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# INDUSTRIAL LIBERTY

BY

JOHN M. BONHAM

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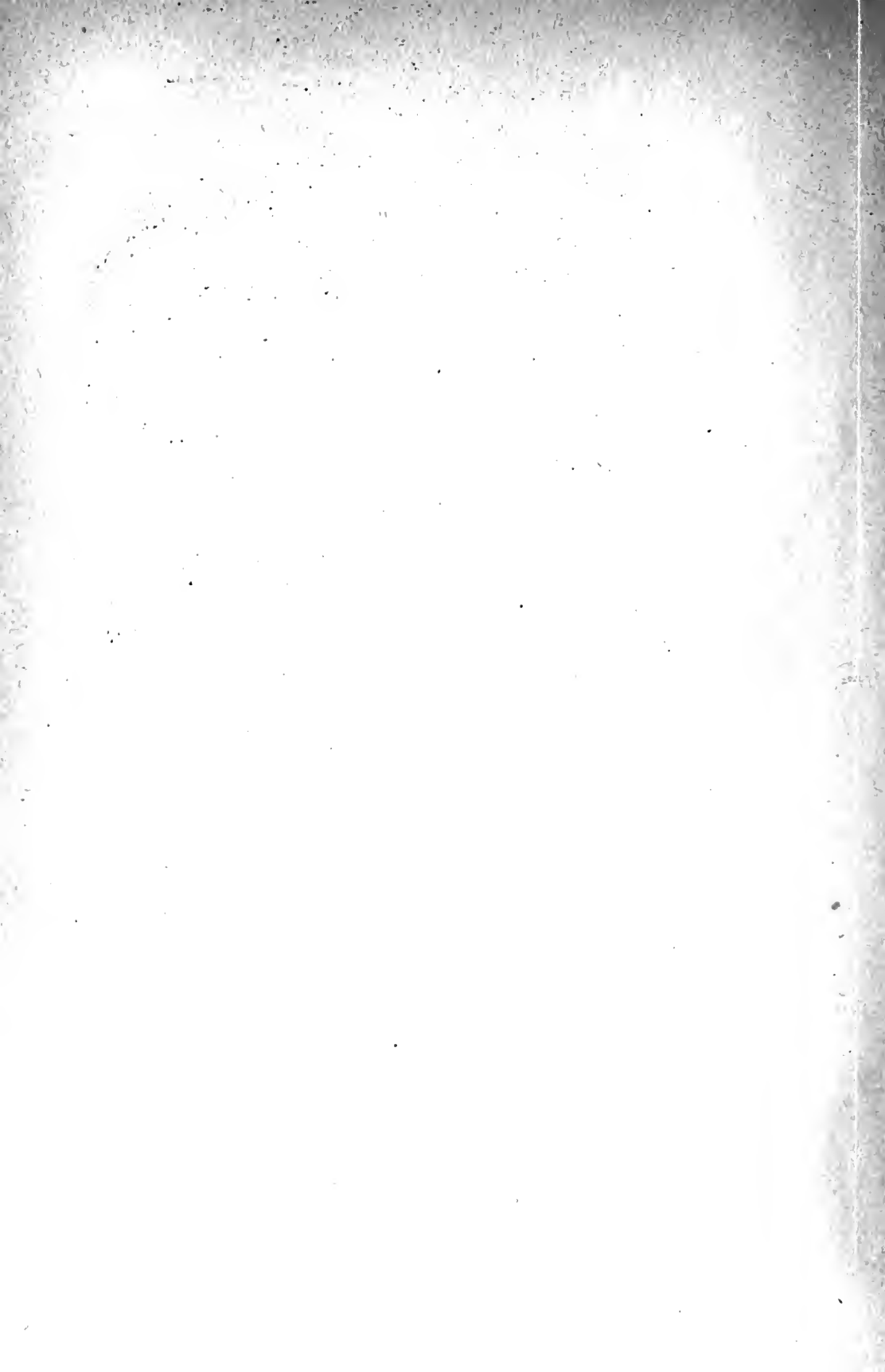
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## PREFACE

I have sought in the following pages to deal with the subject of industrial liberty in a manner which seems to me, in some respects, different from any that I have hitherto noticed. Aiming to keep in view principles rather than statistics, I have undertaken to make an analysis of the salient political and industrial evils of our time, and to measure, by fundamental rules, the departure, in some of our governmental and industrial methods, from these principles. Where it has been necessary to employ concrete illustrations, I have endeavored, as far as possible, to make a dispassionate and an impersonal use of them. It is not assumed that the work is anything more than elementary, since it has been my purpose rather to indicate a line of inquiry than to attempt an exhaustive or even a comprehensive treatment of the subject; and I have undertaken my task with the hope that others better equipped may possibly, from some of the suggestions which I have ventured to make, be induced to engage in a more thorough discussion of those underlying principles upon which modern industry, in order to be wholesome, must rest.

JOHN M. BONHAM.

NEW YORK, *July* 1, 1888.





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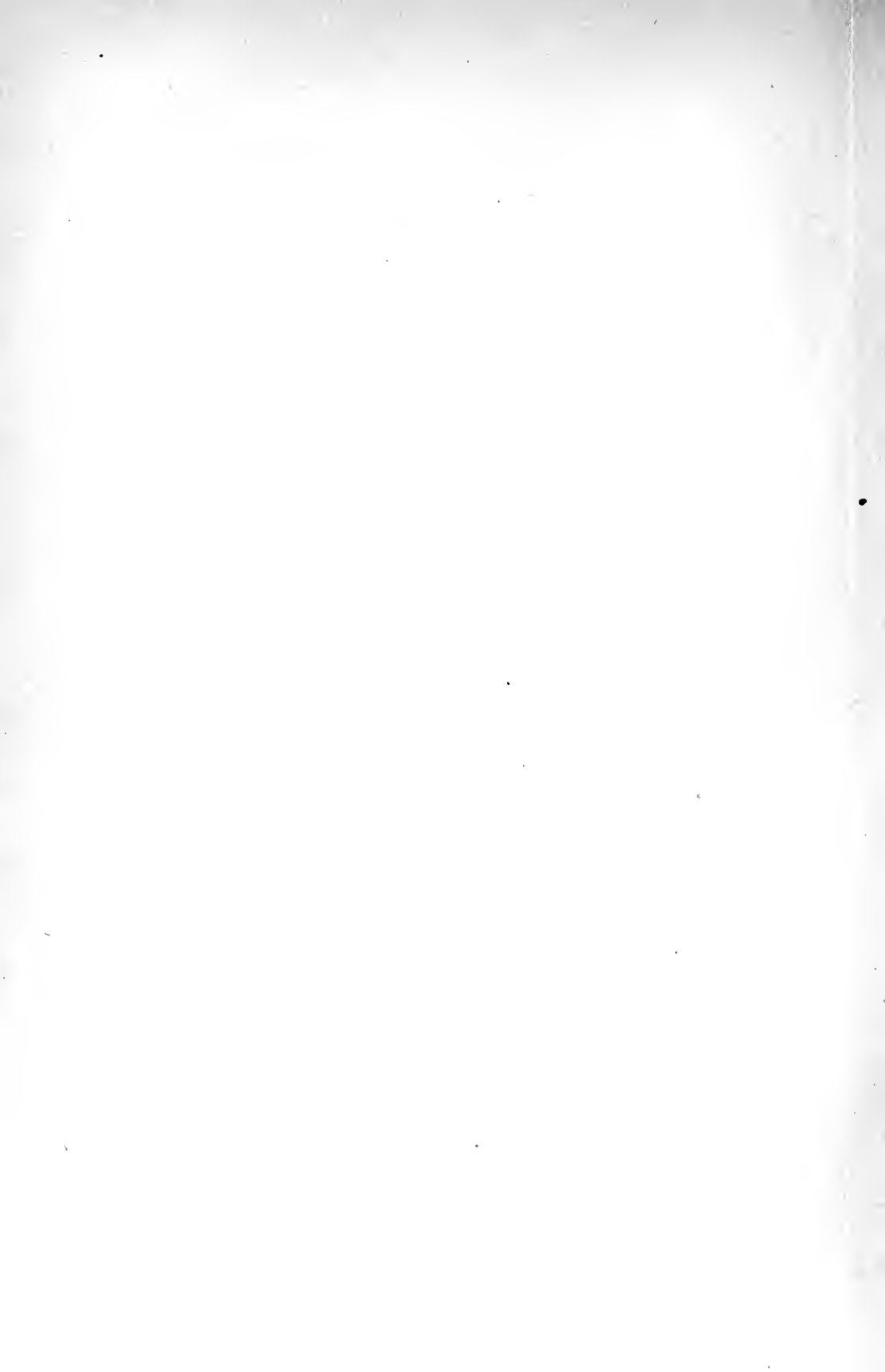
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# INDUSTRIAL LIBERTY

