercourses, to the construction of railways, to the creation of manufactures, to the marketing of products, to the proper inauguration of government, to the education of the people, and to the development of all the varied material and intellectual forces within the colony. Not riches alone suffice to support a colonial policy; something more is demanded, there must be an excess of capital. Money must be plentiful and cheap, investments difficult, interest low; all or many of the conditions must exist which would cause financiers to welcome with pleasure new opportunities for ample returns. The stress of affairs should be even more pressing; for colonial risks involve exceptional danger, and even the higher rates of profit always prevailing will not attract capitalists unless the home market be such as to preclude safe, steady, and at least slightly remunerative transactions; only then can the colonies secure the funds necessary to their progress.

The situation of trade must also be similar. Warehouses must be overstocked; there must be overproduction; the demands of domestic consumption and of buyers in independent foreign lands must be less than the supplies of national industry. Manufacturers and merchants must feel the need of new openings for their goods and wares, while they must find in the colonies an outlet for them. Farming, on the other hand, in the dominant state should be insufficiently developed to satisfy

the daily wants of its people. Colonists are naturally tillers of the soil, and an agricultural community cannot, as a rule, guarantee them the necessary sales. . . .

Having thus discussed the material requirements essential for a country engaged in colonial enterprises, it is now proper briefly to consider two other necessary attributes. A race without the military and naval spirit is ill fitted for these tasks. The possession of colonies involves the control and protection of distant lands; it implies the maintenance of order within their boundaries, as well as the subjugation of the native, barbarous, or semi-civilized tribes; it means the management of many half-explored regions; and, above all, it requires their defense against the world. Where a people would not meet one enemy on its own borders or shores, it will encounter many foes in the vicinity of its dependencies. . . . The inhabitants of the mother country must therefore always be ready, at command, to render service in behalf of her wards, or, as frequently happens, to protect their own land against the foreign aggressor to whom some territorial dispute offers the desired pretext. On the other hand, well-situated possessions may thwart blows aimed at the metropolis. Witness the Greek colonies, which for centuries served as effective barriers to the attempted invasions of the Asiatic hordes directed against their central governments. With the more complex interdependence of races the probability of discord, by reason of distant dominions, has in modern ages greatly increased. The military and seafaring disposition is therefore more and more essential. Such are briefly the requisites indispensable to any nation to enable it successfully to pursue a colonial policy.

439. Phœnician colonization. The earliest colonization of importance was that of the Phœnician merchants.

The Phœnician establishments throughout the Mediterranean were not only important as commercial stations, but even the more as outposts of Eastern civilization, diffusing among the aborigines of the West the culture and education of the most enlightened nations of that age; while their own knowledge of the world and conception of the universe were in turn vastly developed. As the first colonizing people, the Phœnicians conferred unreckoned and incalculable benefits upon future generations. In extending their commerce to the uttermost ends of the earth, they unconsciously bore with their ships a cargo immeasurably more precious than that of merchandise and silver. They transported the elementary rudiments of learning to the untutored tribes of the West, and thence they received not less valuable information of the breadth of the seas and of the uncounted millions of mankind who were not

bounded or confined by any false or imaginary circle of limitation between the gods and men. . . .

The greatest bequest of the Phœnicians to posterity was their broad diffusion of the elements of civilization. Their method was not the less remarkable. They stand the first — in antiquity perhaps the only race — who by peaceful means attained world-wide supremacy; for, not only by sea, but likewise on land, they were the acknowledged sovereign people of their times. Even to-day in daily life, their activity, their skill, their inventive genius, and their commercial instinct are memorable; and not the least of the lessons which they taught is the theory of colonization.

440. Bonds uniting Greece and her colonies. While Greek colonies became in many respects practically independent political units, numerous ties united them to the homeland.

The principal bond between the mother state and the colonies was perhaps religion. The people literally carried their worship with them; for, before departure, they took a light from the sacred fire of the tutelary deity, and this they transported to ignite the flame in some other remote temple to be erected by their hands. . . . .

The public games likewise aroused a strong feeling of union. Not only did neighboring communities there contend with each other, but competitors for prizes came from afar. During their continuance, war was suspended and enemies at arms met as rivals in athletic sports. . . .

The Greeks, wherever wandering, preserved their own language and laws. . . . The medium of common speech afforded decided advantages to the widely scattered colonists; it enabled them to read the same literature and to study the same philosophy; the great number of renowned men, born, educated, and residing in the various dependencies, who became distinguished in letters, morals, history, science, and art, bears witness to this community of thought.

The individual Greek cities enjoyed absolute political freedom with complete control over their local and foreign affairs. Even when entering an alliance created among themselves in certain localities, they never yielded the doctrine of home rule, and were loath to surrender to any central executive the direction of their exterior policy. . . .

The leagues were outgrowths of necessity; dread of conquest was the motive for their foundation. Wherever the federation was the strongest, the fear of invasion was the greatest. . . .

Separated from the fatherland by vast distances and dangerous seas, the Greek colonists were cast upon their own resources. Their innate sense of self-respect and resolute will incited them to the fullest degree of their capacity and strength.

a protracted and sanguinary struggle, had scarcely attained its own freedom before it won by its prowess a distant empire. By a strange anomaly this commonwealth, so arduous in the protection of the privileges of its own citizens, deeded away in absolutism, to a private association, the rights of millions of its vanquished subjects. A commercial organization — frequently imitated on a smaller scale — is to be described, to which, by its charter, the arbitrary dominion over vast regions was granted; a state was erected within a state. A further circumstance connected with the rapid growth of the Dutch colonial realm is in the fact of its acquisition by the expulsion of another European people, rather than by the direct subjugation of native races.

445. General nature of French colonization. The essential features of French colonial activity may be stated as follows:

The narrative of earlier French colonization is essentially a recital of adventure; it is this element, indeed, which chiefly prevented enduring success; many other reasons may be cited partially to explain the numerous misfortunes experienced. The government was invariably vast in plans, but feeble in execution. The forces allotted for tasks were nearly always immeasurably inadequate for their achievement. By brilliancy of action, unity of purpose, and the moderation of their rule, the French succeeded in bringing immense and widely scattered regions under their nominal authority; but, for the most part, throughout their great empire of the West and the East the fabric of their power was weak; when collision came with a more sturdy and better-equipped rival its frailty was at once manifest. Had the French not unreasonably stretched the frontiers of their territories, and had they been content to possess more densely settled, but smaller, domains, they would have undoubtedly stood against the shock of British blows. . . .

By far the greater proportion of French acquisitions are of modern date; for the colonial history of France is sharply divided into two epochs, the one from the end of the sixteenth to the close of the eighteenth century . . . , the other from 1830 to the present. The balance sheet at the day of reckoning for the earlier period showed only insignificant returns, and even these were engulfed in the chasm opened by the Revolution. Of all the leading powers France suffered the most complete loss of national possessions. After the seizure of Mauritius by the English, in December, 1810, not a single outpost remained unconquered by the enemy. As in former ages the French people were in their foreign enterprises the most unlucky, so in the nineteenth century their success has not been more than mediocre; but very recently they have shown an ardor, energy, and resolution which promise better fortune for the future.

446. Britons as colonizers. An English writer mentions the qualities requisite for successful colonization, and bases on the possession of these attributes the success of the British as a colonial people.

There are seven qualities specially useful in the work of colonization. All colonizing nations possess some of these qualities; British success is based on the majority of them. They are —

(1) *Physical Strength.* In the competition for colonies all parts of the earth have been occupied, and that nation must be most successful which can best stand all varieties of climate and come through all dangers with least permanent harm. . . .

We may add here the *tendency to rapid increase in population* which helps to occupy rapidly, and so maintain a hold on, the comparatively waste lands where colonies are formed.

(2) *Adventurousness.* Nations mainly continental are slow to move; it is the maritime powers that scatter their explorers over the world. And it is a great advantage here that a nation should be composite, not all of one stock. . . .

(3) *Trading Spirit.* It is not enough to discover new lands; the colonizer must have some motive for holding them. . . .

(4) *Settling Spirit.* After all, a trading colony like the Dutch East Indies is not our idea of a colony at all. To hold one or two towns along the coast of a big island and keep some order among the native chiefs is not work that can build up new states. The empire-making races must contain men who will open up new countries with the hope of living in them. . . .

(5) *Fighting Spirit.* This does not mean aggressiveness, but the determination to "stand no nonsense." It is the carrying out of the old advice: "Beware of entrance to a quarrel; but, being in, bear 't that the opposéd may beware of thee." . . .

(6) *Adaptability to the Native Element.* The Red Indians in North America, the Bantu tribes of South Africa, the Aztecs of Spanish America, were all important factors in the settlement of those countries; they were too many to be despised and too warlike to be cowed. The nation that could best humor them gained an advantage over its competitors. . . .

(7) *Dominance.* You can utilize native tribes by humoring them; but to establish an empire among them you must be able also to master them, and to do it in such a way that they will own the mastership without chafing under it.

447. The British Empire and the Roman Empire. In several striking points a similarity may be observed between the two greatest empires that the world has seen. In other respects they are essentially different.[1]

English writers are fond of comparing the Roman Empire with their own, and in many ways the resemblance is striking. Beginning with a small country, each expanded over a huge domain, carrying with it an enlightened administration, respect for justice, more gradually its own conception of law, and at length a peace and order which, in imitation of the Latin term, it has become the fashion to speak of in England as the *Pax Britannica*. But if the likeness is great, the differences are not less marked. The possessions of Rome were continuous, stretching in all directions from the shores of the Mediterranean. Her neighbors were at arm's length on the extreme edge of her frontier; no powerful state was interposed between the different portions of her empire. Moreover, the countries under her rule contained all the people most nearly akin to her in blood and civilization, and they formed the bulk of her subjects, for she governed no vast population wholly different in race and color. She was therefore enabled to stamp her own character indelibly upon a great part of her dominions.

To all this the British Empire presents a strong contrast. The dependencies of England are scattered over the whole face of the earth in almost every habitable latitude, while there are scarcely ten consecutive degrees of longitude in which she does not have a foothold. Including Egypt, her six most important possessions lie in five different continents with no means of communication between them but a long sea voyage. Outside of the British Isles with their hundred and twenty thousand square miles, she holds no land in Europe of other than a military significance; but she has nearly four millions of square miles in North America, as much more in Africa, over three millions in Australasia, and nearly two millions in Asia, besides innumerable islands and small bits of coast dotting the map of the world.

448. Expansion of the United States. While only recently become a colonial power, the United States has always been an expansionist nation.

Among the prime factors that have determined the character and history of the United States from the beginning of its existence, none has been of greater importance than the possession by it of a vast

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territory abounding in resources and fertility and suitable in every way for permanent occupation and settlement. As the nation grew, and before the pressure of increasing population scarcely had been felt, this area was constantly added to. At first, taking the form of successive pushings-forward of the boundaries, until there had been included all of the adjacent territory, which either was but partly settled or the ties of which to another country were not of sufficient strength to maintain it in its allegiance, this movement of expansion has at length leaped all barriers of distance and, as the result of rapidly moving events, has brought under the sovereignty of the United States, first, a great territory lying far to the north, then islands lying in both the Atlantic and Pacific oceans, and finally, returning to the mainland, has added a valuable strip of land to the south, where the two American continents are joined together.

Looking back over the course of these events, one cannot fail to be impressed with the slight extent to which this great movement has been consciously planned or directed by those having in charge the destinies of the nation; how largely, indeed, it has practically been beyond their powers to control. The United States, thus, though it has never deliberately or consciously pursued an imperialistic policy, yet to-day finds itself in fact possessed of a territory truly imperial — in its extent, in the variety of the people or races occupying it, and in the wide difference of the conditions that have to be met in its government and administration.

III. Colonial Policy

449. The French as colonizers. The difficulties preventing French colonization may be stated as follows:[1]

The colonies of France cover a vast territory, although large tracts of it are practically worthless. For various reasons the French are not good colonizers. In the first place, it may be noted that there is no overpopulation in France forcing families to seek sustenance in foreign countries. Most important of all, perhaps, as a cause of failure in colonization is the fact that to Frenchmen the life of their home is too attractive to permit a thought of permanent residence elsewhere. As recent French writers have emphasized, there is too much attachment to the settled conditions of a civilized country, too little spirit of enterprise. Young men are satisfied with a moderate income from an official position which enables them to enjoy the advantages of social life in the mother country. Again, the equal distribution of family property among children deprives France of the large class of penniless but venturesome younger sons

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who carry on so much of the imperial work of Great Britain. It is therefore remarked by all, that in French colonies very few Frenchmen, outside of the official hierarchy, are to be found. Indeed, during the present century there has been very little true colonization by Frenchmen in foreign lands. The French colonies in Canada, Louisiana, and South America have not been reënforced by accessions from the home country. Even in Algeria, which by its geographical situation is almost a province of France itself, there are only 318,000 Frenchmen against 446,300 subjects of other states. . . .

On account of the rigid and illiberal colonial system introduced by the French bureaucracy, French colonies have very little attraction for foreigners, who wish to be free from constant irritation and interference by the administration. The French colonies, therefore, have been an expensive luxury, and they have not become a field for investment and industrial exploration to the same extent as have the colonies of other nations. By discouraging her colonies from entering into commercial and industrial relations with any but the mother country, France is really excluding from them the capital and men that alone could make them profitable.

450. Criticism of the French colonial system. Some of the merits and defects of the French colonial system are indicated in the following:

One important feature which marked the administration of the French colonies before the Revolution was the vigorous endeavor to secure absolute uniformity in the governance of all the dependencies, with little provision for differences in local conditions. . . . On the contrary, the present system exhibits entire flexibility both in the methods of supervising colonial affairs from home, and in the organizations of the colonies themselves. . . .

There is now, therefore, a decentralization of control which contrasts very strongly with the excessive centralization of the old dominion, and even with the very symmetrical policy which characterizes other branches of French administration at the present day. This division of control has, on the whole, been advantageous; for it has helped to give French colonial policy in the nineteenth and twentieth centuries an elasticity which it utterly lacked in the eighteenth, and it has likewise served to mitigate that pernicious faith in administrative shibboleths which has too often been the curse of French politics both at home and abroad.

One feature which serves to distinguish the present colonial system of France from that of Great Britain, Germany, or the United States, is the

practice of giving to dependent territories a certain representation in the official councils of the mother state. Algeria, being regarded as part of France, has of course its quota of representatives. . . . The protectorates, including Tunis, have no representation at all in the French parliament although the degree of control exercised over them is fully as great as in several other territorial dependencies. Of the score or more of "colonies proper," only seven have the right to send representatives . . .; to others not less important no rights of representation are given. . . .