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## CHAPTER I

### FUNDAMENTAL IDEAS

ANY one who attempts a study of economic questions in the light of modern research cannot fail to be impressed, upon the threshold of his inquiry, by the multiplicity and apparent complexity of the data involved in these questions, by the variety and conflicting character of many of the propositions which are suggested for reform, and still more strongly by the absence of any one central and clearly defined principle upon which there can be a substantial agreement. The statisticians and political economists keep too near their facts and figures, and regard their subjects mainly, if not exclusively, as of commercial quality; as related only to the values of labor and production, to capital and wages; as simply involving dollars and cents and the conveniences of trade. The politician approaches them diplomatically, and offers to compromise all difficulties with palliative and merely expedient measures. Many of

the writers on economic reform are occupied in confusing causes with effects, and in the endeavor to match one result with another. Meanwhile an impression is more or less prevalent among the people that economic laws have lost their sanction and their character.

Under these circumstances a rational course of examination would seem to lie, first, in an effort to indicate precisely and simply the primary qualities of industrial liberty, particularly as related to the American citizen; then to marshal existing social and industrial conditions, in order to measure them by this definition, to discover, if possible, how far they have deviated from it; and thereafter to test, by the same standard, some of the more prominent propositions for reform.

Lord Bacon says that it is the "multiplicity of single facts which presents nothing but confusion. The middle principles alone are solid, orderly, and fruitful." By studying these "middle principles" we learn their essential relation to each other, and may also illustrate the degree of congruity or incongruity with these principles which exists in present political and industrial conditions. Following this course, I will first briefly sketch the early progress of the English people towards liberty.

Magna Charta has been rather commonly and vaguely regarded as a great charter of liberty. It was, in point of fact, a very imperfect beginning. It came into being as the result of a conflict between

governing classes. William Mareschal, Earl of Pembroke, and his associate knights and barons, had scarcely any more perception of the principles of political liberty, in their modern significance, than had King John, from whom the Charter was wrested, and the Charter itself secured but little to the mass of the people. The instrument deserves its prominence in English history, not as the delineation but as the foretokening of liberty. A distinguished writer has said of Magna Charta that "in substance it is the first effort of a corporate life that has reached full consciousness, resolved to act for itself, and able to carry out the resolution."<sup>1</sup> Even this seems an overstatement. The Charter had but slight effect upon the prevailing law of tenure, and as little upon hereditary establishment. There was thereafter, it is true, a division of the mastership, which had for some time before been tending towards unity in the person of the absolute king. In consequence of this division, feudal oppression began to be somewhat relaxed; but for all that the vassal was the vassal still. Of all the seventy-nine clauses of the Charter, only one is intended to protect the working people, and this merely secured to them, from unjust seizure, their "wainage," or farming implements.

During the succeeding reign, Simon de Montfort, Earl of Leicester, called into being the House of Commons. This was really a far more important ad-

<sup>1</sup> Stubbs' "Constitutional History of England," N. Y., 1880, vol. I., p. 610.

vance towards popular liberty than the securing of the Charter, because through it the people first gained some voice in the general government. Nevertheless, we must not conclude that in this act De Montfort was impelled by a spirit of liberty in its modern signification. As Mr. Stubbs says of him:

“He was greater as an opponent of tyranny than as a deviser of liberties. The fetters imposed on royal autocracy, cumbrous and entangled as they were, seem to have been an integral part of his policy. The means he took for admitting the nation to self-government wear very much the form of an occasional or party expedient, which a longer tenure of undivided power might have led him either to develop or discard.”<sup>1</sup>

Moreover, the germ of the parliament lay in the primitive institutions of the Saxon race, and while De Montfort has the merit of having been the first to see the immediate uses to which a parliament might be put, in curtailing the absolute power of the king, it cannot be supposed that he conceived the ultimate tendency of that representative government toward the abolition, not only of the king, but of his own class; since indeed the foremost Englishmen of to-day are not altogether ready to admit this result as the final outcome.

The Bill of Rights is another acquisition the influence of which has been largely exaggerated. It was really a bill of particulars. It set forth human

<sup>1</sup> Stubbs' "Constitutional History of England," vol. II., p. 108.

rights of the more obvious kind and commanded them to be observed thenceforth. But while the items thus inventoried belong to the category of freedom, they by no means comprehend the whole principle. They were but its adumbrations, since they did not even remotely indicate any rule whereby political rights generally are to be ascertained.

To return to the historical order. During the wars between the houses of York and Lancaster, the rights of the people were to some extent furthered ; but with the advent of the Tudors came a reaction towards absolutism, which culminated during the reign of Henry VIII., when the parliament became little more than the registrar of the royal will. The advance of political freedom, which took place in the reign of Elizabeth, was caused largely by the general awakening which accompanied the Reformation, and which expressed itself in England in a reaction from the tyranny of Henry VIII. and the bigotry of Mary.

With the incoming of the Stuarts, however, the absolute idea again received forcible expression. James I., even before his accession, formulated, in his work on the "True Law of Free Monarchy," the theory of an absolute royalty, and announced that, "although a good king will frame his actions to be according to law, yet he is not bound thereto, but of his own will and for example-giving to his subjects." This was a step beyond the absolutism of the Tudors, for, as Mr. Green has pointed out :

“ ‘An absolute king,’ or ‘an absolute monarchy,’ meant, with the Tudor statesmen who used the phrase, a sovereign or rule complete in themselves, and independent of all foreign or Papal interference. James chose to regard the words as implying the monarch’s freedom from all control by law, or from all responsibility to any thing but his own royal will. The king’s blunder, however, became a system of government, a doctrine which bishops preached from the pulpit, and for which brave men laid their heads on the block.”<sup>1</sup>

Mr. Green speaks of this notion as if it were wholly a new one ; but while it had never been so definitely expressed before, it is a dogma which has been acted upon by monarchs in one degree or another from the beginning of history. It is, in fact, but a modification of theocracy, which is the oldest form of government. From the passionate adherence with which James and his successor clung to this theory, the Commonwealth came into being. Then followed in order of time the Restoration, the Abdication, the Act of Settlement, through which the crown was conferred by the people, and the gradual development of the Constitution of England. Through all these processes there were lapses and advances of the liberties of the people, but in the main these liberties were enlarged and better guarded.

The English writers of the seventeenth and eighteenth centuries, but particularly the eighteenth, made marked progress in the definition of social and economic principles ; but they were not so successful

<sup>1</sup> “ A Short History of the English People,” by J. R. Green, p. 472.



in ascertaining and determining the ultimate logical bounds of political liberty. John Locke, in 1690, published two Treatises on Civil Government, in defence of the principles of the revolution against the Tories. This work has been extensive in its influence, and singular in the diversity of that influence upon three peoples, each of whom it helped to an entirely different interpretation of freedom. Thus it confirmed the English people in the Act of Settlement and made the subject contented, under the reign of William, with the new order of things inaugurated by that settlement; it had an important influence in urging the French nation, a century later, to revolution and anarchy; while in America it became one of the chief sources of inspiration for the foundation of the republic. The highest purpose of its author, as he himself says, was "to establish the throne of our great restorer, or present King William; to make good his title in the consent of the people, which, being the only one of all lawful governments, he has more fully and clearly than any prince in Christendom."<sup>1</sup> But the surroundings of Locke forbade him to pursue his reasons to their legitimate conclusion. While in all his discussion he saw the necessity of government to support the individual, the necessity of justice in government, and the right of the people to overthrow unjust governments, he believed unqualifiedly that the government which could best accomplish the ends

<sup>1</sup> "Locke on Government," Preface.

of freedom was one which had a king and an order of nobles, a constitutional monarchy. When we come to analyze his definition, we see that his typical idea of political liberty cannot convey the idea of individual freedom of self-government; for self-government and government founded on hereditary right are not, and cannot be, identical.