Among the seven colonies now holding the privilege, no rational basis of representation is established, senators and deputies being allotted without any due regard for differences in population, in area, in wealth, or in contributions to the national exchequer. . . .

The methods by which the various dependencies select their representatives afford further illustrations of the elasticity of the system. In Algeria, the natives do not vote at all. In Martinique, Guadaloupe, and Réunion they hold the franchise on equal terms with Frenchmen, and the same is substantially true of Senegal. In French India and in French Guiana they have a right to vote, but not on equal terms with the French inhabitants; yet even with the handicap they hold a dominant hand in the elections. In Cochin China they are almost entirely shut out, and the French residents are in control. . . .

Although the system of colonial representation has not been without its very distinct advantages, particularly in affording the colonies a recognized official channel through which their grievances might be effectively set forth, it has, without doubt, fallen far short of expectations. In a senate of three hundred and a chamber of six hundred members, the colonial representatives form so insignificant an element that their voting strength is scarcely sufficient to make their support worth the interest of any of the leading political factions. . . .

Not infrequently the colonies select as their representatives men who have already taken an active part in French politics at home; but in the main this practice is not followed. In either case, the objection is often made that the colonial deputies interest themselves too prominently in the purely domestic politics of the republic, and too frequently lose sight of the special colonial interests which they are supposed to guard. . . .

The methods by which senators and deputies are selected in the colonies have also been rather harshly criticized. There are those, indeed, who urge vigorously and with a good deal of circumstantial evidence to support them, that the colonial representatives do not in many cases faithfully reflect the public opinion of the colonies from which they are accredited. . . .

In view of the small percentage of native votes polled, and especially in view of the notorious activity of French officials in connection with the colonial elections, it is indeed questionable whether the colonial deputies sometimes represent much more than the official class in the colonies. . . .

In all the represented colonies except Cochin China the native element has a decisive numerical preponderance; and even where it has not equal weight with the French it is nevertheless strong enough to control the elections. This the French inhabitants regard as a substantial grievance; for the natives contribute only insignificant sums to the exchequer, and, with a few unimportant exceptions, furnish no recruits to the military establishment; whereas the colonial Frenchmen bear the brunt of financial and military burdens, and yet are allotted only a minor share in the choice of those who assume to represent the wishes of the colony in the councils of the nation. . . .

One aspect of the question which has elicited discussion in recent years relates to the bearing which the system of colonial representation has upon the question of political development within the colonies themselves. In the colonies of France the march to colonial autonomy, or toward anything approaching autonomy, has been extremely slow; in none of them is there yet the faintest recognition of this principle. . . .

The French government of the present day, therefore, aware that a half century of experience has not served to stamp with marked success its ventures along the path of political assimilation, finds itself in the somewhat awkward predicament of not being ready to carry the principle of colonial representation to its logical conclusion. On the other hand, it cannot easily withdraw the representative privilege from those colonies to which it has been accorded, for the system has come to be regarded, both in France and in th. colonies, as an incident of republicanism, since it was established by the first republic, revived by the second, and made a constitutional fixture by the third. For sentimental reasons, then, if for nothing more, the elimination of the colonial representatives need hardly be looked for in the very near future. The French have halted, accordingly, between the Spanish and Portuguese systems, which accord representation to all dependent territories, and the British system, which grants representation to none.

451. German colonial policy. At present German colonial ambition is awakening and German commercial interests are widespread.[1]

[1] Copyright, 1900, by The Macmillan Company

Germany, though a great colonizer, has not thus far been prominent in the establishment of political dependencies, as up to the present decade most of her colonists have been lost to the nation. Going chiefly to North America, they have rapidly become Americanized, and even though they may continue to cherish German culture and literature, they have changed their political allegiance completely. Like the Russians, the Germans have been very successful as agricultural colonists. In many portions of the United States, they have replaced the Anglo-Americans and the Irish in the farming industry. Like the Dutch colonists in South Africa, the Germans are content to settle in a wilderness in the hope of turning it into an inviting abode and making it their permanent home. They shun no hardships; their regularity of work and their endurance assure them permanent success as agriculturists.

In our day, Germany is making great efforts to retain the political allegiance of the many colonists who leave her borders, she now endeavors to direct immigration to her own colonies and to Asia Minor, parts of which she hopes by ultimate political occupation to save for the German Empire. German agricultural and industrial colonies are also common in Brazil, in the Argentine Republic, and in Chile. In this connection, too, our attention may well be turned for a moment to the fact that the Germans have within the last decades developed remarkable ability as traders. The highly trained German clerks are to-day the admiration of the commercial world, and the German merchant colonies in places like Hongkong and Rio de Janeiro are rapidly gaining on the supremacy so long held by British commerce.

In the political colonies and protectorates which Germany has established in East Africa and in the Cameroons, as well as in the Pacific Islands, real colonization has been slow to take root, because, in addition to the disadvantageous climate, the German administrative restrictions are unfavorable. The governmental bureaucracy of Germany, not being so flexible and adaptive in its modes of procedure as are the commercial classes, tries to apply to new settlements in the wilderness the methods of the Prussian police sergeant, with the result of so hampering the movements and activities of colonists that many prefer to settle in non-German territory.

452. The Dutch in Java. The Dutch colony of Java has often been considered a model of colonial administration.

It may be well in this place to call attention to the remarkable success achieved by the Dutch in their government of Java. In the present period of great territorial expansion, we are likely to overlook the more modest colonial establishments of a country from which its mightier neighbors

might learn many a lesson in colonial administration. The Dutch are free, on the one hand, from the rigid officialism and the formal routine which embarrasses their continental neighbors; and on the other, from the overbearing behavior that characterizes the English in their intercourse with other nations. The Dutch, therefore, win the affection of their subject races, although by no means indiscriminately fraternizing with them. Their flexible methods enable them to take account and make use of all the local native social institutions for the purposes of good government. By allowing the tribes to observe their traditional customs and by maintaining native dignitaries, the Dutch govern with very little friction, retain the confidence and love of their subjects, and are enabled to exert far greater influence than the use of harsher methods would permit. For the judicious management of native populations, and for the molding of native institutions to the ends of a more enlightened policy, the Dutch colonial administration may serve as a model.

453. Russia as a colonizer. Russia's gradual expansion eastward has been made easy by her ability to deal successfully with Oriental peoples.

Russian colonization has been almost entirely agricultural. In past centuries, spreading gradually from Little Russia over the plains and steppes to the north and east, Russian population advanced with an avalanche-like motion which continued even when the boundary of Asia was reached. And to-day, though the political methods of Russia have become more consciously systematic, agricultural colonization is still the keystone of her expansion. . . .

In its latest phases, the character of Russian colonization has undergone significant changes. The original occupation of Central Asia by Russia was largely military in method, a fact due to the initiative and ambition of military officers stationed in that country. Thus, under the veil of punitive expeditions, tribe after tribe of the natives was conquered and subdued, and a firm military administration introduced. The methods pursued by the Russian in these regions were at first harsh and relentless. By striking memorable blows, they terrified the population and deprived the people of their leaders. After these first steps, however, they adopted more suave methods. The surviving leaders they endowed with official appointments, and took them to the West to admire the power and splendor of the Czar. Russian industry and commerce were gradually introduced and tracts of land hitherto unoccupied were settled by Russian colonists. There was no attempt to introduce religious uniformity by state action; in Asia the empire has shown itself tolerant toward all beliefs. The natural affability of Russian character was given an opportunity to

bear fruit in the establishment of closer relations and a better understanding with the natives.

Of all European powers, Russia is in some respects the most successful as a colonizer in Asia. Herself semi-Oriental, she is not so far above the various tribes of the Asiatic plains as to misunderstand them. The Russians have an insinuating manner and great tact in diplomatic intercourse, and at the same time a political system the splendor and concentrated majesty of which impress the Oriental mind far more than do the simple business methods of the Briton. They know when to use corruption, when to use force, and when to soothe with honors and decorations. Above all, their military and administrative officers fraternize with the leaders of the conquered peoples, and a feeling of solidarity between conquered and conquerors is the result. Indeed, many writers seriously question whether any other power can be permanently successful as a colonizer in Asia, when opposed by the craft and ability of Russia. Her perfect mastery of Oriental diplomacy, her ability to manage the most refractory materials, is proved by her recent unforeseen successes at Peking. It is by combining strength of purpose, irresistible will, and the show of great force, with the milder methods of corruption and official blandishment, that Russia is so successful in the Orient.

454. Relation of England to colonial enterprise. A recent English writer summarizes as follows the stages in the development of England's colonial attitude:

The progressive character of our home development in political liberty and order has been reflected in our imperial history. The following brief summary shows how the place of the State in our colonial enterprise has varied with the stage of growth of our political constitution at home: —

(1) The Adventure period: typified by Raleigh — the State favors and assists colonization.

(2) Beginning of Imperial assertion: Cromwell — the State directs colonization.

(3) The Empire a basis for Trade: Chatham — the State an instrument for extending Trade colonies.

(4) Exploration: Cook — the State an instrument for discovery of new lands.

(5) Trade pure and simple: Cobden and Bright — the State dispensed with and colonies disregarded.

(6) Discharge of Duty: Mill — the State again found necessary.

(7) Imperialism recognized: Beaconsfield — the State widened and England's imperial position reasserted.

455. Constitution of the British Empire League. The growth of common interests among the self-governing portions of the British Empire has led to the imperial federation movement. In 1895 the British Empire League was formed, the objects of which are set forth in its constitution as follows:

1. The Association to be called The British Empire League.

2. It shall be the primary object of the League to secure the permanent unity of the empire.

3. The following to be among the other principal objects of the League:

(*a*) To promote trade between the United Kingdom, the Colonies, and India, and to advocate the holding of periodical meetings of representatives from all parts of the empire for the discussion of matters of general commercial interest, and the consideration of the best means of expanding the national trade.

(*b*) To consider how far it may be possible to modify any laws or treaties which impede the freedom of action in the making of reciprocal trade arrangements between the United Kingdom and the colonies, or between two or more British colonies or possessions.

(*c*) To promote closer intercourse between the different portions of the empire by the establishment of cheaper and, where required, more direct steam, postal, and telegraphic communication, preference being given to routes not traversing foreign territory.

(*d*) To develop the principles on which all parts of the empire may best share in its general defense, endeavoring to bring into harmony public opinion at home and in the colonies on this subject, and to devise a more perfect cooperation of the military and naval forces of the empire with a special view to the due protection of the trade routes.

(*e*) To assimilate as far as local circumstances permit the laws relating to copyright, patents, legitimacy, and bankruptcy throughout the empire.

4. The League shall use every constitutional means to bring about the objects for which it is established, and shall invite the support of men of all shades of political opinion throughout the empire.

5. The League shall advocate the establishment of periodical conferences to deal with such questions as may appear ripe for consideration, on the lines of the London Conference of 1887 and the Ottawa Conference of 1894.

456. Imperialists and anti-imperialists in the United States. The recent colonial expansion of the United States created a wide

diversity of opinion, and threatened for a time to become a leading issue in American politics.[1]

While the public as a whole hesitated between respect for its cherished traditions and the allurements of the new prospects, the more partisan on both sides wrangled fiercely over the question whether the country should or should not retain its new acquisitions. The two points of view are usually called the Imperialist and the Anti-imperialist. . . .

In the long and bitter disputes as to what should be done with the new insular possessions, argument centered on the retention of the Philippines. . . .

Amidst the multitude of conflicting statements at this time, we can recognize a few main contentions which reappear again and again. In the first place, the Anti-imperialists asserted that there were plenty of unsolved problems at home to which the nation should devote all its energies instead of squandering them elsewhere, especially as the Americans had no experience in colonial matters. . . . But the fiercest and most effective attacks of the Anti-imperialists were based on the charge that the new policy was an abandonment, not only of the wise traditions of the fathers of the republic, but of the noble ideals which had made the Union honored throughout the world. . . .

The advocates of a policy of expansion met the assertion that, according to American ideals, government should be by the consent of the governed, with the declaration that this was true only when the governed were capable of taking care of themselves; that, when they were not, the progress of the governed — which meant also the advancement of civilization — was more important than their consent. . . .

The charge that the acquisition of colonial possessions was contrary to the traditional policy of the United States was met in one of two ways, — either by admitting its truth but declaring that the time had now come for a change, or by denying the historical accuracy of the statement. According to the writers who support the latter view, colonization has been the dominant characteristic of the whole growth of the country.

457. Instructions to the Philippine Commission. The following extract is taken from President McKinley's instructions to the Philippine Commission, and illustrates the attitude of the United States to its dependencies:

Without hampering them by too specific instructions, they should in general be enjoined, after making themselves familiar with the conditions and needs of the country, to devote their attention in the first instance

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to the establishment of municipal governments, in which the natives of the islands, both in the cities and in the rural communities, shall be afforded the opportunity to manage their own local affairs to the fullest extent of which they are capable. . . .

The next subject in order of importance should be the organization of government in the larger administrative divisions corresponding to counties, departments, or provinces, in which the common interests of many or several municipalities falling within the same tribal lines, or the same natural geographical limits, may best be subserved by a common administration. . . .

That in all cases the municipal officers, who administer the local affairs of the people, are to be selected by the people, and that wherever officers of more extended jurisdiction are to be selected in any way natives of the islands are to be preferred, and if they can be found competent and willing to perform the duties, they are to receive the offices in preference to any others. . . .

In all the forms of government and administrative provisions which they are authorized to prescribe, the commission should bear in mind that the government which they are establishing is designed not for our satisfaction, or for the expression of our theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands. . . .

The people of the islands should be made plainly to understand that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar. . . .

It will be the duty of the commission to promote and extend, and, as they find occasion, to improve the system of education already inaugurated by the military authorities. In doing this they should regard as of first importance the extension of a system of primary education which shall be free to all, and which shall tend to fit the people for the duties of citizenship and for the ordinary avocations of a civilized community. This instruction should be given in the first instance in every part of the islands in the language of the people. . . .

The main body of the laws which regulate the rights and obligations of the people should be maintained with as little interference as possible.

IV. Forms of Colonial Government

458. Classification of colonies. Several bases for the classification of colonies are suggested in the following:[1]

Colonies are classified, according to their method of origin and acquisition, into four leading groups: 1, those created or acquired by military force; 2, those engaged in agricultural pursuits, where farming is the main occupation of the inhabitants; 3, those employed in commerce or trade, consisting chiefly of a few merchants, sent out from the parent state to carry on the barter and exchange of commodities with the natives of the region in which they reside; and 4, those in which the plantation system prevails, devoted to the cultivation of such products of the soil as cannot for climatic reasons be grown in the home country. As illustrations of these various classes, the Roman establishments may be cited, in antiquity, as colonies by conquest; in modern times the Spanish possessions in Central and South America belonged to the same type. Among agricultural colonies the United States — while a British dependency — and Australia may be reckoned. The principal commercial colonies are those under the administration of trading companies, such as formerly the Dutch and English domains in East India and in that vicinity; of plantation colonies those in the West Indies and in the torrid zones of Africa are the most important.

Nor should a fifth order be entirely forgotten; reference is made to penal stations, to such as those whither England used to deport her criminals and to which France still to-day sends certain of her offenders. . . .

In reality, another simpler, but much broader, classification of colonial origin may be made by dividing colonies into those voluntarily and those involuntarily founded by the metropolis; or rather those intentionally established by the government and those unconsciously created by the people. Among those organized under official direction all distant military strongholds must be included; likewise commercial stations, at least in their inception; plantation and penal settlements are also comprised in this same group. Agricultural communities and a certain portion of trading establishments alone are due to individual initiative, without any material assistance from the mother country, and frequently, as history shows, without her coöperation. As belonging to the class of colonies directly inaugurated by the state, those of Rome and of Spain may be mentioned; to the number indirectly erected or aided by its authority, those of Holland and England in and around the Indian Ocean; while

[1] Copyright, 1900, by Henry C. Morris.

to the division constituted by personal effort, those of Greece and the North American and the Australian territories, past and present, of Great Britain may be assigned.

459. Spheres of influence. An important recent method of indirect colonial expansion is described in the following:[1]

In recent years a far-reaching and radical change has come over the entire field of colonial enterprise. The economic energies of the western nations have been stimulated to such an extent that the more restricted markets of the old commercial world, as well as the opportunities it offers for capitalistic investment, are no longer adequate. Moreover, both commerce and capital have become nationalized, have been taught to look to the state for assistance, and to adjust their own activities and policies to the upbuilding of national power. Far more than was ever before conceivable, the national state has become the exponent of the sum of energies within its bounds. . . .

In this era of direct political expansion, the older methods of colonial growth have come to be considered too slow and uncertain. The gradual development of trade and industrial enterprise, the civilizing influence of missionaries, are not sure enough means of gaining a firm foothold in new regions, but these individual forces must be seconded, and even anticipated, by the state. As each nation is loath, for fear of the others, to trust solely to the natural process of colonial evolution, they have all joined in an artificial division of the unoccupied world, and in the creation of political authority over territories within which no economic activities have as yet been developed.

460. Colonial protectorates. The essential features of a colonial protectorate are as follows:

When a state has succeeded in excluding other nations from the opportunity of exerting political influence within a certain region, it may then set to work and develop its own authority therein, either by occupation, by annexation, or by the establishment of protectorates. The latter is the favorite mode of transition from the negative sphere of influence to a positive direct control. . . .

There are certain essential features and conditions which may be found wherever the colonial protectorate exists. These may be summarized as follows: first, that the native authorities continue to reign, and that the local institutions and customs shall not be interfered with; second, that the protected state has political relations with the protecting

[1] Copyright, 1902, by The Macmillan Company.

power only, and that it relinquishes the right of declaring war; third, that it admits a political resident as representative of the protecting power, and thus enables the latter to exercise a personal influence upon the government of the protected state; fourth, that while, as a rule, native laws and customs are permitted to continue in force, they shall yield when the imperial interests absolutely demand. The responsibility which the paramount power assumes will not permit it to tolerate within the protected territory gross misrule, hopeless indebtedness, or barbarous practices which would offend the elementary ideas of humanity. In general, it may be said that international law looks upon colonial protected territory as a part of the protecting state, and holds the latter responsible for conditions within it and for acts emanating from it; on the other hand, with respect to municipal law, colonial protectorates are usually treated as distinct from the national territory, and as not sharing the legal institutions of the protecting state, nor as subjected to its direct legislative authority.

461. The relation of the United States and Cuba. The following provisions, known as the Platt Amendment, were incorporated in the Army Appropriation Act of 1901. They were accepted by Cuba as an appendix to its constitution.

That the government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgment in or control over any portion of said island.

That said government shall not assume or contract any public debt, to pay the interest upon which, and to make reasonable sinking fund provision for the ultimate discharge of which, the ordinary revenues of the island, after defraying the current expenses of government shall be inadequate.

That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.

That all Acts of the United States in Cuba during its military occupancy thereof, are ratified and validated, and lawful rights acquired thereunder shall be maintained and protected.

That the government of Cuba will execute, and as far as necessary extend, the plans already devised or other plans to be mutually agreed upon for the sanitation of the cities of the island, to the end that a recurrence of epidemic and infectious diseases may be prevented, thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the southern ports of the United States and the people residing therein.

That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations, at certain specified points, to be agreed upon with the President of the United States.

That by way of further assurance the government of Cuba will embody the foregoing provisions in a permanent treaty with the United States.

462. Establishment of crown government in India. The interests of the East India Company in India were resigned to the crown in 1858. The following proclamation, issued by the crown in the same year, states England's policy toward the colony:

Whereas, for divers weighty reasons, we have resolved, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled, to take upon ourselves the government of the territories in India heretofore administered in trust for us by the Honorable East India Company.

Now, therefore, we do by these presents notify and declare that, by the advice and consent aforesaid, we have taken upon ourselves the said government; and we hereby call upon all our subjects within the said territories to be faithful, and to bear true allegiance to us, our heirs and successors, and to submit themselves to the authority of those whom we may hereafter, from time to time, see fit to appoint to administer the government of our said territories, in our name and on our behalf. . . .

We desire no extension of our present territorial possessions; and, while we will permit no aggression upon our dominions or our rights to be attempted with impunity, we shall sanction no encroachment on those of others. We shall respect the rights, dignity, and honor of native princes as our own; and we desire that they, as well as our own subjects, should enjoy that prosperity and that social advancement which can only be secured by internal peace and good government. . . .

. . . We declare it to be our royal will and pleasure that none be in any wise favored, none molested or disquieted, by reason of their religious faith or observances, but that all shall alike enjoy the equal and impartial protection of the law. . . .

And it is our further will that, so far as may be, our subjects, of whatever race or creed, be freely and impartially admitted to offices in our service, the duties of which they be qualified, by their education, ability, and integrity, duly to discharge.

We know, and respect, the feelings of attachment with which the natives of India regard the lands inherited by them from their ancestors, and we desire to protect them in all rights connected therewith, subject to the equitable demands of the State; and we will that, generally, in framing and administering the law, due regard be paid to the ancient rights, usages, and customs of India. . . .

When, by the blessing of Providence, internal tranquillity shall be restored, it is our earnest desire to stimulate the peaceful industry of India, to promote works of public utility and improvement, and to administer its government for the benefit of all our subjects resident therein. In their prosperity will be our strength, in their contentment our security, and in their gratitude our best reward.

463. Self-governing colonies. The following extract describes the position and powers of England's most important possessions, which are practically self-governing:[1]

All the great English settlement colonies have, therefore, attained to self-government, and have developed an almost independent political life. The connection with the mother country is maintained, not by compulsion or the fear of superior force but through a spirit of accommodation between the home and the colonial governments, and a rational endeavor to respect and advance their mutual interests. Thus the colonies are enabled to benefit by the prestige of association with a great empire, without being called upon for any serious sacrifices. The internal affairs, and in fact almost the entire polity of the colonial commonwealths, are left free from interference by the mother country. . . . The administration of the public lands has been turned over to them completely; they have been permitted to develop their own tariff policy and to negotiate commercial treaties with foreign nations; and while, of course, the general political relations of the colonies to the outside world are determined by the arrangements of the mother country, the colonial governments are always consulted before any important step involving their interests is taken.

[1] Copyright, 1902, by The Macmillan Company.

The self-governing colonies of Great Britain have often been compared to international protectorates, and it admits of no doubt that they are in some respects very similar. In both, the foreign relations are controlled by the paramount state, while complete autonomy exists as to internal affairs. . . .

Though the future of the self-governing colonies is uncertain, it is safe to predict that they will not again allow the mother country to encroach upon their internal autonomy, and their renewed subjection is not to be thought of. Whether they will continue in some form of federation with the mother country, or whether they will sooner or later claim complete sovereignty, depends entirely upon how far the basis of common race and civilization can be supplemented by lasting economic interests.

PART III

THE ENDS OF THE STATE

CHAPTER XXIV

THE PROVINCE OF GOVERNMENT

I. The Aims of the State

464. The state an end or a means. Bluntschli criticizes the one-sidedness of viewing the state as either a means or an end and gives his conception of the purpose of the state as follows:

The question is often raised whether the State is an end or a means, i.e. whether the State has an end in itself, or simply serves as a means to enable individuals to attain their ends.

The ancient theory of the State, especially that of the Greeks, regarded the state as the highest aim of human life, as perfect humanity, and was therefore inclined to regard the State as *an end in itself.* As compared with the State, individual men appeared only as parts, not as beings with separate personal rights. . . .

In complete opposition to this fundamental theory of the ancients is the opinion, which has been often maintained by English and American writers, that the State is not an end in itself, but is simply a *means* to secure the welfare of individuals. . . .

It seems to me that both the ancient and the modern view contain a germ of truth; but both commit the error of regarding only one side of the matter and of overlooking or denying the other side. . . .

are avoided if we direct end of the State as the *development of the national capacities*, the *perfecting of the national life*, and, finally, its *completion*; provided, of course, that the process of moral and political development shall not be opposed to the destiny of humanity. This formula includes everything that can be regarded as a proper function of the State, and excludes everything that lies outside the State's range. It regards the idiosyncrasies and the special needs of different nations, and thus, while it firmly maintains the unity of the end of the State, it secures the variety of its

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It seems to me that both the ancient and the modern view contain a germ of truth; but both commit the error of regarding only one side of the matter and of overlooking or denying the other side. . . .

But all these objections are avoided if we formulate the proper and direct end of the State as the *development of the national capacities*, the *perfecting of the national life*, and, finally, its *completion*; provided, of course, that the process of moral and political development shall not be opposed to the destiny of humanity. This formula includes everything that can be regarded as a proper function of the State, and excludes everything that lies outside the State's range. It regards the idiosyncrasies and the special needs of different nations, and thus, while it firmly maintains the unity of the end of the State, it secures the variety of its

development. The life task of every individual is to develop his capacities and to manifest his essence. So, too, the duty of the State person is to develop the latent powers of the nation, and to manifest its capacities. Thus the State has a double function. Firstly, the *maintenance* of the national powers; and, secondly, their *development*. It must secure the conquests of the past, and it must extend them in the future.

465. The primary, secondary, and ultimate purposes of the state. Burgess attempts to separate the proximate and ultimate ends of the state, and to distinguish state and government in the methods used in attaining these ends.

First, then, as to state ends. An exhaustive examination of this subject will reveal the fact that there are three natural points of division. There is a primary, a secondary, and an ultimate purpose of the state; and, proceeding from the primary to the ultimate, the one end or class of ends is means to the attainment of the next following. Let us regard the ultimate end first. This is the universal human purpose of the state. We may call it the perfection of humanity; the civilization of the world; the perfect development of the human reason, and its attainment to universal command over individualism; the apotheosis of man. . . .

The state cannot, however, be organized from the beginning as world state. Mankind cannot yet act through so extended and ponderous an organization, and many must be the centuries, and probably cycles, before it can. Mankind must first be organized politically by portions, before it can be organized as a whole. I have already pointed out the natural conditions and forces which direct the political apportionment of mankind. I have demonstrated that they work toward the establishment of the national state. The national state is the most perfect organ which has as yet been attained in the civilization of the world for the interpretation of the human consciousness of right. It furnishes the best vantage ground as yet reached for the contemplation of the purpose of the sojourn of mankind upon earth. The national state must be developed everywhere before the world state can appear. Therefore I would say that the secondary purpose of the state is the perfecting of its nationality, the development of the peculiar principle of its nationality. . . .

But now, how shall the state accomplish this end? The answer to this question gives us finally the proximate ends of the state. These are government and liberty. The primary activity of the state must be directed to the creation and the perfecting of these. When this shall have been fairly accomplished, it may then, through these as means, work out the national civilization, and then the civilization of the world.

First of all, the state must establish the reign of peace and of law; *i.e.* it must establish government, and vest it with sufficient power to defend the state against external attack or internal disorder. This is the first step out of barbarism, and until it shall have been substantially taken every other consideration must remain in abeyance. If it be necessary that the whole power of the state shall be exercised by the government in order to secure this result, there should be no hesitation in authorizing or approving it. This latter status must not, however, be regarded as permanent. It cannot secure the development of the national genius. If continued beyond the period of strict necessity, it will rather suppress and smother that genius. So soon as, through its disciplinary influence, the disposition to obey law and observe order shall have been established, it must, therefore, suffer change. The state must then address itself to the establishment of its system of individual liberty. It must mark out, in its constitution, a sphere of individual autonomy; and it must command the government both to refrain from encroachment thereon itself and to repel encroachment from every other quarter. At first this domain must necessarily be narrow, and the subjects of the state be permitted to act therein only as separate individuals. As the people of the state advance in civilization, the domain of liberty must be widened, and individuals permitted to form private combinations and associations for the accomplishment of purposes which are beyond the powers of the single individual and which could be otherwise fulfilled only by the power of the government. . . . It may, also, be good policy for the state to aid them in the accomplishment of work which they could not, without such aid, perform, instead of authorizing the government itself to undertake and execute such enterprises. This all signifies, however, only a readjustment by the state, from time to time, of the relation of government to liberty.

466. The ends of the state. Garner, agreeing in the main with Burgess, adds one more to the numerous theories as to the proper function of the state.