Blackstone similarly makes a definition which lacks essential completeness. In his description of civil liberty he says: "That constitution or form of government, that system of law, is alone calculated to maintain civil liberty which leaves the subject entire master of his own conduct, except in those points in which the public good requires some direction or restraint."<sup>1</sup> In considering this definition we must take into account the intention of the definer, especially as to that which constitutes the public good. Most persons would cordially agree that the public good is the great end to be desired, but would differ very widely as to those things which constituted this public good, and particularly as to the kind of government best suited to secure it. It is this point that Blackstone's definition leaves undetermined. He tells us in effect that a political structure is best calculated to maintain civil liberty, without defining that structure; and when we measure his definition by the context, we have every reason to infer that what he regards as a realization of the greatest public good exists in, and is secured by,

<sup>1</sup> "Blackstone's Commentaries," Book I., p. 126.

a constitutional monarchy, just as we have reason to believe that to the Czar of the Russias this greatest public good seems to be in an absolute monarchy, and to an American citizen it seems to be in a republican form of government. When Blackstone, comparing all forms of government with each other, became a panegyrist of the constitutional monarchy of Great Britain,<sup>1</sup> it could not be expected that he meant to comprehend in his definition that larger idea of political liberty "which cannot brook a king." And indeed to any citizen of a monarchy, who is content with his government, such larger idea of political liberty, instead of seeming to have any quality of liberty in it, must appear to be a species of treason.

William Penn's definition, which conspicuously adorns the walls of Independence Hall at Philadelphia, has been held up as a classical definition of a free government. He says: "Any government is free to the people under it (whatever its frame) where the laws rule and the people are a party to those laws; and more than this is tyranny, oligarchy and confusion."<sup>2</sup> This definition contains self-contradictions. Besides, when, in the text which prefaces it, the definer establishes to his own satisfaction the doctrine of the divine right of kings, he thereby entirely disqualifies himself for realizing the qualities of political liberty, and his definition

<sup>1</sup> "Blackstone's Commentaries," Book I., p. 51.

<sup>2</sup> Preface to "Frame of Government," Colonial Records, vol. I., p. 31.

cannot therefore be regarded as containing such a conception of political liberty as that of which I am now treating. Penn was a Royalist, and he could not entertain any idea of forming a government which involved absolute independence of the monarch from whom he received his charter of Pennsylvania. His very acceptance of that charter implied a pledge of fealty to the hereditary monarch who claimed title to the vast domain of America by the accident of his birth. Penn received the province as a fief under the condition of feudal allegiance, the direct considerations of the grant being the military service of the father of the grantee, the rendering of tribute by the payment of two beaver skins yearly, the fifth part of all the gold and silver to be found in the domain, the continued faith and allegiance of the people of the province to the monarch, and the transmitting of all the laws enacted within the province to the privy council of Great Britain, for the rejection of all such as might be deemed inconsistent with the royal prerogative. Under such circumstances as these Penn could not have adequately conceived that idea of liberty whereby each one of the citizens of the commonwealth which he established was to be a freeman, a guardian of himself, of his rights, and of the associated rights of others—a sovereign in his own capacity, hostile to any notion of domination by birth.

Montesquieu's "*Esprit des Lois*" held a high place among the framers of the Constitution. It

was a source of inspiration to them. Washington with his own hands copied an abstract of it made by Madison.<sup>1</sup> Montesquieu was of the lawyer nobility, and held his judicial position as an hereditary possession. He was thoughtful and scholarly, and his work is characterized by a great love of system; but, measured by the standards of to-day, it must be admitted that parts of it are very defective. While he is broad, profound, and brilliant, he does not attempt to grapple with despotism in order to overthrow it. His chief service was that he set men thinking; he did not resolve their problems. As with the other writers whom I have named, his environments precluded the possibility of his forming a definition of political liberty which could stand the test of concrete illustration. In the multitude of the suggestions which he does give, taken one with another, there is great variety and contradiction. Many of them point in diametrically opposite directions. While some of these suggestions have been beneficially used in the construction of modern political liberty, others have been made the basis of the wildest political theories. Thus, for instance, Montesquieu is doubtless the originator of the idea by which we have made co-ordinate the legislative, the executive, and the judicial branches of our government.<sup>2</sup> Yet his dictum, that in commercial countries it is the duty of the government to exercise a

<sup>1</sup> Bancroft's "History of the Constitution," vol. II., p. 9. New York, 1885.

<sup>2</sup> "Spirit of the Laws," Book XI., ch. 6.

paternal care in furnishing work to every man, has become one of the fundamental claims of that branch of socialism which was lately led by Louis Blanc.<sup>1</sup>

As Madison says of him: "He appears to have viewed the Constitution of England as the standard, or, to use his own expression, as the mirror of political liberty."<sup>2</sup>

While Jeremy Bentham, in his "Constitutional Code," fixes the sovereignty in the whole people and says "it is best to give the sovereign power to the largest possible portion of those whose greatest happiness is the proper and chosen object,"<sup>3</sup> he assumes for this sovereignty something more than human power. Government, according to him, fulfils its function "by creating rights which it confers upon individuals,"<sup>4</sup> instead of confining itself to declaring and enforcing rights which grow out of custom and usage, in accordance with natural law. Thus, while he seats the power in the majority, and so far indicates democracy, his assumption is, that the power so conferred, unlike a power derived from agree-

<sup>1</sup> "Spirit of the Laws," Book XXIII., ch. 29.

Nothing could be more grotesque than some of the reasons set forth by Montesquieu in support of slavery: such, for instance, as that "sugar would be too dear if the plants which produced it were cultivated by any other than slaves"; that "these creatures are all over black, and with such a flat nose that they can scarcely be pitied"; that "the negroes prefer a glass necklace to that gold which polite nations so highly value—can there be a greater proof of their wanting common-sense?"; and that "it is hardly to be believed that God, who is a wise Being, should place a soul, especially a good soul, in such a black, ugly body."—"Spirit of the Laws," vol. XV., ch. 5.

<sup>2</sup> *Federalist*, No. 47.

<sup>3</sup> Bentham's Works, Bowering's edition, vol. IX., p. 97.

<sup>4</sup> *Id.*, vol. I., p. 301.



ment, unlike any human power, is possessed of a supernatural quality. As Herbert Spencer says, commenting upon this process of reasoning :

“The sovereign people jointly appoint representatives and so create a government ; the government thus created creates rights ; and then, having created rights, it confers them on the separate members of the sovereign people by which it was itself created. Here is a marvellous piece of political legerdemain! . . . Surely, among metaphysical phantoms the most shadowy is this, which supposes a thing to be obtained by creating an agent, which creates the thing, and then confers the thing upon its creator!”<sup>1</sup>

Bentham, often, in treating of liberty, combines the polemical with the philosophical, the practical with the theoretical, and not unfrequently confounds them. His doctrines, in the translation of M. Dumont, were propagated through Europe, and became more popular abroad than at home. This was partly due to the circumstance that, in the process of translation, many of the vagaries of terminology were eliminated ; but more to the fact that there was so much in Bentham's writings that afforded support to the wildest theories of the wildest theorists. It was for this that they received their greatest favor in France.<sup>2</sup>

<sup>1</sup> “The Man *versus* the State,” New York, p. 38.

<sup>2</sup> Jeremy Bentham doubtless did a large service to the world in challenging a great number of words that had been masquerading in the language under false meanings. He did this especially in his “Book on Fallacies,” in which he has a chapter on “Impostor Terms.” Unfortunately, however, he sometimes fell under his own ban ; and Herbert Spencer furnishes several trenchant illustrations of this in Bentham's efforts at the treatment of ultimate human rights.

I have mentioned only a few of the more important of the political writers of the eighteenth century, but it may be fairly said of all of them, that they made definitions of liberty for which, by reason of their environment, they could not furnish clear illustrations; since behind all their illustrations lay their acceptance of the ideas and governments under which they lived. Under the laws of these governments there existed these essential postulates—a ruling class and a ruled class,—a ruling class by assumed hereditary right, and a ruled class by assumed hereditary necessity; and where these are postulates, any definition of human liberty must be inadequate. It is for this reason that whilst the English Constitution marks the early development of liberty, it does not exhibit its growth and stature. Where the existence of a king is assumed to be an essential of government, there cannot be any complete realization of that quality of liberty which is comprehended in the political equality of all men before the law—of that kind of government which is maintained only through the delegated servants of the people.