If one more attempt to formulate a general statement of the function of the state may be permitted, I would offer the following: The original, primary, and immediate end of the state is the maintenance of peace, order, security, and justice among the individuals who compose it. This involves the establishment of a régime of law for the definition and protection of individual rights and the creation of a domain of individual liberty, free from encroachment either by individuals, or by associations, or by the government itself. No state which fails to secure these ends can justify its existence. Whatever else it may ignore, it cannot neglect these considerations without failing in its greatest and most essential

purpose. Secondly, the state must look beyond the needs of the individual as such to the larger collective needs of society — the welfare of the group. It must care for the common welfare and promote the national progress by doing for society the things which the common interests require, but which cannot be done at all or done efficiently by individuals acting singly or through association. . . . This may be called the secondary end of the state. The services embraced under this head are not absolutely essential to the existence of society but they are desirable and are in fact performed by all modern states.

Finally, the promotion of the civilization of mankind at large may be considered the ultimate and highest end of the state. . . . Thus the state has a triple end: first, its mission is the advancement of the good of the individual; then it should seek to promote the collective interests of individuals in their associated capacity; and, finally, it should aim at the furthering of the civilization and progress of the world, and thus its ends become universal in character.

467. The functions of the state. The following is a suggestive discussion of the general principles that determine the sphere of state action:

The primary right of the State, as of the individual, is, to be. Now, war, not peace, is the law of life; and the struggle for existence is a universal fact. Obviously, the first function of the State is to maintain, in a condition of the utmost efficiency, such fleets and armies, and other preparations for war, as its security against rival States demands. . . . Equally obvious is its function to maintain its internal tranquillity by its magistrates and police. . . .

Again. The right of the State, as we have seen, is not merely to existence, but to complete existence, noble and worthy existence, an existence in accordance with the dignity of human nature. Hence, among its functions must be reckoned the promotion of civilization. It is the guardian of the ideal and of the material interests of the people whose personalities it incorporates. . . .

The real difficulty is to determine what are the proper limits of the State's interference with individual action.

The true principle would appear to be that the State should leave free all interests and faculties of its subjects . . . so far as is consistent with the maintenance of its own rights. It is no part of its functions to do for them what they can do for themselves better, or even as well. It is a part, and a very important part, of its functions to allow them to develop their own personality, to become more and more men, to make

the most and the best of themselves, for their own and the common welfare. And not only to allow, but prudently to aid, whether by direct encouragement or by the removal of hindrances. This is the just mean of State action in respect of the subject. It is equally removed from a false paternalism and a false individualism.

The false paternal theory of the State's functions makes it not merely a high, but the only factor of human development, as the creator and arbiter of the rights of its subjects. The sufficient condemnation of this doctrine is that it is utterly unethical: that it is altogether fatal to that human freedom which is the essence of personality. It is expounded, in different forms, by two very different schools. The one is what we may call the German school of political mysticism: a philosophical travesty of the old very unphilosophical legitimism, which invests the State — the monarchical State — with theocratic attributes, and imposes on the subject the one duty, to obey. . . .

The other — a far more influential school in contemporary Europe — is the Jacobin or ultra-Radical school which, consciously or unconsciously, represents the sophisms of Rousseau. This school insists that man belongs wholly to the State: the falsely democratic State resting upon a fictitious universal suffrage. . . .

The opposite error to this false paternalism is the false individualism professing the doctrine of *laissez faire*, which sees in civil society nothing more than a struggle for existence among millions of human atoms; which regards the function of the State as nothing more than to keep the ring while they fight.

II. Individualism

468. Anarchism. The nature of anarchism, the extreme form of individualism, is stated in the following:

Anarchy means, in its ideal sense, the perfect, unfettered self-government of the individual, and, consequently, the absence of any kind of external government. This fundamental formula, which in its essence is common to all actual and real Theoretical Anarchists, contains all that is necessary as a guide to the distinguishing features of this remarkable movement. It demands the unconditional realization of freedom, both subjectively and objectively, equally in political and in economic life. In this, Anarchism is distinct from Liberalism, which, even in its most radical representatives, only allows unlimited freedom in economic affairs, but has never questioned the necessity of some compulsory organization in the social relationships of individuals; whereas Anarchism would extend the Liberal doctrine of *laisser faire* to all human action, and would

recognize nothing but a free convention or agreement as the only permissible form of human society. But the formula stated above distinguishes Anarchism much more strongly (because the distinction is fundamental) from its antithesis, Socialism, which, out of the celebrated trinity of the French Revolution, has placed the figure of Equality upon a pedestal as its only deity. Anarchism and Socialism, in spite of the fact that they are so often confused, both intentionally and unintentionally, have only one thing in common, namely, that both are forms of idolatry, though they have different idols; both are religions and not sciences, dogmas and not speculations. Each of them is a kind of honestly meant social mysticism, which, partly anticipating the possible and perhaps even probable results of yet unborn centuries, urges upon mankind the establishment of a terrestrial Eden, of a land of the absolute Ideal, whether it be Freedom or Equality. . . .

And that is what Anarchism undoubtedly is: a theory, an idea, with all the failings and dangers, but also with all the advantages which a theory always possesses; with just as much, and only as much, validity as a theory can demand as its due, but at any rate a theory as old as human civilization, because it goes back to the most powerful civilizing factor in humanity.

469. The individualistic theory. The nature of individualism and its relation to anarchism appear in the following:[1]

According to the individualistic school, the importance of the so-called private rights of property, life, and liberty is greatly emphasized, and the proper province of the State held to be limited solely to the protection of them. The coercive power of the State according to this view is regarded as a necessary evil, being required only because of the weakness and imperfectness of man's moral nature. Hence, it is held that, with a developing sense of order and morality, the State's importance will diminish, until, when the millennium shall arrive, its absolute vanishing point will be reached. At this point individualism merges into anarchism pure and simple, and the two views are thus distinguishable only by the fact that, while the anarchist would depend upon such occasional coercion as voluntary association would provide, until this moral perfection of man is attained, the individualist advocates the exercise, until then, of police powers by a regularly constituted State.

470. Functions of government according to individualism. Sidgwick states as follows the proper functions of government according to the individualistic theory:

[1] Copyright, 1896, by The Macmillan Company.

1. To protect the interests of the community generally and individual citizens so far as may be necessary from the attacks of foreign states.

2. To guard individual citizens from physical injury, constraint, insult, or damage to reputation, caused by the intentional or culpable careless action of other individuals.

3. To guard their property from detriment similarly caused; which involves the function of determining doubtful points as to the extent and content of the right of property and the modes of legally acquiring it.

4. To prevent deception leading to the detriment of person or property.

5. To enforce contracts made by adults in full possession of their reasoning faculties, and not obtained by coercion or misrepresentation nor injurious to other persons.

6. To protect in a special degree persons unfit, through age or mental disorder, to take care of their own interests.

471. Defense of the individualistic theory. The argument in favor of the *laissez-faire* theory in politics rests on the following grounds. It emphasizes the rights of the individual and lays stress on the value of competition and initiative.

In defense of the individualistic conception of the sphere of state activity it is argued, in the first place, that considerations of justice require that the individual shall be let alone by the state in order that he may realize fully and completely the ends of his existence. . . . According to their views it is necessary to the harmonious development of all the powers of the individual that he should be interfered with as little as possible by the state, because every restriction upon his freedom of action tends to destroy his sense of initiative and self-reliance, weaken his responsibility as a free agent, impair his energies, and blunt his character. . . .

Free competition develops in the individual the highest possibilities, sharpens and strengthens his powers of initiative, and increases his sense of self-reliance; while overgovernment not only hampers enterprise and interferes with the natural development of trade, but it strikes at the development of character, tends to crush out individuality and originality by interfering with the natural struggle between individuals, and leads to a general lowering of the social level. The highest civilization, say the laissez-faire advocates, has been developed under individualism, a system which has produced more material and educational progress than could ever have been produced under paternalism. . . .

The laissez-faire principle, say its advocates, rests also upon sound considerations of a scientific character. It is in harmony with the principle of evolution, since it is the only system that will lead to the survival of the fittest in the economic struggle. It assumes that self-interest is a universal principle in human nature, that each individual is a better judge of what his own interests are than any government can possibly be, and that if left alone he will follow them.[1] . . . By leaving each individual to do unaided that for which he is best fitted, the strong and fit classes survive, the unfit elements are eliminated, and thus the good of society is promoted.

Again, and this is most important in the arguments of the laissez-faire theorists, the policy of noninterference rests upon sound economic principles. Better economic results, it is asserted, are obtained for society by leaving the conduct of industry as far as possible to private enterprise. . . . The self-interest of the consumer will lead to the demand for the things that are most useful to society, while the self-interest of the producer will lead to their production at the least cost. . . . Unrestricted competition stimulates economic production, tends to keep wages and prices at a normal level, to prevent usurious rates of interest, to secure efficient service and the production of better products than can be obtained by state regulation or state management.

The experience of the past, say the laissez-faire advocates, abundantly establishes the wisdom of the noninterference principle. History is full of examples of attempts to fix by fiat of the state the prices of food and clothing and of many other commodities; of laws regulating the wages of labor, etc. . . . Most of such legislation was mischievous and destructive of the ends which it was intended to secure, and the results which were sought for could have been more effectively obtained by allowing every man to sell his labor and goods whenever and wherever he wished. . . .

Finally, the laissez-faire theorists argue that it is a false assumption which attributes omniscience and infallibility to the state and which regards it as better fitted to judge of the needs of the individual, and to provide for them than he is himself. There is, they assert, a common belief that governments are capable of doing anything and everything, and of doing it more efficiently than it can be done by private initiative, when, in reality, experience and reason show the contrary to be the fact. . . . The great majority of things are worse done, they declare, when done by government than when done by individuals who are most interested, for the people understand their own business better and care for it better than any government can.

[1] Cf. Willoughby, "The Nature of the State," p. 326.

472. Criticism of the individualistic theory. The weakness of the theory, under modern conditions, becomes evident in the following:

The individualistic theory of state functions has been criticized upon various grounds. First of all, the assumption that the state is an evil has not been borne out by the experience of mankind under the régime of state organization. History, in fact, shows unmistakably that the progress of civilization in the past has been promoted to a very large degree by wisely directed state action. . . . The function of the state in the complex civilization of to-day is not merely repressive; . . . it has a higher mission than that of restraint and punishment.

So long as men live in groups they will have collective wants which can only be satisfied through state organization, and hence there is no reason for believing that the necessity for the state will ever disappear or that the rôle which it now plays in the life of human societies will ever diminish. On the contrary, all the signs indicate that with the increasing complexity of modern civilization the need for state action will become stronger and its rôle more extensive. . . .

The view of the laissez-faire advocates that state intervention in the interest of the common good necessarily involves a curtailment of individual freedom rests on an assumption that is true only within very restricted limits. It is a very narrow view indeed which sees in a factory act, a pure-food law, or a quarantine regulation nothing but an infringement upon the domain of individual liberty. The rights of all are enlarged and secured by wise restrictions upon the actions of each. . . . In reality wisely organized and directed state action not only enlarges the moral, physical, and intellectual capacities of individuals, but increases their liberty of action by removing obstacles placed in their way by the strong and self-seeking, and thus frees them from the necessity of a perpetual struggle with those who would take advantage of their weakness. . . .

The chief fault of the individualists is that they exaggerate the evils of state regulation and minimize the advantages; they misunderstand the true nature and limits of liberty and have a mistaken idea of the relation of the individual to the society of which he is a part. . . . Their doctrine rests on the assumption that the individual is largely a thing apart from the group of which he is a member, that he can be separated from society and treated as though his interests were entirely distinct from the interests of his fellow men. . . .

The laissez-faire writers never tire of parading and exaggerating the mistakes which governments have made in the past, and when they are

all collected and put on exhibition, they constitute what to some is a strong indictment against state interference. . . . It may readily be admitted, observes an able writer, that government is weak and inefficient at times and obedient to private interests, but it does not follow from such an admission that government ought to be made "weaker, corrupter, and more inefficient by practicing the illogical doctrine of laissez faire."

The laissez-faire assumption that each individual knows his own interests better than the state can know them, and is therefore the best judge of what is good for him and if left to himself will follow those interests, is true only in a limited sense, and is still less true of classes. . . .

Not only is the individual not always a competent judge of his own interests as an economic consumer, but in affairs of personal conduct he is often not to be trusted, particularly in matters relating to his health or safety or moral welfare. The truth is the state may be a better judge of a man's intellectual, moral, or physical needs than he is himself, and it may rightfully protect him from disease and danger against his wishes and compel him to educate his children and to live a decent life.

The practice of all modern states is in fact in harmony with this view. Few, if any, governments leave their citizens to find out for themselves what is healthy food; what physicians, surgeons, and druggists are qualified to practice; or what conditions of work are safe or dangerous. . . .

Much of the individualistic distrust of government is due, as Sir Frederick Pollock has pointed out, to the failure to distinguish between centralized government and local self-government. A good deal of the objection which the individualists urge against government would be justified if it were centralized government that is complained of, but the objection is not always well founded, when directed against local government, through local bodies directly under the eye of the people concerned. . . .

Spencer's doctrine of "negative regulation," which would limit the function of the state to redressing rather than preventing wrongs, would in many instances defeat the ends of the state. . . . We agree with Sir Frederick Pollock that if it is negative and proper regulation to say that a man shall be punished for building his house in a city so that it falls into the street, it cannot be positive and improper regulation to say that he shall so build it that it will not appear to competent persons likely to fall into the city street. . . . The freedom of contract is a taking phrase, as has been aptly remarked, and to many it is a conclusive argument against state intervention in industrial matters; but when it refers to an agreement between a capitalist and an ignorant laborer who is at the mercy of his employer, there is no equality. The doctrine of freedom has no sanctity in such cases.

III. Socialism

473. Origin of socialism. The conditions that gave rise to the modern theory of socialism are described as follows by a brilliant French writer:

In the nineteenth century there has been a complete revolution in the organization of labor. In the eighteenth century there were as yet few large cities and almost no great factories. The regulations of the trades did not permit an employer to have more than three or four workmen. These journeymen, as they were called, worked in the shop with their employer, as the artisans in our small towns still do; after a few years they themselves became employers.

In our day the great industry has been created. In order to utilize the power of machines, a great number of workmen are gathered in the same factory; in order to furnish fuel to those machines, mines have been opened which give work to thousands of men. The absolute liberty of industry, established at the demand of the economists, has permitted the proprietors of factories and mines to employ hundreds of workmen in their service by simply pledging them a certain sum per day. Then began the separation of the manufacturers, who possessed capital, and the workmen, who rented out their labor for a certain wage. This was called the conflict of capital and wages. . . . The manufacturers form a part of the upper classes, the wage earners find themselves in a condition unknown before the nineteenth century. They live in the town where their factory is situated, but nothing holds them there. If the factory should have no need of them, they hope to find a better place elsewhere; they will go to the other end of the land in order to find work in another town. Therefore, they have no fixed habitation. They live like nomads, ever ready to depart. They possess nothing, having only their wages to live on. The wages depend on the labor, and there is no guarantee that they will always have labor, for their employer engages them by the day or week, and does not agree to keep them beyond that time.