We have to acknowledge, indeed, that we owe a great debt to England. From her we received an inestimable boon in the body of the great Common Law, that firm foundation of occidental civilization. But in accepting the Common Law from England, we did not take all that belonged to it. Its primogeniture and entailments, its class distinctions and

class-government, were largely discarded. What we did bring with us to America was the sturdy Anglican spirit of the people, which gradually appropriated and established the fundamental law in support of fuller individual liberty. In the new country, unencumbered by traditionary restraints, this instinct had larger scope; and it is to it, therefore, that we owe all of the true qualities of this larger sense of liberty which we have. Indeed, it is by this instinct that liberty made whatever progress exists in any of the countries of Western civilization; for, although restrained and hindered in Europe, when we look for its genesis, we find that it has come from the demands of the people, and not from the free-will of the rulers—not from the graciousness of the rulers, but from their failings, and through the resistance of this popular instinct against tyranny. Thus it was King John's weakness, and not his good-will, that enabled the knights and barons to secure the Charter. It was the bigotry and obstinacy of Charles which called the Commonwealth into being. The English parliament enlarged its power by the flight of James II.; the Act of Settlement was born of his abdication, and nothing was more favorable to the continued growth of that parliament than the weakness of the first two Georges in absenting themselves in their beloved Hanover and neglecting their English subjects. But in America, largely by reason of the absence of clogging traditions and tenures which belonged to the Common Law, political

liberty received a more practical and a broader interpretation than it ever had before. Here, for the first time in the history of the world, it was set forth, not with instances merely, but as an almost universal principle<sup>1</sup>; and thus set forth, it was crystallized into the fundamental declaration and law of the people. Samuel Adams, the father of the Town-meeting, and Thomas Jefferson, the author of the Declaration of Independence, were of the leaders during the Revolution and for some time after. If we contrast the representative men of each period, we may readily realize the difference existing between those very limited conceptions of liberty which prevailed in the reign of King John, and the comprehensive idea of it which marked the American revolutionary period.

William Mareschal, Earl of Pembroke, and Simon de Montfort, Earl of Leicester, were aristocrats and warriors of an essentially militant period. They fought for their class; they accorded to their dependent husbandmen a minimum of the results of their triumph.

Samuel Adams, the son of a New England brewer, and Thomas Jefferson, the son of a Virginia farmer, were of the people and for the people. They advocated the principle of equality for all men before the law, a principle not restricted to any people, but for the world at large—political liberty for the human race.

<sup>1</sup> The qualification which it is necessary here to make is, of course, African slavery.

From this time forth it was intended that political liberty, clothed in a new nomenclature, should become a rule of life; that the governing power should have no hereditary quality whatever. The ruler thereafter was to receive the rules from the ruled, and to acknowledge that sole constituent authority. The fundamental principle was set forth that no one man was born into the world with any right to govern other men; that the man who became a leader must become so by his qualities for executing the will of his constituents, and for preserving the equal power of those constituents; and this principle was to be borne out in all the relations of government.

The work of framing the Constitution, it is true, was only in part creative. The framers took as their basis the British Constitution, which was the result of the slow development of time, and upon this it was necessary to make great structural changes. A distinguished writer<sup>1</sup> has said that their work consisted chiefly in taking the British Constitution and filling in the interstices. They did vastly more than this. They eliminated the titles of nobility and political class-distinctions of all kinds, and substituted in the place of them institutions which should fall into congruity with the necessities of life under self-government. These were organic changes, and this work required the highest order of constructive skill. Even a constitution which is the result of gradual development can never be said to be fin-

<sup>1</sup> Maine on "Popular Government," New York, 1886, p. 253.

ished until development ceases; because that which is created by development must continue to change by further development. In order to make a constitution which shall assimilate with selected parts of one which has been evolved, so that the result will fully answer new and untried conditions, it is necessary that the fundamental principles of political development be thoroughly studied and understood. The fathers of the republic brought to this task that variety and quality of skill and learning which were necessary for this accomplishment. They were acquainted with ancient history, and with the ancient republics; with the French, English, Swiss, and Dutch literature on government; with the British Constitution; and with the Constitutions of the several states of the Federation. They had eminent legal ability, the sagacity and patriotism of the statesman, and the wisdom of the political philosopher. Thus equipped they accepted the authority of the past; not with absolute submission, but for the suggestions it contained for the application of principles to existing and prospective circumstances. They measured present progress and tendencies by history and by experience, avoiding too close an adherence to history and too ready an acceptance of speculative theory. They walked in the middle path, and recognizing in the progressive movement of civilization a uniformity, a persistence, an enlargement of scope, they established political institutions that should work in harmony with these.

The history of the Convention furnishes abundant evidence that there were acts of weakness as well as acts of valor; pusillanimity and courage; selfishness and patriotism; chicanery and statesmanship; and that, after the Constitution was completed, there was a great deal of confusion and discussion before it was adopted. Still, the controlling spirit of these fathers in thus welding the freedom of America upon the best qualities of the Constitution of Great Britain, was a spirit characterized by sagacity, courage, fidelity, and statesmanship. One of the best evidences to us of the prevalence of these qualities, is to be found in the prominence which the American Constitution holds in the eyes of the whole of Western civilization, and in its growing influence upon the development of European, and especially English, thought. The manner in which this Constitution has remained in substantial congruity with our own subsequent development; in which it has restrained where restraint was necessary, and enlarged where freedom grew; the manner in which it has borne the nation through the crisis of a civil war, has not only proven the sum of the great wisdom thus exercised, but it also affords warrant for the belief that we shall be enabled, with moderate structural changes, to adjust and assimilate to it the phenomenal activities of this and coming generations.

In some respects no time was ever more propitious for affording a measure of the stature of political liberty than the post-Revolutionary period of Amer-

ica,—that period during which the Supreme Court was called upon to define the Constitution under practical tests. The lessons which were studied came from two certain opposing tendencies. The French Revolution had just illustrated the excesses of anarchy. The French nation, having been oppressed for centuries by monarchical restraints, had just broken all bounds. The political pendulum had swung from the extreme of despotism to the extreme of ochlocracy. The rabble arrayed the Demon of License in the robes of the Goddess of Liberty. The English nation contemplated with the utmost horror the conditions which thus prevailed in France. English legislation was for a time completely paralyzed. The excesses of the Reign of Terror called into being a feeling of revulsion against all freedom. It came to be assumed that the freedom of the masses inevitably tended toward the unbridled excesses of the mob. It was a most fortunate circumstance, at this time, that the interpretation of our Constitution was in the hands of men of profound legal attainments, historic wisdom, and judicial temper.

Addressing themselves to the problem of adapting the Constitution to practice, they studied the two extremes which immediate history thus afforded them. As causes arose that involved questions of constitutional construction, they defined certain essential qualities of liberty by clearly drawing the line between unbridled excess on the one hand and



the undue restraints of hereditary government on the other. Thus, through a long series of decisions, they familiarized the people with the political principle that, whilst with the people rested the sovereignty, in public and individual self-restraint lay the true means of guarding and preserving that sovereignty.<sup>1</sup>

Let us now briefly examine the industrial law of society, in its fundamental operation, as related to this liberty, in order that we may endeavor, from such examination, to construct the precise definition of the qualities of American political and industrial liberty.

We may set it down as a primal fact, that activity is a normal and necessary condition of the human race; and as corollaries from this fact, that this activity is best secured when each individual is engaged in that particular occupation which most tends to develop his industrial faculties; and that the highest incentives to this activity are to be found in the right of each individual to get, gather, hold, and, with certain limitations which I shall presently notice, to bequeath property.<sup>2</sup>

<sup>1</sup> Had it not been for slavery, the fathers of the republic would have gone within one step of defining the ultimate of political and industrial liberty. But the sin of slavery cannot be charged to Jefferson. He employed all his influence for the extirpation of the slave-trade and the deportation of the slaves. He sought to incorporate in the Declaration of Independence a clause in which he truly charged the English government with the responsibility for the African slave-trade; and it was his highest boast, forty-five days before his death, that he had ever thus used his efforts in behalf of freedom. (See Jefferson to James Heaton, May 20, 1826.)

<sup>2</sup> Baron Wilhelm von Humboldt, in his treatise entitled "The Sphere and Duties of Government," strikes the keynote of individuality in one sen-

The acquisitions of each man represent his struggles, his risk, his skill, prudence, foresight, and abstinence; his gains are for his family, his old age, and for his children's beginnings. In the confidence and security with which he can hold and bequeath property lie the great incentives for the struggle to acquire it. It is in order to make these incentives complete that the individual may bequeath his acquired property to those who come within the bounds of his natural affection; it is to prevent the lessening of these incentives that the individual cannot create indefinite perpetuities, which would tend to interfere with the free activities of subsequent generations. In a word, the incentives of the acquisition of property and the security of its possession are things of paramount importance, because they constitute the great mainspring of all industrial endeavor; and when these are thus guaranteed to every one equally, the most constant activity is thereby promoted, and the largest sum of human activity follows. It is this variation and diffusion of freedom which produce the greatest sum of human

tence. He says: "The end of man, or that which is prescribed by the eternal or immutable dictates of reason, and not suggested by vague and transient desires, is the highest and most harmonious development of his powers to a complete and consistent whole"; that, therefore, the object "toward which every human being must ceaselessly direct his efforts, and on which especially those who design to influence their fellow-men must ever keep their eyes, is the individuality and power of development"; that for this there are two requisites, "freedom and a variety of situations"; and that from the union of these arise "individual vigor and manifold diversity." ("The Sphere and Duties of Government," from the German of Baron Wilhelm von Humboldt, pp. 11-13.)

energy, the greatest sum of human skill, the greatest sum of human benefits, and their most equitable distribution. Moreover, there can be conceived no greater moral stimulus than that which results from the daily employment of each citizen, with each day's result of labor possessed and held in a sense of security. In the free operation of these incentives it is necessary to note that the individual is the chief object of nature's solicitude: the individual as a unit distinguished from the number. Inherent in these incentives lies the vivid recognition of the equality of right of each of these units before the law, before the popular power, and before any power exercised by any aggregation or delegation of the units, whether such delegation be for the enlargement of commercial convenience or for civil and industrial government. The unvarying prerequisite is that the power must be exercised for the equal commercial convenience and for the equal government of each one of the units. There is no possible place for the least phase of favoritism in the operation of this principle. The moment a political privilege of any kind is created, freedom recedes just so far as the privilege operates. The highest attribute of this political freedom, therefore, is that it is an equation, in which each one of the constituent units has an exact and equal quantum of political right. The incentives of acquisition and possession which thus belong to political liberty are not mere incidents or accidents; they are in and of it essentially, and by

the inherent obligation of nature<sup>1</sup>; and it is immanent in the whole law of this liberty that no condition can be engrafted upon that law to change its quality.

Thus Liberty brings her gift to mankind, not in the mass, but to each individual man, and says:

“You shall have the free use of your faculties, to make, to build, to get, to gather, and to keep. You shall be equal to all others before my law; not equal in faculty or endowment, for my gift to you is of political right, not of natural faculty. Political freedom does not, and cannot, confer natural faculty;

<sup>1</sup> The “natural rights” of man is a subject of transcendent importance and one which has been clearly set forth by Herbert Spencer. He says:

“Says Professor Jevons, in his work ‘The State in Relation to Labor’: ‘The first step must be to rid our minds of the idea that there are any such things in social matters as abstract rights.’ Of like character is the belief expressed by Mr. Matthew Arnold in his article on copyright: ‘An author has no natural right to any thing whatever which he may produce or acquire.’ So, too, I recently read in a weekly journal of high repute, that ‘to explain once more that there is no such thing as “natural right” would be a waste of philosophy.’ And the view expressed in these extracts is commonly uttered by statesmen and lawyers in a way implying that only the unthinking masses hold any other.”

“One might have expected that utterances to this effect would have been rendered less dogmatic by the knowledge that a whole school of legists on the Continent maintains a belief diametrically opposed to that maintained by the English school. The idea of *Natur-recht* is the root of German jurisprudence. Now whatever may be the opinion held respecting German philosophy at large, it cannot be characterized as shallow. A doctrine current among a people distinguished among all others as laborious inquirers, and certainly not to be classed with superficial thinkers, should not be dismissed as though it were nothing more than a popular delusion.”

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“‘So early as the fifteenth century,’ says Professor Pollock, ‘we find a common-law judge declaring that, as in a case unprovided for by known rules the civilians and canonists devise a new rule according to ‘the law of

nor can it change the variety of that faculty. I take you as I find you, with those faculties which nature has thus given you in diversity. I would not change these if I could; nor would I disturb their diversity; since it is by this very diversity that individuality receives its highest expression, and that the largest results of my gift of political freedom and political equality are realized. Bringing, therefore, to me the faculties which nature has given you, I determine that you shall employ them in your own behalf, in nature, which is the ground of all laws,' the courts of Westminster can and will do the like."

Mr. Spencer then considers the source of this truth as depending upon the scientific fact that there can be no social phenomena but what, if we analyze them to the bottom, bring us down to the laws of biology, of life; and that there can be no true understanding of them without reference to the laws of life. He then goes on to show how animal life involves waste; how waste must be repaired; how repair implies nutrition; how nutrition supposes obtainment of food; how food can only be gotten through powers of prehension and, usually, locomotion; how, in order to achieve these ends, there must be freedom to move about. He then proceeds:

"If we adopt pessimism as a creed, and with it accept the implication that life in general being an evil should be put an end to, then there is no ethical warrant for these actions by which life is maintained: the whole question drops. But if we adopt either the optimist view or the meliorist view—if we say that life on the whole brings more pleasure than pain, or that it is on the way to become such that it will yield more pleasure than pain, then these actions by which life is maintained are justified, and there results a warrant for the freedom to perform them. Those who hold that life is valuable, hold, by implication, that men ought not to be prevented from carrying on life-sustaining activities. In other words, if it is said to be 'right' that they should carry them on, then, by permutation, we get the assertion that they 'have a right' to carry them on. Clearly the conception of 'natural rights' originates in recognition of the truth that if life is justifiable, there must be a justification for the performance of acts essential to its preservation, and, therefore, a justification for those liberties and claims which make such acts possible." (See "The Man *versus* the State," p. 87 *et seq.*)

my behalf, and in behalf of humanity, with the same freedom as that with which every other man may use his. You may bequeath the fruits of your endeavors, within the limits of your natural affection, to your children and grandchildren. This you may do in order that your incentives to acquisition and possession may be complete. Beyond this you cannot tie up your gains to be held against the incentives and activities of the generations to follow. I confer this gift upon you, upon the condition that you will assist every other unit in the exercise of his like political gift, and that you will not permit any person or combination of persons to exceed the common limit. It is only by implicit obedience to this high command that you shall keep the gift unsullied. Endeavor but once to magnify it beyond the bounds of another unit's gift, and the endeavor shall be measured back to you in penalty. You may delegate a part of your authority to other units, to act for you as legislators, as judges, as executives, in order to keep unimpaired and to enforce individual political right. You may, for the common convenience, permit commerce and industry to be conducted by delegated units; but you must see to it that paramount to all such authority is the supreme equal political right of the individual units, the sacred thing to which all other things must be adjusted; and that every created artifice must be made to conform to this; that no one must ever in the least degree interfere with or obstruct its sanctity. These are

the inviolable conditions of your title to my gift. You cannot alienate this title, and you can only bequeath it with its inexorable conditions."

It has become the habit of some men, who have achieved commercial success upon violations of the simple principles of political liberty here indicated, to treat with indifference any reference to these simple principles. The subject of political liberty is to them an outworn platitude; the Declaration an archaism, a sounding generality that may serve well enough for a patriotic celebration, but is totally unsuited for the grave and practical affairs of the rest of the year. But, for the generation from which that Declaration sprung, it was hallowed by privations and sacrifices. Every word was vibrant with meaning, and it exalted their spirits like new wine. By the Constitution, which followed it, they gauged the affairs of their daily lives; they tested their relations to each other, and it harmonized and simplified these relations. Their delegated authorities enacted statutes, made decisions, and executed them, not only in conformity with it, but with an eye single to its preservation and effect.