Thus, beside the peasant and artisan classes already established, there arose a new class formed of workers in factories and of miners. To this body was given the old Roman name proletariat (those whose only wealth is in their children). . . . The members of the modern proletariat are assuredly better fed, better lodged, and the object of less scorn than were the common people of the Middle Ages. However, they are much more discontented. They are not comfortable because they have no abiding place, and cannot count upon the future. At the

same time, since society has become so democratic, they hear continually that all men are equal before the law, and that they have the same political rights as the wealthy class. They have ceased to be resigned to their fate, and have set about demanding a change in conditions.

The economists of the eighteenth century taught that poverty is the result of natural laws, and that it is inevitable. . . . In the nineteenth century some theorists appeared who argued from a contrary principle. They said that poverty comes from the unequal division of wealth — some have too much, others too little; society is badly organized, the state ought to make it over in such a way as to diminish this inequality. A social revolution is necessary. These partisans of revolution were called Socialists, and their doctrine was denominated socialism. The Socialists all agree in attacking our system of property ownership, and demand the intervention of the state for the purpose of establishing another system. But they do not agree on what ought to take the place of the one now existing. Therefore, they cannot form one school.

474. Development of socialism. A leading American socialist outlines the various phases through which the movement has passed.

In its first phases, socialism was a humanitarian rather than a political movement. The early socialists did not analyze the new system of production and did not penetrate into its historical significance or tendencies. The evils of that system appeared to them as arbitrary deviations from the "eternal principles" of "natural law," justice, and reason, and the social system itself as a clumsy and malicious contrivance of the dominant powers in society.

True to their theory that social systems are made and unmade by the deliberate acts of men, they usually invented a more or less fantastic scheme of social organization supposed to be free from the abuses of modern civilization, and invited humanity at large to adopt it.

The scheme was, as a rule, unfolded by its author by means of a description of a fictitious country with a mode of life and form of government to suit his own ideas of justice and reason, and the favorite form of the description was the novel. The happy country thus described was the Utopia, hence the designation of the author as "utopian."

That these theories should have frequently led in practice to the organization of communistic societies as a social experiment, was but natural and logical.

The utopian socialists knew of no reason why their plans of social organization should not work in a more limited sphere just as satisfactorily as on a national scale, and they fondly hoped that they would

gradually convert the entire world to their system by a practical demonstration of its feasibility and benefits in a miniature society.

Utopian socialism was quite in accord with the idealistic philosophy of the French Encyclopedists, and lasted as long as that philosophy retained its sway.

The middle of the last century, however, witnessed a great change in all domains of human thought; speculation gave way to research, and positivism invaded all fields of science, ruthlessly destroying old idealisms and radically revolutionizing former views and methods.

At the same time the mysteries and intricacies of the capitalist system of production were gradually unfolding themselves, and the adepts of the young social science began to feel that their theories and systems required a thorough revision.

This great task was accomplished toward the end of the forties of the last century chiefly through the efforts of Karl Marx, the founder of modern socialism. Marx did for sociology what Darwin did later for biology; he took it out from the domain of vague speculation and placed it on the more solid basis of analysis. . . .

The social theories of Karl Marx and the movement based on them are styled *Modern* or *Scientific* socialism in contradistinction to *Utopian* socialism.

Modern socialism proceeds from the theory that the social and political structure of society at any given time and place is not the result of the free and arbitrary choice of men, but the legitimate outcome of a definite process of historical development, and that the underlying foundation of such structure is at all times the economic basis upon which society is organized.

As a logical sequence from these premises, it follows that a form of society will not be changed at any given time unless the economic development has made it ripe for the change, and that the future of human society must be looked for, not in the ingenious schemes or inventions of any social philosopher, but in the tendencies of the economic development.

Contemporary socialism thus differs from the early utopian phase of the movement in all substantial points. It does not base its hopes on the good will or intelligence of men, but on the modern tendency toward socialization of the industries. It does not offer a fantastic scheme of a perfect social structure, but advances a realistic theory of gradual social progress. It does not address its appeals to humanity at large, but confines itself principally to the working class, as the class primarily interested in the impending social change. It does not experiment in miniature social communities, but directs its efforts toward the industrial

and political organization of the working class, so as to enable that class to assume the control of the economic and political affairs of society when the time will be ripe for the change.

475. The elements of socialism. The following may be considered the essential points in socialistic theory:

Socialism, when analyzed, is found to embrace four main elements. The first of these is the common ownership of the material instruments of production. . . .

Attention must be called, also, to the statement that it is the material *instruments of production* which are to be owned in common, and not all wealth. That wealth which is not designed for further production can still remain private property under socialism. This means wealth used for enjoyment rather than for production. . . .

The second element in socialism is the common management of production. Not only are the material instruments of production to be owned in common, but they are to be managed by the collectivity, in order that to the people as a whole may accrue all the benefits of management; that is, all those gains of enterprise called profits, as distinguished from interest, and in order that the management may be conducted in accordance with the public need, rather than in accordance with the advantage of private captains of industry. . . .

The third element is the distribution of income by the common authority; that is, the income of society, or the national dividend, as it is frequently called: and it is that part of the wealth produced by society which may be used for enjoyment, after the material instruments of production have been maintained and suitably improved and extended. . . .

The fourth element in socialism is private property in the larger proportion of income. It thus becomes at once apparent that modern socialism does not propose to abolish private property. Quite the contrary. Socialism maintains that private property is necessary for personal freedom and the full development of our faculties. The advantages of private property are claimed by the advocates of the existing social order as arguments for its maintenance; but socialism asserts that society, as at present constituted, is unable to secure to each one the private property which he requires. Socialism proposes to extend the institution of private property in such manner as to secure to each individual in society property in an annual income, which shall be, so far as practicable, sufficient to satisfy all rational wants. . . .

The results of the analysis of socialism may be brought together in a definition which would read somewhat as follows: *Socialism is that contemplated system of industrial society which proposes the abolition of private*

property in the great material instruments of production, and the substitution therefor of collective property; and advocates the collective management of production, together with the distribution of social income by society, and private property in the larger proportion of this social income.

476. The strength of socialism. The principal arguments advanced in favor of the socialistic state are the following:

Under the present system of economic organization, the laboring man does not receive the fruits of his toil. A large part goes to reward capital or to pay for the services of those who direct and supervise the employment of labor, or to speculators and middlemen, and too little to those who are the real producers. In short, society under the present system is organized in the interests of the rich and leads to grave inequalities of wealth and of opportunity. . . . The state should therefore take control of all the land and capital or means of production now being used for the exclusive benefit of the owning class. Under the individualistic régime industrial competition has become so fierce that the industrially weak have no chance of success and cannot survive in competition with the rich; they are growing relatively poorer and becoming more dependent upon the employing class, while the rich are growing richer and becoming more independent. The theory of socialism, it is argued, is founded on principles of justice and right. The land and the mineral wealth contained therein should belong equally to all, not to a few. . . .

Competition under the present system not only leads to injustice and the crushing out of the small competitor, but it involves enormous economic waste and extravagance in the duplication of services. The system of unrestricted competition leads to lower wages, overproduction, cheap goods, and unemployed workers. The only remedy for such a condition, say the socialists, is the abolition of competition and the substitution of the coöperative principle, under which equality of opportunity and equality of reward and economy of production will be secured. Under the socialistic régime, it is asserted, a higher type of individual character will also be produced and a larger degree of real freedom. Such industrial competition as we have to-day tends to beget materialism, unfairness, dishonesty, and a general lowering of the standard of individual character. Man needs, therefore, to be guided and aided by the state and protected against his own inherent frailties.

The doctrine of socialism, moreover, is really in harmony with the organic theory of the nature of the state, which teaches that society is an organism, not a mere aggregation of individuals, that the good of all is paramount to that of a few, and that in order to secure the good of

the greatest number the welfare of the individual as such must be subordinated to that of the many.

Finally, it is argued by the socialists that the state has already abolished competition in certain fields and introduced in its place the coöperative principle and has demonstrated its success as an industrial manager to the entire satisfaction of all candid and thoughtful men. Government management and control of the postal service, government coinage, government ownership and operation of railroads, telegraphs, mines, and other industries of a public nature in various countries have all established the advantages of collective management over private management, and thus fully justified the wisdom of the principle of socialism. . . . Collective ownership and management, it is maintained, is thoroughly democratic; indeed, socialism is the "economic complement of democracy"; it rests upon both ethical and altruistic principles and is the only system under which efficiency and justice in production can be secured and under which a full and harmonious development of individual character can be realized.

477. The weakness of socialism. Ely outlines the objections to a practical application of socialistic theory under the following heads:[1]

(1) Strong as may be the indictment of the existing industrial system, it is not sufficient to indicate that socialism is to be the necessary or the desirable outcome. The modern machine age is little more than a century old, and some of its most important phases are very recent. The dire predictions made by Karl Marx and his followers on the strength of some of the earliest phenomena of the factory system have not been borne out, and similarly the evils of to-day may possibly be very largely eliminated without departing from our fundamental institutions. In short, the first weak point in the socialist's position is that he attempts to predict the course of economic evolution too far in advance. That we shall have a juster distribution of wealth in the future, and that we shall eliminate many of the present wastes of production seems probable, but whether this will be accomplished by a socialistic organization or not, it would be hazardous to predict. . . .

(2) The socialist underestimates the efficiency of the present system. To-day there is a premium on energy and thrift. Much may be wasted, but much is also produced. That socialism would result in a larger sum total of goods for consumption has never been proved. But on the other hand, we can say that the present régime is continually offering more and more to the mass of the people. . . .

[1] Copyright, 1908, by The Macmillan Company.

(3) The socialist is also in other respects too pessimistic with respect to the present. He sees all of the starvation, misery, luxury, and extravagance, but he passes by the millions of happy homes scattered throughout the land. He does not see that the world is full of opportunity for the rising generation, that even if the chance for the ownership of an independent business for the ordinary man is smaller, the things which he can enjoy, if he is of average intelligence and energy, are much greater than ever before in the world's history.

(4) The socialist underestimates the importance of individual responsibility. To-day a man is confronted by the stern necessity of making his own way, and this must have some good effect upon character. On the whole, the lazy and incompetent are sifted out. Bad heredity and a lack of proper training are the cause of a good deal of economic misfortune. It is well to distinguish the criticism here made from the common error of supposing that socialism would necessarily crush individuality, that we must all dress and eat alike, etc.

(5) The socialist underestimates the importance of free enterprise in industry. If a man now believes that he can develop a certain industry that will satisfy important wants of the people in the future, he does not need to secure the consent of some government official to make the experiment. . . .

(6) Perhaps the most frequently mentioned objection to socialism is the danger to liberty. Under socialism there would be simply the public sphere of employment, and there is reason to fear that the inability to escape from the public sphere would compel the submission to onerous and tyrannical conditions imposed by the administrative heads of the business in which one might be engaged. . . . Those in whose hands centered political and economic control would have tremendous power, however they might be selected or appointed. As in the religious sphere in the past, so in the economic sphere in the future, we may find that compulsory coöperation is incompatible with human nature.

(7) The Marxian socialists may be criticized for the importance which they attach to the economic interpretation of history, for the validity of that proposition does not establish the validity of the socialist contention. If it be true that our social life is a reflex of our economic activity, it still does not necessarily follow that our economic development is going to be such as will land us in socialism. Their doctrine of the class struggle also does not give an accurate account of existing conditions. We have a laboring class and a capitalist class, it is true, but there is also a considerable class, perhaps large enough to hold the balance of power between the other two, which does not sympathize exclusively with either labor or capital.

IV. Socialism in Present Politics

478. Growth of socialism in Germany. The following extract indicates the growing strength of socialism in Germany and its unjust representation in the Reichstag:

There is no large liberal party in Germany to advocate the more democratic institutions of responsible ministers, equal electoral districts, and retrenchment in military expenditures; consequently the principal opposition to the methods of William II comes from the socialist party which steadily increases in numbers and in the effectiveness of its organization. It stoutly resists any increase in expenditure for colonial purposes, favors international peace, and scorns the "divine right" theories of the emperor. . . .

The steady increase of socialism is shown by the following table:

Year of election	Socialist votes	Members elected	Year of election	Socialist votes	Members elected
1877	493,288	12	1890	1,497,298	36
1881	311,961	12	1903	3,008,000	81
1887	763,000	11	1907	3,251,009	43

Furthermore, the Reichstag can scarcely be regarded as really representing the views of the nation. The government has refused to revise the apportionment of representatives as it was arranged in 1871, although great changes have taken place since that year. As a result Berlin, for instance, has only six members in the Reichstag, although its population of two million inhabitants would entitle it to twenty. This accounts for the relatively small number of socialists and the large number of conservatives in the parliament, for in 1907 the socialists, although they could muster 3,250,000 voters, returned only 43 members, whereas the conservatives secured 83 seats with less than 1,500,000 supporters, mainly in the country districts.

479. Causes for socialist losses in Germany in 1907. Some of the reasons for the relative decline in the socialist vote in the latest parliamentary election in Germany are given by a leading German socialist as follows:

There are many causes to explain this retrogression. Thus, the intimate connection of the Social Democracy with the centralized trade unions has in some places led such workers as belonged to other unions to vote

against the party. This has been the case particularly with members of the Christian Catholic trade unions, which in several places had candidates of their own, half a dozen of whom have been elected. The connection of the Social Democracy with the most militant trade unions and the tremendous growth of the latter have also induced many small masters who formerly had voted for social-democratic candidates to vote against them this time. The same has been the case with a number of small traders because of the promotion of coöperative societies by the Social Democracy. In rural districts small farmers have turned against it (as well as against advanced Radicals) because of the movement for the repeal of the duties on pigs and pork. They were delighted with the rise in price of the animal they fed, and would not hear of the change. To use Prince Bülow's words, it was in many districts the *brave swine* that saved the State. And similar examples of an estrangement of sections of the popular classes from the Social Democracy were found elsewhere.

But the main reason of the failure is to be found in the strong combined action of almost all non-social-democratic parties and their agencies against the party of socialism, which is based on the class-war theory. Never before have these parties displayed such activity as at this time, and never have they been so united in their opposition. It was indeed a great social reaction. Bismarck at his best succeeded in getting a political combination formed that included the two Conservative parties and the National Liberals. The National Combine of 1906 embraced all these and advanced liberalism, besides including the South German Radical Democracy. It was, so to speak, a united effort of all the upholders of the present state of society against social revolution. With a zeal never displayed before, all these parties canvassed the electors and fetched them up in conveyances of all sorts to the polling places.

480. Program of the French socialists. The Paris Regional Congress of 1880 drew up the following program. With slight changes it has been sanctioned by various national congresses and still remains the orthodox statement of general principles of the socialist party in France.

The French socialistic workingmen, in giving as the aim of their efforts in the economic domain the return to the collective form of all the means of production, have decided as a method of organization and of strife to enter into the elections with the following minimum program:

A. Political Program

1st. Abolition of all laws upon the press, meetings and associations, and especially of the law against the International Association of Laboringmen. — Suppression of the pass book, that *mise en carte* of the working class and of the articles of the Code establishing the inferiority of the workingman as against the employer;

2d. Suppression of the religious budget and return to the nation "of the properties called *mortmain*, both movable and immovable, belonging to the religious corporations," including therein all the industrial and commercial annexes of these corporations;

3d. General arming of the people;

4th. The commune to be the mistress of its own administration and police.

B. Economic Program

1st. Cessation of labor for one day per week or legal prohibition for employers operating more than six days out of seven. — Reduction of the working day to eight hours for adults. — Prohibition of the working of children under 14 years in private factories; and, from 14 to 18 years, reduction of the working day to six hours;

2d. Legal minimum of wages, determined each year according to the local price of the commodities;

3d. Equality of wages for the workers of the two sexes;

4th. Scientific and professional instruction for all the children placed for their support under the charge of society, represented by the State and the communes;

5th. Placing under the charge of society the aged and infirm workingmen;

6th. Suppression of all interference of employers in the administration of workingmen's funds for mutual relief, of provision, etc., restored to the exclusive management of the workingmen;

7th. Responsibility of employers in the matter of accidents guaranteed by a money deposit paid in by the employer and proportioned to the number of workingmen employed and the dangers which the industry presents;

8th. Participation in the formation of the special rules of the different factories; suppression of the right usurped by employers to impose any penalty whatever upon their workingmen under the form of fines or of retentions out of their wages;

9th. Revision of all contracts which have alienated public property (banks, railroads, mines, etc.), and the control of all the factories of the State intrusted to the workingmen who labor in them;

10th. Abolition of all indirect taxes and transformation of all the direct taxes into a progressive tax upon incomes in excess of 3000 francs. Suppression of inheritance in the collateral line and of all inheritance in the direct line exceeding 2000 francs.

481. Program of the Social-Democratic Federation in England. The following is the program of the English Social-Democratic Federation, as revised at the annual conference of 1893:

OBJECT

The socialization of the means of production, distribution, and exchange, to be controlled by a democratic state in the interests of the entire community, and the complete emancipation of labor from the domination of capitalism and landlordism, with the establishment of social and economic equality between the sexes.

PROGRAM

1. All officers or administrators to be elected by equal direct adult suffrage, and to be paid by the community.

2. Legislation by the people in such wise that no project of law shall become legally binding till accepted by the majority of the people.

3. The abolition of a standing army, and the establishment of a national citizen force; the people to decide on peace or war.

4. All education, higher no less than elementary, to be compulsory, secular, industrial, and gratuitous for all alike.

5. The administration of justice to be gratuitous for all members of society.

6. The land, with all the mines, railways, and other means of transit, to be declared and treated as collective or common property.

7. The means of production, distribution, and exchange to be declared and treated as collective or common property.

8. The production and the distribution of wealth to be regulated by society in the common interests of all its members.

PALLIATIVES

As measures called for to palliate the evils of our existing society, the Social-Democratic Federation urges for immediate adoption:

The compulsory construction of healthy dwellings for the people, such dwellings to be let at rents to cover the cost of construction and maintenance alone.

Free secular and technical education, compulsory upon all classes, together with free maintenance for the children in all board schools.

Eight hours or less to be the normal working day fixed in all trades and industries, by legislative enactment, or not more than forty-eight hours per week, penalties to be inflicted for any infringement of this law.

Cumulative taxation upon all incomes exceeding £300 a year.

State appropriation of railways; municipal ownership and control of gas, electric light, and water supplies; the organization of tramway and omnibus services, and similar monopolies in the interests of the entire community.

The extension of the post-office savings bank, which shall absorb all private institutions that derive a profit from operations in money or credit.

Repudiation of the national debt.

Nationalization of the land, and organization of agricultural and industrial armies under state or municipal control on coöperative principles.

As means for the peaceable attainment of these objects the Social-Democratic Federation advocates:

Payment of members of parliament and all local bodies and official expenses of election out of the public funds. Adult suffrage. Annual parliaments. Proportional representation. Second ballot. Abolition of the monarchy and the House of Lords. Disestablishment and disendowment of all state churches. Extension of the powers of county councils. The establishment of district councils. Legislative independence for all parts of the empire.

482. Periods of socialist development in the United States. After the various utopian communistic experiments that marked the early history of socialism in the United States, the progress of the movement proper may be divided into the following periods:

The first beginnings of modern socialism appeared on this continent before the close of the first half of the last century, but it took another half a century before the movement could be said to have become acclimatized on American soil. The history of this period of the socialist movement in the United States may, for the sake of convenience, although somewhat arbitrarily, be divided into the following four periods:

1. *The Ante-bellum Period*, from about 1848 to the beginning of the civil war. The movement of that period was confined almost exclusively to German immigrants, principally of the working class. It was quite insignificant in breadth as well as in depth, and was almost entirely swept away by the excitement of the civil war.

2. *The Period of Organization*, covering the decade between 1867 and 1877, and marked by a succession of socialist societies and parties, first

on a local then on a national scale, culminating finally in the formation of the Socialist Labor Party.

3. *The Period of the Socialist Labor Party*, extending over twenty years, and marked by a series of internal and external struggles over the question of the policy and tactics of the movement.

4. *Present-Day Socialism*, which embraces the period of the last few years, and is marked by the acclimatization of the movement and the advent of the *Socialist Party*.

483. Platform of the Socialist party in the United States. The following demands are contained in the platform drawn up by the national convention of the Socialist party in the United States:

While we declare that the development of economic conditions tends to the overthrow of the capitalist system, we recognize that the time and manner of the transition to socialism also depend upon the stage of development reached by the proletariat. We therefore consider it of the utmost importance for the Socialist Party to support all active efforts of the working class to better its condition and to elect socialists to political offices, in order to facilitate the attainment of this end.

As such means we advocate:

1. The public ownership of all means of transportation and communication and all other public utilities, as well as of all industries, controlled by monopolies, trusts, and combines. No part of the revenue of such industries to be applied to the reduction of taxes on property of the capitalist class, but to be applied wholly to the increase of wages and shortening of the hours of labor of the employees, to the improvement of the service and diminishing the rates to the consumers.

2. The progressive reduction of the hours of labor and the increase of wages in order to decrease the share of the capitalist and increase the share of the worker in the product of labor.

3. State or national insurance of working people in case of accidents, lack of employment, sickness, and want in old age; the funds for this purpose to be collected from the revenue of the capitalist class, and to be administered under the control of the working class.

4. The inauguration of a system of public industries, public credit to be used for that purpose in order that the workers be secured the full product of their labor.

5. The education of all; state and municipal aid for books, clothing, and food.

6. Equal civil and political rights for men and women.

7. The initiative and referendum, proportional representation, and the right of recall of representatives by their constituents.

484. Platform of the "International." The following platform was adopted by the International Workingmen's Association at the height of its power, and has since been adopted by several socialist parties as their national platform:

In consideration that the emancipation of the working class must be accomplished by the working class itself, that the struggle for the emancipation of the working class does not signify a struggle for class privileges and monopolies, but for equal rights and duties, and the abolition of class rule;

That the economic dependence of the workingman upon the owner of the tools of production, the sources of life, forms the basis of every kind of servitude, of social misery, of spiritual degradation, and political dependence;

That, therefore, the economic emancipation of the working class is the great end to which every political movement must be subordinated as a simple auxiliary;

That all exertions which, up to this time, have been directed toward the attainment of this end have failed on account of the want of solidarity between the various branches of labor in every land, and by reason of the absence of a brotherly bond of unity between the working classes of different countries;

That the emancipation of labor is neither a local nor a national, but a social problem, which embraces all countries in which modern society exists, and whose solution depends upon the practical and theoretical coöperation of the most advanced countries;

That the present awakening of the working class in the industrial countries of Europe gives occasion for a new hope, but at the same time contains a solemn warning not to fall back into old errors, and demands an immediate union of the movements not yet united;

The First International Labor Congress declares that the International Working-Men's Association, and all societies and individuals belonging to it, recognize truth, right, and morality as the basis of their conduct toward one another and their fellow men, without respect to color, creed, or nationality. This Congress regards it as the duty of man to demand the rights of a man and citizen, not only for himself, but for every one who does his duty. No rights without duties; no duties without rights.

CHAPTER XXV

THE FUNCTIONS OF GOVERNMENT

I. Classification of Governmental Functions

485. The actual working of government. In his presidential address, delivered before the annual meeting of the American Political Science Association in 1909, President Lowell emphasized the importance of a study of the physiology of politics, — the actual functioning of political institutions.

To advocate in this twentieth century the importance of studying the actual working of government may seem like watering a garden in the midst of rain. But that this is not the case every one must be aware who is familiar with current political literature on such living topics as proportional representation, the referendum and initiative, and the reform of municipal government. These discussions are for the most part conducted in the air. They are theoretical, treating mainly of what ought to happen rather than what actually occurs; and even when they condescend to deal with facts it is usually on a limited scale with very superficial attention to the conditions under which the facts took place. The waste of precious efforts at reform, from a failure to grasp the actual forces at work, is indeed one of the melancholy chapters in our history. . . . Reformers are prone to imagine that a new device will work as they intend it to work, and are disappointed that it does not do so. They are far too apt to assume that if their panacea be adopted mankind will become regenerate; whereas the only fair supposition is that men will remain under any system essentially what they are — a few good, a few bad, and the mass indifferent to matters that do not touch their personal interests. . . .

We are all familiar with cases where forms of government have been imitated without the corresponding functions; where institutions have been copied under conditions in which they could not produce the same effects as at home. A well-known example of this is the attempt of other European countries to adopt the English parliamentary system. The system has yielded in new lands results of varying merit; but it has not worked as it does in England, because the environment which

determined the real functions of the organs of government could not be reproduced. Yet this was not at first perceived; and although that particular fact has since become so well known as to be a commonplace, there is no good reason to assume that we have outgrown the blindness of those days. We are ever hearing men extol the virtues of some foreign political contrivance, without observing, often without stopping to inquire, what its actual mode of operation may be, or whether the functions of the organs at work may not in reality be quite different from what they appear. . . .

Surely, enough has been said to point out the need at the present day of a greater study of the physiology of politics. If scientific methods are to have any considerable influence on public affairs in this country, if American scholarship is to achieve any marked advance in political science; it would seem to be essential that our Association should encourage more extensive research in political phenomena from this point of view.

486. Analysis of governmental functions. Willoughby classifies the functions of government under three general heads.[1]

First, those concerned with the *Power* of the State. Under this head are included, in very large measure, the essential functions, namely, those that concern the maintenance of order and the preservation of the State's political autonomy in the family of nations. In earlier times this was almost the sole conscious aim of the State. In those times when not only were its own citizens unaccustomed to order and obedience to law, but when between the States themselves there existed a pure struggle for existence unmitigated by principles of international morality, such was necessarily the case. It was therefore quite essential that the functions of the State for the maintenance of itself as a military power should dwarf, by their importance, the value of political and civic rights, and that therefore these latter should have been deemed of importance only in so far as they served to strengthen the power of the State. . . .

At the present day, the relative importance of this aim in the State's life varies according to conditions and circumstances. In Europe it still plays a very prominent part, as seen in the energy expended in the maintenance of navies and enormous standing armies. Geographical situation and a law-abiding spirit of its citizens make it possible for the United States government to subordinate this aim to other and higher purposes. Nevertheless, while the enormous power of our State is thus

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for the most part dormant, and is fully manifested only in times of imminent danger, it is none the less its most essential attribute.

The second aim of the State is, or should be, that of creating and maintaining the widest possible degree of *Liberty*. As already explained, this includes not only the perfection of its governmental machinery, whereby political liberty in the largest possible degree shall be secured, but also the guaranteeing to the individual of as wide a field as possible in which he shall have a freedom of action, protected at once from arbitrary governmental interference and private molestation. At the same time, as a corollary from this, the action of the State should be so directed as to render its citizens progressively more capable of exercising this freedom. Under this head are included, therefore, all possible efforts to improve the State's method of organization and administration, to remove selfish and class interests from the administration of public affairs, and thus to render possible not only the formulation of an intelligent public opinion, but a realization of those aims that this opinion discloses when so formulated.

Thirdly, and finally, there are those functions of the State, that, apart from any considerations of power or maintenance of individual liberty, tend by their exercise to promote the *General Welfare*, either economically, intellectually, or morally.

487. Classification of state functions. Garner makes also a threefold classification of governmental functions, but from a different point of view.

The functions of the state have been classified by many writers as: first, those which are necessary and indispensable; and, second, those which are optional; or, simply those which are essential and those which are nonessential; or, again, those which are socialistic and those which are not. They may be classified more exactly as: first, those which are necessary; second, those which are natural or normal but not necessary; and, third, those which are neither natural nor necessary, but which in fact are often performed by modern states. . . . What are called the essential, normal, or constituent functions are such as all governments must perform in order to justify their existence. They include the maintenance of internal peace, order, and safety, the protection of persons and property, and the preservation of external security. They are the original primary functions of the state, and all states, however rudimentary and undeveloped, attempt to perform them. They embrace the larger part of the activities of the state and have to do principally with the conservation of society and only secondarily with social progress.

By natural but unnecessary functions are meant those which the state may leave unperformed or unregulated without abandoning a primary duty or exposing itself to the dangers of anarchy, but which would be neglected or at least not so well performed by private enterprise. Among such functions may be mentioned . . . the conduct of various undertakings which would be unprofitable as private ventures but which are required by the common interest.