And now, in view of what I have said, let us look at the Declaration of Independence and the Constitution of our country, in order to see whether we may not extract from them that precise definition which we promised ourselves in the beginning. Probably the most comprehensive sentence in the Declaration of Independence is the one beginning

“All men are created equal,”<sup>1</sup> and probably the most comprehensive one in the Constitution is that which declares that no law shall be passed in any State, and, by necessary implication, by the federation of States, that shall impair the obligation of contract. Taken together, these statements furnish the basis for a comprehensive and precise definition of modern industrial liberty. That definition may be expressed in these words:

*Industrial liberty consists in the freedom of each individual citizen, guarded by such delegated authority, contributed by each, as is necessary to preserve this individual freedom equally to each; and this liberty includes the freedom of each individual citizen to contract, and the sanctity of contract.*

The individual is thus the source of all political power. In the law of political liberty, therefore, there is a power, a right, and a duty; the power is paramount, the right and duty inseverable and fundamental. To the individual belongs the right; it is secured through the recognition by each individual of political equality, and by the consensus of individual self-restraint. The duty expressed in self-restraint makes this right a political right, equal and complete. Such a power and such a right can properly belong to no class, and can have no

<sup>1</sup> I fully realize this to be out of accord with the important distinction between political equality and the assumption of social or intellectual equality, or of any equality among the human faculties, but as I treat of this distinction more in detail in Chapter IX. I do not consider it necessary to dwell upon it here.



hereditary character, and cannot be expressed except by recognition of its equality. These are the bounds of political and industrial liberty, and they cannot be added to or diminished.

As I have already intimated, the Constitution went within one step of providing for this ultimate. Let me briefly indicate the manner in which this was done. The powers which were expressly delegated by the States to the Federal Government were all of a character which tended to support the sovereignty of each one of the States alike. Indeed this is the larger purpose of these powers. I need not recite them in detail, but will give one of them in illustration. The Federal power to regulate commerce between States tends to support the autonomy of all the States. Such delegated power, exercised within the limits of the grant, cannot have a centralizing tendency. Its influence is towards diffusion, because its essential function is to hold the States in co-equal sovereignty by an harmonious adjustment of their powers. In this view, the denial by the Federal power of any right in a State to withdraw from the associated sovereignty is not an act which implies concentration. It is the exertion of an influence for diffusion. It is in effect a denial by the holder in trust of the title-papers of the sovereignty of all the States, that there could exist in any one State the right to mar the associated sovereignty in which each State has an equal and inalienable interest. The Civil War was thought to have changed this relation. It

was believed by many that the act of war by the Federal Government against the seceding States was in itself a breach of this sovereignty,—a breaking down of the autonomy of the States. But the opposite of this has been classically illustrated by the consequences; for when after the war the Federal Government finally restored the autonomy to the Southern States, that act was unique in history, and it constituted the highest possible declaration of the principle of State sovereignty under the Constitution. Inherent, then, in this institution, made by the framers of the Constitution, there is the quality of a compact whereby power is conferred upon the federation to enable it to keep that compact inviolable, not only not to trench upon it itself, but also not to permit it to be trenched upon. The custodian of that compact is thus the holder of the scales of sovereignty. In accordance with this view, the amendments to the Constitution which have been engrafted on it since the war cannot be construed as seriously marring the autonomy of the States. Mr. Justice Miller has lately expressed himself to this effect upon these amendments. He treats the amendments as exceptions to the rule; but if the theory which I have advocated is correct, they are not so much exceptions as instances of diffused sovereignty. Nevertheless, he concludes that the sovereignty of the States is unaffected by the legislation during and since the war. He says:

“It may be considered now as settled that, with the ex-

ception of the specific provisions in them for the protection of the personal rights of the citizens and people of the United States, and the necessary restrictions upon the power of the States for that purpose, with the additions to the powers of the general government to enforce those provisions, no substantial change has been made. The necessity of the great powers conceded by the Constitution originally to the Federal Government, and the equal necessity of the autonomy of the States and their power to regulate their own domestic affairs, remain as the great features of our complex form of government.”<sup>1</sup>

Indeed the only act within my knowledge which tends seriously to impair the sovereignty of the State, by assuming for the Federal Government a new kind of sovereignty, is to be found in the decision of the Supreme Court of the United States in the case of *Juilliard vs. Greenman*, on the subject of legal tender.<sup>2</sup> This, in my opinion, as I shall hereafter endeavor to show, has done the greatest violence, not only to the sovereignty of the States, but to a fundamental individual right—the sanctity of contract.

It will thus be seen that the establishment of the inter-autonomy of the States for the preservation of liberty was, as I have said, the extent to which the framers of the Constitution went. The idea of the supremacy of individuality, as it is understood to-day, was not then realized, nor perhaps would such an idea have then been entertained. Indeed, the

<sup>1</sup> Address to the Law Alumni of Michigan University, by Mr. Justice Samuel F. Miller, of the United States Supreme Court, 1887.

<sup>2</sup> U. S. Supreme Court Reports, 110, p. 42.

distrust of a simple republican government was then more generally felt than can now be easily realized. The disbelief in the capacity of the individual was quite a common fear at the time of the formation of the Constitution. Madison, who was called "the Father of the Constitution," shared it. Washington shared it. Hamilton was possessed by it. His leanings were all in favor of a constitutional monarchy. In the Convention he says: "I acknowledge I do not think favorably of republican government. . . . Real liberty is neither found in despotism nor in the extremes of democracy, but in moderate government."<sup>1</sup> Jefferson almost alone had no sympathy with the fear, but he was absent as a representative of the government in France during the whole time of the formation of the Constitution. Nevertheless, it was largely from the fact that his confidence prevailed in the policy which followed, that the confidence in the people for self-government came at last to prevail.

I do not mean to say that no idea of individuality was entertained during the discussions that took place. The term is indeed often used, but always as implying one of a multitude, and generally in the discussion of the relation between the peoples of the States and the people of the Federal Government; never with reference to the ultimate individual right. The idea was not then entertained that in a real republic the individual unit must of necessity be the

<sup>1</sup> Yates in Elliot, I. 450.

ultimate repository of power and right. It was not fully realized that the delegation of a power from a number of units cannot take to itself any extraneous quality by the addition; that no divine right can attach to a power by delegation from human beings; that there exists in this delegated power only and simply the agglomeration of individual sovereignties; that the sole reason for being of the delegated power is to keep inviolate and separate the source of all power, which is the individual sovereignty, to preserve this foundation of power and right from the encroachment of every other individual sovereign; and that thus the delegation of all power in a republic exists solely to keep the individual sovereignties equal, and to hold them in poise, just as the secondary autonomy of the States is held in poise by the delegated power given to the Federal Government. Any idea, therefore, of the federation of the States, and of the people of the States in their collective capacity, as being secondary adjuncts for the preservation of individual sovereignty, was not conceived. Nevertheless, the Constitution as it was made is in harmony with this view of individual sovereignty; and the sovereignty of the States constitutes the incidental machinery for the support of the sovereignty of the individual. This individual sovereignty thus exists as a necessity, as an essential to the complete idea of republicanism, for the reason that there is not and cannot be in any republic any right to govern on account of

hereditary privilege or class distinction. All other rights to govern being thus eliminated, there is left only the ultimate individual autonomy—the equal repository of power—the source from which all power in a republic must come; and this being the ultimate, it is the most important. It is for the preservation of this that all institutions of government in a republic must be erected.

The reluctance to accept this conclusion with its full import, or rather the slowness by which we are approaching this larger conception of political liberty, is due partly to the difficulty which we have in divesting our minds of the notion that there must be, somewhere, some who are created to rule others by an hereditary or other right, and partly to the fears which we entertain of the capacity of the individual for self-government—fears which are inspired by the precedent instability of ancient democracies and by a distrust born of the examples of individuality which the continent of Europe furnishes, and which express themselves in socialism, communism, and nihilism. But the idea of a class or hereditary government is a figment of the divine right of kings, since there is no point between divine right and an unqualified recognition of the individual, that has not some degree of a divine or some other mysterious assumption in it. The instability of the democracies of history affords no ground for such conclusion, since there is not the least analogy between the ancient and modern types. The former is based

upon militancy; the latter is based upon industrialism; and in the progress of civilization the industrial conditions are overcoming the militant. They are essentially opposite and can afford no ground for comparison. The license mistaken for liberty in continental Europe, arises from the important fact that the individual fibre, habits, and training of the continental unit are entirely different from those of the Anglo-Saxon, with which we have to deal. And beside all this, if we are to have a republic, we cannot have a class government, since that is essentially other than a republic. In a fully developed republic, therefore, we must have the individual as paramount, because there is no place else for the ultimate power to rest. Although the fathers of the republic did not, as I have said, entirely realize, and therefore did not specifically provide for this fuller development, yet the complex system which they did devise secures diffusion of power by the sovereignty of the States, and constitutes a system which is entirely in accordance with the later development, and sufficient to support it.