Among the activities of the state which are neither essential nor natural, but which are not a matter of indifference to the public and which are performed by some states as well as by private enterprise and at less cost, are a great variety of services mainly economic and intellectual. . . . Under this head also may be included a great volume of regulatory or restrictive legislation dealing with the conduct of certain trades and occupations which are affected with a public interest.

II. Essential Functions

488. Essential functions of the state. Willoughby introduces his discussion of the essential functions of the state with the following paragraphs:[1]

The fact that the exercise of a power by a State is, *pro tanto*, a limitation of the freedom of action of the individual, necessarily brings the interests of the two into frequent opposition, and, in each particular instance, the question resolves itself into the proper balancing of them.

It is admitted by all that the State should possess powers sufficiently extensive for the maintenance of its own continued existence against foreign interference, to provide the means whereby its national life may be preserved and developed, and to maintain internal order, including the protection of life, liberty, and property. These have been designated the essential functions of the State, and are such as must be possessed by a State, whatever its form.

The particularity with which it is necessary that the control of the State should be exercised in regard to these essential matters, and especially in regard to those that have to do with the definition and protection of private rights, is largely determined by the character of the people governed, and by their state of civilization.

489. The constituent functions. The essential, or, as Wilson calls them, the constituent, functions of the state may be itemized as follows:

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(1) The keeping of order and providing for the protection of persons and property from violence and robbery.

(2) The fixing of the legal relations between man and wife and between parents and children.

(3) The regulation of the holding, transmission, and interchange of property, and the determination of its liabilities for debt or for crime.

(4) The determination of contract rights between individuals.

(5) The definition and punishment of crime.

(6) The administration of justice in civil causes.

(7) The determination of the political duties, privileges, and relations of citizens.

(8) Dealings of the state with foreign powers: the preservation of the state from external danger or encroachment and the advancement of its international interests.

490. Sovereignty and the essential powers. Dealey points out that certain functions of the state follow naturally from the very nature of its sovereignty.

From the consideration of sovereignty itself we may now pass to the application of it in the various aspects of national life, first outlining in a general way the relation of sovereignty to the essential powers of the state.

The authority of the state in respect to the protection of life and property is often discussed under several terms, such as the war power, the police power or the power to preserve the peace of the state. But whatever name may be applied to such manifestations of supremacy, whether exerted in carrying on war, in suppressing riots and rebellion or in checking crime, it is but another name for sovereignty, which is the collective term for whatever power is possessed by the state. Certain aspects of sovereign power, however, are so important in themselves that it is customary to speak of sovereignty as though made up of three essential powers, namely, the police power, including the war power, the power of taxation, and the power of eminent domain. By police power is meant the power of the state to do anything needful for the safety and welfare of the nation. The power of taxation implies that the state may take from its subjects the services and property necessary for its support. The power of eminent domain implies that the state has the right to take from its subjects their lands or property for public use. In all states that have developed along democratic lines these powers are constitutionally safeguarded, so as to secure the people against governmental tyranny; but in practice it is understood that such restrictions are for times of

peace. When necessity arises, the riot act is read or martial law proclaimed, civil and constitutional guaranties, like *habeas corpus*, are suspended, and the government, in the exercise of the so-called war or police power, takes into its hands the full power of sovereignty on the plea that, *inter arma leges silent.*

491. Theory of state taxation. The general nature of the reasons for taxation, distinguishing between activities conferring common benefit and those conferring special benefit, may be briefly stated as follows:[1]

The various activities of the State can be easily classified, according to the degree of common or special benefit they are supposed to confer upon the citizens, or taxpayers. The various groups shade into one another, of course. But the extremes are perfectly clear and fundamentally different. Thus, it is universally admitted that the functions of the general administrative and legislative departments are of such a character as to give a common benefit, for which, ideally, every one should pay according to some scheme of supposed equality. But at the other extreme there are many things done by the State which confer so special a benefit as to justify a special charge. For example, when the State carries a passenger or a box of freight over its railroad, or carries a letter, or provides the citizens with china or tobacco, it confers a special benefit. Between these two extremes there are any number of grades, according as the predominant thought is that of common or special benefit, when both ideas are present. But there is one more consideration that must be introduced. There are a certain number of State activities which it is in the interest of the whole to have performed, but which accrue to the special benefit of certain classes, who on account of poverty are unable to pay for that benefit; and if the State is to perform these functions, it must call upon the other classes for assistance, excusing the poorer. Theoretically, the support of the poor and defective classes is an activity conferring a common benefit upon all the other members of society, and hence they are called upon to contribute accordingly. If we consider it the moral duty of society as a whole to help the weak, then the relief of the poor confers a common benefit. It is the same if we look upon poor relief from a less altruistic point of view, and consider that society is merely protecting its own interest, as, for example, in isolating the feeble-minded, so that they shall not propagate their weakness.

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492. Modern military and naval armaments. The extensiveness of modern preparation for war and its influence on universal peace is brought out in the following:

In winning and defending world-wide empires the countries of Europe have been compelled to maintain large military and naval forces in addition to those necessary for actual national defense. Colonies and protectorates inhabited by subject races require the presence of European soldiers; and the protection of merchant vessels on the high seas and in foreign ports demands large navies. Consequently imperial ambitions and patriotic pride have led to a steady increase in the armies and navies of Europe.

The cost of maintaining these great military establishments is greatly enhanced by the continued invention of new and ever more formidable instruments of destruction which speedily render old equipment obsolete and compel every country to keep abreast of the nation most advanced in the science of warfare. The old flintlock rifle loaded at the muzzle gave way to the Minié rifle charged with a cartridge and fired by a percussion cap; the Minié rifle was in turn supplanted by the breech-loader; then came the rapid-fire repeating rifle, with a range of a mile. The ancient muzzle-loading cannon, with its short and uncertain range, has been gradually improved, and in its place we now have the enormous breech-loading Krupp guns carrying balls weighing five hundred pounds for ten miles or more with wonderful accuracy. New explosives of terrible power — nitroglycerin, melinite, and lyddite — make gunpowder seem like a child's plaything, and smokeless powder, by keeping the field clear, makes range finding more deadly than ever. Moreover, new instruments, such as the war balloon, armored trains, automobiles, wireless telegraphy, and searchlights, greatly facilitate military operations.

Sea fighting has undergone a revolution no less complete and rapid. Within fifty years the wooden man of war has disappeared before armored vessels, which are rapidly developing in speed, tonnage, and fighting capacity. Even the battleship of fifteen years ago is giving way before vessels of the *Dreadnought* type. The ineffectiveness of the ordinary cannon against the steel battleship has led to the use of torpedoes of terrible explosive power; and these in turn to the invention of torpedo destroyers. The new and dangerous factor of the submarine mine has been added, while the submarine vessel may soon considerably modify the present mode of naval warfare.

Indeed, there seems to be no end to the rivalry of nations in the invention of costly instruments of war. Millions and billions have been expended in ships and guns which have become obsolete without ever

being brought into action. France to-day, in time of peace, has an army of over six hundred thousand men and spends nearly two hundred million dollars annually for war purposes, — an establishment which rivals that maintained by Napoleon when at war with all Europe. Germany also supports a standing army of over six hundred thousand men. England spends over three hundred million dollars a year for the army and navy, — five times as much as for education.

Nevertheless it may be said that this marvelous military development has contributed something to the movement toward peace in Europe. The enormous number of men that would speedily be called into action and hurried to the front in express trains, the countless millions that a general European war with these costly instruments would involve, the terrible loss of life and property that it would bring, — all this has tended to make statesmen shrink from risking the possibilities of war. Moreover, the cost of maintaining armies on even a peace footing is so great, the strong protest of workingmen and socialists against warfare — antimilitarism as it is called — is so determined, the financial interests involved are so influential, and the effects of international conflicts on industry and trade are so disastrous, that a movement for the peaceful settlement of international disputes and the reduction of armaments has developed in every civilized nation.

493. The preservation of internal peace. Besides the maintenance of state existence against foreign aggression, the preservation of internal order and security is an essential governmental function.

As the primary function of the state is the protection of the lives and property of the community through war, it is not strange that a similar function in internal affairs should develop. State authority in such matters, however, grew much more slowly. Long before the state existed men had protected themselves and still felt abundantly able to do so in ordinary emergencies. In all civilizations, groups of men are found united in bonds of real or fictitious kinship for purposes of joint protection. How instinctive this has become is seen at a glance by observing the numerous fraternal orders of developed civilization. These groups in early civilization were united for purposes of blood revenge, fine payments, and mutual responsibility. The patriarchal family at a later stage answered the same purpose. The loosening of patriarchal family ties through commerce and industry brought about in city life the development of the guild, the guild for social and religious purposes, the trades guild, the merchant guild, and akin to these the orders of knighthood and

the brotherhoods of the church. Such associations, found in all civilizations and in all times and places, devoted themselves to the preservation of the peace by restraints placed on individual members, by discipline inflicted on disturbers of the peace, and by presenting a united front against aggressions of unruly members of the community.

But besides associations for the preservation of the peace there were others organized for opposite purposes, associations composed of outlaws, robbers, criminals who had fled from home, men owning no master, worthless fellows for whom no one would be responsible. Against such the united strength of the entire community was necessary. The state therefore developed the function of unifying the force of the community against armed associations of lawless men within its own borders. Similarly, armed resistance to the laws of the community in the form of rebellions, insurrections, and riots, was suppressed through the power and strength of the state. In this way developed the right of the state to suppress such disturbances with a strong hand, if necessary suspending civil law for the time and exercising arbitrary war powers.

III. Optional Functions

494. Evolution of governmental ownership of public utilities. Certain industries are to-day of fundamental social interest. This public importance did not always exist, nor is it of equal degree in all states at present. A general process of development may, however, be noted.

With wide variations in detail, we can trace a general law of development, in five stages:

1. Everywhere at first all of the above enterprises are in private hands, and are used for purposes of profit and sometimes of extortion, like the highways, the coinage, and the post offices of medieval Europe, or the early bridges, canals, and markets.

2. In the next stage they are "affected with a public interest" and are turned over to trustees who are permitted to charge fixed tolls, but required to keep the service up to a certain standard. This was the era of the canal or turnpike trusts and companies.

3. In the subsequent stage the government assumes the business, but manages it for profit, as is still the case in some countries with the postal and railway systems.

4. In the fourth stage the government charges tolls or fees to cover expenses only, as was recently true of canals and bridges, and as is the theory of the postal system and municipal water supply in America to-day.

5. In the final stage the government reduces charges until finally the service is free and the expenses are defrayed by a general tax on the community. This is the stage now reached in the common roads, in the coinage, in most of the canals and bridges, and which has been seriously proposed by officials of several American cities for other services, like the water supply.

495. Forms of public industries. Ely classifies under the following heads the industries undertaken by states:[1]

In the beginning, let us briefly pass in review the principal classes of industrial enterprise in which the modern State engages for the satisfaction of other than State wants; because, obviously, we are not concerned with enterprises like the government printing office, the government navy yards, and in general, those incidental industries whose products the government consumes but does not regularly sell.

I. First, we find States like Switzerland monopolizing the manufacture of alcohol and certain alcoholic beverages, Japan monopolizing the opium traffic in Formosa, or commonwealths engaging in the retail distribution of intoxicating beverages. The purpose of the State in engaging in such industries is primarily sumptuary; it is desired to regulate the traffic almost to the point of suppression, perhaps. Ordinarily a good revenue would be secured, but revenue is a very secondary consideration. Prices will be placed above the level of highest net profit, and not improbably the ideal of regulating consumption will be so vigorously pursued that profits will disappear altogether.

II. Secondly, we have the group of so-called "fiscal monopolies." France, for instance, monopolizes the manufacture of matches, cigarettes, and tobacco in general; Japan has recently gone farther than any other country in the creation of fiscal monopolies; while Prussia, Austria, Italy, Spain, and other European countries maintain public lotteries — as did many of the American colonies during the eighteenth century. The primary object of the State in undertaking these enterprises is public revenue, gain; and naturally a monopoly price is charged, the price which will yield the greatest net revenue.

III. Next, we have a group of enterprises consisting principally of the so-called "natural monopolies," which the State undertakes not for suppression, not for profit, but primarily for regulation — to regulate the quality of the product, as in the case of water; to maintain effectively what have been called "equitable conditions for the prosecution of private business," as in the case of railways; to prevent monopolistic extortion and corporate abuse, as in the case of lighting companies, the

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post office, the telegraph, and the telephone; or to prevent crime and preserve intact the foundations of commercial prosperity, as in the monopoly of coinage. The charges here are ordinarily adjusted to either the "revenue" or the "cost" principle, that is to say, the State will either aim to make a fair business profit such as is secured in competitive private enterprises, or it will endeavor approximately to meet expenses by adjusting its charges to the cost of production. . . .

IV. Finally we have a large and heterogeneous group of industries which are maintained principally for service, for their educational and developmental influence, not primarily for regulation, and not at all for profit, but "for the public good." We include here not only schools and educational institutions of all kinds, but roads and canals; the savings banks and public pawnshops maintained in several countries of continental Europe; workingmen's insurance as developed by Germany, Austria, and several of the Australian colonies; and the model manufacturing establishments such as France maintains for the production of tapestries and fine porcelains. In this group charges will sink to a minimum, and in some lines of enterprise, such as education, practically disappear. Revenue here is not only a minor, but is almost a negligible, consideration.

496. The United States governments in business. While the United States has not, like some states, entered extensively into governmental operation of business enterprises, its various governments do carry on a number of public industries.

First and last, the national, state, and municipal governments exercise a considerable number of industries on public account.

The national government is the largest publisher in the world, expending every year over $4,000,000 for printing and issuing documents and books. It is a manufacturer, as in the government arsenals and navy yards where ships and materials of war are made. The post office is so nearly self-supporting that it may fairly be considered a vast business for forwarding intelligence; and it is much better conducted than the private express companies. It is not impossible that the federal government will also become the proprietor of telegraphs and telephones, and even of the railroads of the country. The United States manufactures at its own expense bank bills for all the national banks. During the Spanish War it organized transport steamers, which were virtually a large freight and passenger line.

Some of the states are engaging in public forests as a state industry. Most of them keep up some kind of manufacturing in their prisons and

workhouses; when prohibited by law from making standard goods, they often make furniture and other supplies for state institutions. The Southern states go into the business of leasing out convicts to private firms, to be used in railroad construction and like hard labor.

In the municipalities we find the greatest number of public industries. No American city goes to the extent of the French, with public pawnshops and public restaurants, or imitates the English system of public tenement houses; but a large number of American cities engage in the business of supplying water and gas or electricity to private consumers, and there is now a manifest tendency toward the business of public street cars. Wherever the town system prevails, there is a town hall, which is often let for private entertainments. The city of New York manages a large system of public docks for profit, and the city of Boston has a public printing establishment.

497. Government regulation of industry. Governments interfere with private business enterprises for the following purposes:

The chief forms of modern government interference with private industry may be put under the four heads of action in behalf of consumers, of producers, of investors, and of the community in general.

1. In the middle ages the government interposed in behalf of the consumers either to guarantee good work or to insure reasonable price. Both of these forms of interference have disappeared in general industry to-day, because custom has been replaced by competition. . . . In modern times, accordingly, we find that the chief form of interference with competitive industry in behalf of the consumer is legislation to safeguard health, as in the case of food inspection and quarantine regulation.

2. On the other hand, the interests of the laborer have been so materially affected by the advent of the factory system that modern interference on behalf of the producers is well-nigh exclusively limited to them. As we have learned, there are five classes of such interference, all of which, except the last, are rapidly becoming universal: (a) legislation to safeguard health, through the so-called factory laws, applicable to men, women, and children alike; (b) legislation to insure safety through employers' liability laws; (c) legislation fixing maximum hours of work, as in the case of the eight-hour law for miners and public employees; (d) compulsory insurance against illness, old age, or lack of employment; and finally (e) legislation fixing minimum wages, as in Australia and New Zealand. . . .

3. In former times the striking example of interference by government in case of investment was in behalf of the borrower. The usury

laws, designed to protect the unfortunate debtor, have, as we know, been rendered almost completely unnecessary through the growth of competition in the loan of capital. This same development has, however, brought about the need of intervention of the opposite kind. To-day it is the lender or investor in corporate enterprise, and not the borrower, who requires protection. . . . Here, again, there are dangers on both sides, the risk of over-rigidity which will hamper legitimate enterprise, and the danger of lax accountability which will destroy confidence. That, however, some solid measure of regulation is requisite can no longer be successfully disputed.

4. We come, finally, to the case of government interference in behalf of the general interests of the community. This takes the form of protection, which has already been discussed in a separate chapter, and also of bounties and subsidies.

The danger of such intervention is that particular interests may foist themselves upon the legislator in the guise of general interests. Bounties may be classified as (a) military bounties, (b) forest bounties, (c) agricultural and industrial bounties, and (d) land transport and shipping subsidies.

498. How to regulate trusts. Professor John B. Clark suggests the following as possible methods of trust regulation:

First, we may prosecute with more intelligence the effort to break up the trusts into smaller corporations. It has, for example, been suggested that no corporation should be permitted to have more than a certain amount of capital. But if a maximum of capital were fixed for all industries, the difficulty would be that an amount which is too small for prosecuting one type of business would be sufficient to enable a company to monopolize another. A more effective policy would allow capital to vary in different kinds of business, but would so restrict the output of each corporation that no one could produce more than a certain proportion of the whole output of goods of the kind that it makes. . . .

Secondly, we might abolish customs duties on all articles manufactured by the trusts. We might in this way appeal to the foreign producer to become the protector of the American consumer. There is no denying the efficacy of such a measure. It is idle to say that, because trusts exist in free-trade countries, our present tariff is not effective in promoting them. Trusts have very little power in free-trade countries. . . .

Thirdly, it is conceivable that we might introduce an elaborate system of price regulation. We might accept monopoly as inevitable, but prescribe, in a minute and detailed way, at what rates goods should be sold. On the supposition that this difficult policy were carried out in a spirit

of complete honesty, — on the supposition that the officials of the law remained incorruptible, though placed in positions that offered the maximum inducement for corruption, — there would still remain for determination the question as to what principle they should follow in regulating prices. . . .

Fourthly, we may put all monopolized industries into the hands of the state and thus, within a very extensive field, carry out the program of the socialists. To a casual observer, this looks easier than the other policy; and it will certainly find more and more advocates, as the powers of trusts increase. There is, moreover, no doubt that this measure would abolish certain evils that are inherent in private monopolies. Even if it did not succeed in giving the public cheap goods, it might save the people from the necessity of buying goods that were made dear by private producers' grasping policy. But this measure must stand or fall with the general cause of socialism; and, while so extensive a subject as that is not here to be discussed, it is safe to say that the judgment of the people is against it. . . .

Is there no further recourse? There is one; and it has the advantage of being in harmony with the spirit of our people, with the principles of common law and also with the economic tendencies that have made our present state a tolerable one. It is to give to potential competition greater effectiveness — that is, to give a fair field and no favor to the man who is disposed to become an independent producer, leaving him wholly at the mercy of fair competition but shielding him from that which is unfair. Let the trust crush him, if he cannot produce goods as cheaply as it can; but let him bring the trust to terms, if he can produce them more cheaply. This puts the trust in a position where its security will depend, not on its power to destroy competitors unfairly, but on its power to meet them fairly.

499. The problem of railway regulation. The general nature of the problem of governmental regulation of railways is thus stated by a leading American authority:[1]

There are two parts to the permanent problem of government regulation of railroad transportation, two duties devolving on the state. One is to adjust the relations of the carriers with each other; the other is to maintain an equitable relationship between the public and the carriers. The theory concerning the interrelations of the carriers that has generally been adhered to in the laws of the United States and the several American States has been that the several railroad companies should act independently and should actively compete with each other as regards traffic and rates. Neither pooling arrangements nor agreements

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concerning the making and maintenance of reasonable rates have been sanctioned by law. . . .

The Government's obligation to maintain an equitable relationship between the carriers and the public is as great to-day as it ever has been. The problem has a different form than it has had in the past or may have in the future, but in essence the question is a permanent one, and consists in harmonizing as far as possible the interests of the private corporations of a quasi-public character engaged for profit in the performance of a service of a public nature, with the interests of the individuals, the localities, and the general public served by the carriers. This general problem is a continuing one, but the specific reason for Government regulation will vary from time to time, and may be, as it was in 1870, to secure cheaper rates to the seaboard for the agricultural products of the Central States; or may be, as was particularly the case during the period from 1870 to 1890, to adjust the rates charged at the small local towns and at the large cities; or the reasons may be, as at the present time, to secure relatively reasonable rates for rival areas of production and for rival economic interests in the same area of production.

500. Real value of a protective policy. One important political point, often overlooked in economic discussions of protection and free trade, is emphasized in the following:

On the other hand, the free traders fail to make allowance for an important element in the problem. The essence of free trade is cosmopolitanism; the essence of protection is nationalism. Free trade holds up to our contemplation the ultimate economic ideal, but fails adequately to reckon with actual forces. The universal republic is far in the distance, and the separate nations still have an important function to subserve in developing their own individuality and thus contributing distinctive elements to the common whole. Legitimate competition presupposes a relative equality of conditions; as long as the growing nations of the world are in a state of economic inequality, we must expect and not entirely disapprove the effort on the part of each to attain equality by hastening its own development. Ultimately, no doubt, patriotism will be as much of an evil as particularism has now become; but in the present stage of human progress patriotism is a virtue. Free traders often overlook the sound kernel in what seems to be the apple of discord.

As long as nations continue to form the economic units it is not competent to argue from internal free trade to international free trade. The cotton mills in the South may injure their competitors in New England, but the nation will look on with equanimity, because it means a

surplus production of wealth within the country. When, however, an industry in one country is menaced by the competition of another, it is no solace to the first that the world's wealth is being augmented at the cost of its own. Nations are not yet so unselfish. They calculate that even if protection carries with it certain incidental disadvantages, they stand to gain more than they will lose. Even as an engine of commercial diplomacy a protective tariff is frequently of service.

In the main, then, the conclusion would seem to be that under certain conditions a protective policy is relatively defensible. It may be conceded that in countries the mass of whose exports are of an industrial character protection is unwise. It may be taken for granted that when nations reach a state of comparative economic equality, protection will be unnecessary and even injurious, because if left alone each will then develop its own natural advantages. It cannot be gainsaid that protection sets loose the selfish passions of individuals and classes and that it is responsible for its share of political greed and unsavory legislation. But when the economic resources of a country are not yet fully developed, it may none the less be desirable to accelerate the pace, in the interests of its own immediate national progress, with the idea that the contributions of fully mature and economically well-rounded nations to the common wealth of the globe will in the long run exceed the gain from an uneven and one-sided evolution.

501. Tariff outlook in Europe. Certain tendencies indicate the further extension of free-trade principles in Europe.

The war of protective tariffs which is now in progress in Europe is doing more than could any amount of argument to discredit that policy. Statesmen in all countries are beginning to appreciate that however advantageous protection might be if one country could practice it all by itself, it is suicidal when pursued to its logical limit, that is, the entire exclusion of all products that may be produced at home, by all countries together. The United States, with its varied natural resources, may pursue such a policy and prosper, but this is not possible for one of the countries of Europe. It may take time for this conviction to win general assent, but that it is gaining ground is evinced by the agitation for enlarging the boundaries of the protected areas. Tariff unions similar to the German *Zollverein* are now being considered on the one hand for the whole continent of Europe, and on the other for the whole British empire. That such unions will be formed is highly improbable, but that the same arguments that are urged in their favor may be advanced with even more cogency in support of a policy of general free trade must be admitted by all who have followed the tariff controversy.

502. Difficulties in the way of a tariff reduction in the United States. Even if it were agreed that a reduction in our protective tariff would be beneficial, certain practical difficulties would still have to be met.[1]

In the first place, it is necessary to remember that the federal government must secure a large revenue from tariff duties, and that in consequence the question which we are discussing is not one of protection *versus* free trade, but of protection *versus* freer trade. In the second place, the economic importance of the whole controversy has unquestionably been exaggerated. We find a country like England prosperous under free trade; we find countries like France and the United States prosperous under protection. It is of real but not of vital importance. Our internal trade vastly exceeds our foreign trade in every way. The domestic trade of the Mississippi Valley alone is far greater than our entire foreign commerce. In the third place, the American tariff is a historical growth, and bad as it may be in many respects it has taken deep root. During the last century it has become part of our life, and cannot be suddenly eradicated with impunity. If it is true that American labor would be better off without it, it does not follow that it ought to be removed suddenly in the interests of American labor. If the industrial growth is abnormal, it is none the less true that adjustment to normal conditions is a painful process and should be conducted cautiously. Displacements of labor and capital cause suffering and loss, and it is clear that any reform of the tariff must be conservative and careful, a movement toward freer trade, not the sudden withdrawal of protection.

503. Reasons for the legal regulation of labor. Some of the reasons why governmental regulation of labor has replaced the earlier *laissez-faire* policy are stated in the following:

Unorganized workmen do not bargain on terms of strict equality with employers. That this is the case when the workers are children will scarcely be questioned by any one. Employers of such labor stand to it in a relation half paternal, and have it in their power to make or mar the young lives that are devoted to their service. It might be thought that considerations of common humanity would lead employers of children to fix hours and other conditions of employment that would not be injurious to them. Unfortunately this is not the case. In every country labor laws have been found necessary to protect children from the rapacity and cruelty not only of employers, but even of their own parents.

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It is generally, although not universally, conceded that protective labor laws ought to extend to women as well as to minors. Such extension is defended by those who think the activity of women should be confined as far as possible to the domestic circle, on the ground that women are unfitted for the rough and tumble of industrial competition and if permitted to work for wages at all, should do so on conditions marked out for them by law. A reason less open to objection is the simple fact that women have not yet learned to organize unions or to protect themselves in other ways and are therefore the prey of unscrupulous employers when the law fails to protect them.

If the second of the above reasons is accepted as a justification for laws protecting women wage earners, there seems no reason why such laws should not be extended to men in those trades in which they do not bargain on equal terms with their employers. This view appears to be gaining ground and has, as we shall see, already found expression in connection with legislation affecting the so-called sweating trades.

Another reason for protective labor laws, than inequality between employers and employees, is the ignorance and carelessness of the latter. Ignorance often leads workmen to assume risks and undertake tasks on terms that they would not with full knowledge accept. Once committed, the inertia that is characteristic of all men prevents them from repudiating their bargains. Carelessness is an even more common cause of contracts of employment that are socially undesirable. This is conspicuously the case in dangerous trades. The natural optimism of workmen leads them to feel that whatever the dangers may be, they themselves will escape. The result is that they accept risks, even certainties, of disease and death on terms that compensate neither them, their families, nor society at large for the waste of life which such employments entail. It is on this account that special legislation in reference to the conditions of employment in dangerous trades has been found necessary, and on it also are based the laws in reference to employers' liability for injuries to their employees and industrial insurance.

504. Public education. The importance of public education in democratic states is suggested in the following:

Governments now recognize that the common people are intelligent creatures worthy and capable of indefinite intellectual improvement. In past centuries rulers regarded their subjects principally as taxpayers, laborers, and soldiers; but education has now been declared an indispensable part of the advancement of public welfare, — the avowed aim of all modern governments. The success of democratic experiments depends

upon the intelligence of the average citizen; the competition for markets requires skilled workmen and managers; and the widening interests of mankind demand the means of acquiring knowledge.

The recognition of these facts has induced almost all the European governments to establish elementary schools, technical institutes, and universities, and to compel even the poorest child to acquire at least the rudiments of knowledge. In England the government appropriates over seventy-five million dollars a year for elementary education alone, and France spends almost fifty million dollars. Illiteracy, once regarded as the natural and inevitable state of the people, has now become a national disgrace which all countries are laboring to remove. Their success may be measured by the decline of illiteracy in the armies. It was the exceptional soldier, in the eighteenth century, who could read and write; now it is the exceptional one who cannot. Less than one per cent of the recruits for the German army are illiterate, and only one in twenty in France cannot read and write.

The work of the schools is reënforced by the newspapers and magazines. The invention of the steam printing machine and the mechanical typesetter has reduced the cost of the newspaper from ten or twenty cents a copy to from one to three cents. Editions of ten thousand copies, considered enormous at the opening of the nineteenth century, have grown into editions of hundreds of thousands scattered broadcast throughout the land by the express train. The telegraph gathers the news every moment from the four corners of the earth; the conduct of rulers and statesmen, the schemes of reformers, the current political issues are the subject of hourly criticism and discussion, and public opinion can thus be aroused as never before in the history of mankind.

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