To recapitulate briefly. There exists this difference between the liberty indicated by the Declaration of Independence and the Constitution, and that political liberty which is here defined. In the former, political liberty is conceived as belonging to the people in mass; the latter liberty rests upon the individual entity. Individual political liberty depends essentially upon the duty which lies behind

it—the duty of individual self-restraint and the recognition of the equal political right of every other individual,—and it is to secure the performance of this duty that the delegated authority is created. The Declaration sets forth that all men are equal. The ultimate definition above given indicates that each individual has all the essentials of political sovereignty in himself, and that upon the preservation of the integrity of this sovereignty the preservation of all political equality depends. In this view, the guard to political liberty, by the contribution to delegated authority, is not a limitation, but an amplification. The continuance of American freedom depends upon the character and vitality of the Anglo-Saxon unit and the power of the aggregate of Anglo-Saxon units to adapt each new physical force, as it comes into use, and also to assimilate all other units which come in contact with it, for the highest preservation of the political and industrial vitality of the individual unit.

In view of the tendency of the mechanical power of modern civilization, and of the corporate power, towards the creation of class power and towards centralization; in view also of the reflex tendencies arising from these, towards socialism, agrarianism, communism—all of which are interferences with the sanctity of individual political liberty and with those diffused incentives upon which this sanctity and liberty depend,—it becomes necessary that the true bounds of industrial liberty be clearly understood.



Under the law of industrial liberty, as I have heretofore defined it, these incentives for the acquisition of property and the security of its possession will be diffused, and the sanctity of contract will be established for every delegation or aggregation of individuals. With the principle thus established, every corporation or association, whether political or commercial, which is public or *quasi*-public, will exist for service to every individual by an equal rule; and under this law, in its relation to individual contract, every individual may contract with every other individual who is willing to contract for a lawful purpose, without any restraint whatever; and all contracts made in accordance with this principle shall be binding. Thus, under the operation of this law, it will be found that such interference with contract as railway discrimination cannot exist; nor can such other interference with private contract between employer and employed as the Knights of Labor propose to establish be tolerated. I will illustrate this more fully hereafter.

The definition is of universal application. It furnishes the archetype of industrial liberty. It affords a formula for every case that any complication of circumstances can produce—a standard whereby we may exactly determine any variation from its limits.

It is undoubtedly true that the highest degree of individual political liberty thus defined is not only not now realized, but that it is far from present

realization. Even the Anglo-Saxon unit, which is perhaps the best, is, as a matter of fact, not yet impressed with a requisite sense of its importance and of the self-restraint that is needed to secure the accomplishment of any thing like this degree of freedom. Under the most favorable circumstances a long time will perhaps elapse before we can enjoy such an equilibrium. At present we have the expression of this individuality by means of the majority; but a majority is by no means a perfect expression of the consensus of the individual factors. It may be, and sometimes is, tyrannical; as negligent of the individual right or of the minority as an autocrat may be, although not as likely to be so constant, since the shifting element which moves between party and party operates wholesomely against the continuance of extremes. But a majority, at best an uncertain power, is under present conditions the only vehicle we have. While some efforts have been made and are making to improve upon its office, these efforts have as yet not been signally successful. When I note the sum of all the tendencies of civilization, I believe there is reason for hope in this direction—for hope that we are gradually but slowly moving, toward the realization of larger political liberty. If we can ever arrive at the stage where the average man will be a man who clearly sees that through indirect as well as direct consequences his own largest social, intellectual, physical, and moral power and right rest upon the recognition of precisely the same

things in others; if it is not too much to hope that the growth of intelligence will at last bear the majority to this point, then we may entertain the confidence of its ultimate accomplishment. The typical man then, representing the majority, will see in the largest political freedom—the equal freedom—a larger right to himself in justice than in aggression, a more secure tenure in the exact recognition of the law of tenure than in its violation, and vested interests standing upon the permanent basis of right. I conceive this to be a possibility lying somewhere on the line of future civilization. Between our present state and its accomplishment there is the necessity, doubtless, of a large increase in the average of human intelligence, and there will be, in our progress to it, lapses as well as advances. In the past eighteen hundred years, taking all in all, there has been a growth, gradual it is true, but with considerable persistency, and a growth in this direction. And it is this fact that affords substantial reason for the continuance of this growth until we shall reach the point upon the line where this consummation lies. But however this may be, all that we need ask for the purpose of the present examination is whether the definition which I have given is true. If it be true, if it sets forth a sound principle, then we may make it such a standard as I have indicated for measuring not only those departures from the principles which exist in the industrial conditions about us, but also for measuring the qualities of all the

reforms which are proposed concerning those conditions; and when we use it for reducing to simplicity those confusions which come from the too close consideration of multiplied and complex results, we will come to see with more clearness the force and application of those "middle principles" which underlie the whole subject.

## CHAPTER II

### THE INFLUENCE OF THE DISCOVERY OF STEAM AND THE MECHANICAL INVENTIONS UPON INDUSTRY

EDMUND BURKE, in 1790, pronounced a eulogy upon the age of chivalry in these words :

“ The age of chivalry is gone ; that of sophisters, economists, and calculators has succeeded, and the glory of Europe is extinguished forever. Never, never more shall we behold that generous loyalty to rank and sex, that proud submission, that dignified obedience, that subordination of heart which kept alive, even in servitude itself, the spirit of exalted freedom.”<sup>1</sup>

In a vein just the opposite of that in which these sentiments were conceived, Burke had long before held up the prime necessity of compliance with the order of nature as being paramount, in order to sustain

“ those unalterable relations which Providence has ordained that every thing should bear to every other. These relations, which are truth itself, the foundation of virtue, and consequently the only measures of happiness, should be likewise the only measures by which we should direct our reasoning. To these we should conform in good

<sup>1</sup> “ Reflections on the Revolution in France.” London, 1790, p. 113.

earnest, and not think to force nature, and the whole order of her system, by a compliance with our pride and folly, to conform to our artificial regulations. It is by a conformity to this method we owe the discovery of the few truths we know, and the little liberty and rational happiness we enjoy.”<sup>1</sup>

I place these extracts side by side in contrast, in order to show how far the foremost statesman of his age was from realizing the immense transitions which were taking place about him, and from realizing the necessity of more than ever carefully studying and conforming, “in good earnest,” to the necessities of the new order of things thus inaugurated by industrial progress. Coleridge says of Burke: “He possessed and sedulously sharpened that eye which sees all things, actions, and events in relation to the laws which determine their existence and circumscribe their possibility. He referred habitually to principles, and was a scientific statesman.” The condition of affairs must have been peculiar, without precedent, which could cause such a man to lose his clearer vision of the underlying principles of his surroundings, to indulge in sentimental regrets for the past, and to oppose all progress. And so, indeed, they were. The French Revolution, with all its enormities, stood prominently before the eyes of all the English statesmen; and not only gave the severest shock to the sentiments which were born of the romance period, but threatened the foundations

<sup>1</sup> Burke's Works. Boston, 1839. Vol. I., p. 9. “Vindication of Natural Society.”

of all human government. These statesmen became more than profoundly conservative, and sternly set their faces against every innovation. To them it was conclusive that, because the spirit of change had gone so far and so violently in France, it was therefore not to be allowed to take its first step in England. To them the only safety lay in the sanctions of the past. But the "stream of tendency" had set unalterably against chivalry and in favor of industry, and was not therefore to be turned. The doom of mediæval conditions, although not yet accomplished, was sealed. Chivalry and knighthood had nothing more to confer upon mankind, nor could the new spirit of the age accept from them instruction regarding the industrial lessons of life, any more than that spirit could revive within itself a faith in witchcraft or in the divine right of kings. Whatever virtues may be conceded to the chivalric period, such as the "generous loyalty of rank and sex," the "proud submission," and the "dignified obedience," it could not be claimed that the "spirit of exalted freedom" was any longer to be kept alive "in servitude." Of the laws of commercial obligation and exact justice, the cavalier knew little and cared less. As chivalry impressed upon its own age the idea that the highest sentiments of honor were compatible with the lowest sense of commercial honesty, it could confer nothing upon the subject of industrial law which could have the least value for the incoming age.

Nevertheless, although the decisive change was thus in progress, it was more than half a century before this time that the contest had really begun between the industrial and the landed interest. The Landed Property Qualification Act was passed in 1712. It was intended to assert the principle of the larger right of the landholder in the management of the government. This act was elicited by the manifest fact that, in the reign of Queen Anne, already the moneyed interest was tending to supersede the landed interest. "Power," as Swift said, "which, according to an old maxim, was used to follow land, is now gone over to money."<sup>1</sup> It was a fundamental maxim of the Tory party at that time, that "law in a free country is, or ought to be, the determination of a majority of those who have property in land"<sup>2</sup>; that "the right strength of this kingdom depends upon the land, which is infinitely superior, and ought much more to be regarded, than our concerns in trade."<sup>2</sup> It has been truly said of England that "the country represents all the elements of conservatism and tradition, whilst with the commercial centres were all the elements of progress."<sup>3</sup> But England as a "pasture ground" was no more. The new England was thenceforth to be a land of manufacture and a centre of foreign commerce. The inventions of spinning and weaving, the discoveries of coal and iron in the north, which con-

<sup>1</sup> "England in the Eighteenth Century," W. E. H. Lecky, New York, 1878, vol. I. p. 217.

<sup>2</sup> *Id.*, p. 217.

<sup>3</sup> *Id.*, p. 202.



verted the most sterile parts of the country into the richest, were soon thereafter to be supplemented by the discovery of steam, which was to promote and enlarge the industrial change until it should become the greatest change in all history.

No such social cataclysm, however, as that which the later inventions have brought about, was or could have been dreamed of then. This in the order of things was to come later. Indeed, although in the progress of Western civilization this industrial spirit had steadily gained ground in its contest with the military spirit, the contest proceeded at first by very gradual stages, so that the achievements were easily appropriated by civilization. The first great decisive act of legislation which marked the new era was the repeal of the Corn Laws. Even when the inventions born of steam and electricity, and the other immediate *sequelæ*, were "marshalled in the wage" to make the victory permanent, the progress continued deliberate for a long time after; and it is only within the past twenty-five years that the supremacy of industrial methods has with a certain suddenness become overwhelming. While the attention of mankind was closely directed to the products of steam, especially in the development of railway locomotion, there was a signal failure to appreciate two features which are now becoming the most prominent of the whole development. The first of these is the anomalous relationship of these activities to the State, which was scarcely at first even fore-

shadowed by thinkers and observers; and the second, the inadequate conception of the magnitude of the effects of steam upon all the conditions of life. The new material powers, as if conscious, overleaped all bounds. In one point of view the victorious industry preserves some of the methods of the old militant force, since some of the means by which it exerts itself are of the militant kind. It is as if a victorious army, having overcome a tyrant in behalf of freedom, should refuse thereafter to submit to the law of freedom, and become a tyrant itself. Modern invention has thus, at first view, almost the aspect of a paradox. It is the most potent engine for the progress of civilization, and, at the same time, the most severe strain upon the high sanctities of that civilization. It advances industrial growth and the material comforts of mankind, while it insidiously trespasses upon the bounds of political right. It increases the means of subsistence, and mechanically diffuses these means; but the processes by which it does this tend toward the centralization of political power and against the diffusion of political liberty.

The application of steam and electricity have thus lately assumed such stupendous proportions, and such magnificent variety, and have brought with them such vast material convenience, that they have tended to lead captive the judgment and bewilder the imagination. To many minds it seems as if those established principles of industry and economics which have proven sufficient for the simpler re-

lations of life, as they have hitherto existed, have become altogether inadequate for the regulation of the new and complex conditions. Even some of our reformers fall under the glamour of these immediate results. So much is so readily accomplished, although in ignorance and defiance of economic law, that they are prone to accept the fact of easy accomplishment as a warrant for the defiance. There are those who honestly believe that the natural laws of competition are no longer in existence, because railway managers have succeeded in disregarding them; as when, for instance, these managers engage in destructive competition between commercial centres, persisting in this competition even to the loss of all profit, and afterwards recouping their losses by the use of their power in exacting tribute from their local patrons. But those who reason in this way need not go far in their process of ratiocination to conclude that all natural law is without sanction. It does not always occur to them that, as in the instance which I have given, the act which overcomes the principle of competition is an artificial act—an interference with a natural law,—and being so, while it may obstruct it, it cannot annihilate the law. Wholesome competition remains the law of normal trade, notwithstanding such wholesale efforts at ignoring it. The railway manager is not endowed with supernatural power. He cannot make a thousand miles less than one hundred because he persists in charging less for what is called the “long haul” than for

the "short haul." But the theorist, without reasoning, assumes that he can; and it is from this class, by no means a small one, that false theory receives both construction and recognition.

The universality of the influence of steam and electricity upon international relations is not the least instructive feature of its development. When we consider the laborious care with which the English estate and its noble appendages have been guarded by rigid feudal tenure, through ages, against the encroachments of time, the vagaries of youth, and the assaults of discontent, it becomes astonishing to note how these sanctions have been influenced within the last ten years; how the indirect effects, coming from causes operating at great distances, are gradually tending to level the class distinctions, to modify the entailments and perpetuities of the Common Law, and how they are undermining all the old traditions. The low-priced products of the western prairies of America are wearing away, as inexorably as geological erosions, the incomes of the English landlord's estate. The more intimate international relation, proceeding from more intimate personal intercourse, promotes the spread of democratic ideas among the people. The Irish question, involving an attack upon primogeniture, hereditary holding, absenteeism, and all the accompaniments of class interests, has thus its true genesis in steam and electricity. Nevertheless, the progress of this industry has been more deliberate in Europe than in America. This has

been largely due to the strength of tradition and the countervailing force of hereditary interests. But the greater activity in this country comes not alone from the comparative freedom from these restraints, but also from the larger stimulus which has been given in America by the eagerness of the citizens to develop a new country, by the disposition of the government to extend public aid and credit in furtherance of this object, and by the favorable conditions of the country, such as the fertility of the prairies, the vast extent of virgin soil, and the resources coming from variety of climate.

In thus considering the difference in the influences of modern industry upon different political institutions, we observe something like an anomaly. In England the expansion of manufacturing energy is tending manifestly towards democratic results; whilst in America, where democracy is already assumed to have a fuller form under law, the tendency hitherto is rather towards an interference with democratic sanctions. If the freedom which the fundamental law of America aims to establish had been rigorously guarded from the beginning, with a vivid jealousy to protect this freedom above all things by the strict adjustment of all industries to the institutions, whilst, doubtless, the eagerness for rapid material advancement might not have been so largely satisfied, the country would have been enabled more fully to appropriate for the furthering of equal political right all the great uses which steam and electricity have thrown upon us.

Thus, whilst the results would have been more deliberate, they certainly would have been more normal and more permanent. It is from the very carelessness with which our freedom is held, coupled with our great anxiety for rapid physical advancement, that monopolies and methods at variance with the democratic idea have found their largest opportunity with us. The too easy generosity with which vast domains of public land have been conferred has produced a concentration of corporate power thoroughly hostile to the furtherance of political freedom. Nevertheless, as I will presently endeavor to show, this condition is but a transitional one, and in the more progressive stages the guards of liberty are yet likely to be sufficient to bring all the elements of modern civilization under control.

Statistics of commercial, material, and mechanical growth abound. They come upon us at every turn, and seem to be occupying a large part of the attention of the world. Hundreds, probably thousands, of volumes have been written upon the subject of steam and its material advantages, setting forth how it has enlarged our medium of exchange, our means of subsistence, our intercommunication; how it has redistributed populations and thrown all the activities into newer, larger, and constantly changing relations with each other. The progress of railway development, the immense revenues from industry, and the extent of new territory, developing the population of new areas, constitute one of the chief

topics of discussion and the wonderment of the time. They astonish us by their magnitude, and confuse us by their variety and complexity. But these statistics too often only express the quantity, and distract our attention from the quality and the tendency of the phenomena. A not inconsiderable part of our statistical literature is devoted to exalting our national activity and inflating our national vanity. Books with this view are eagerly sought and generally read; and the supply of them seems to be less than the demand, for their number is constantly increasing. Their authors generally set forth with grandiloquent rhetoric the immense progress of America under democracy. They confuse political equality with intellectual and social equality. Their views of patriotism are satisfied by the indiscriminate abuse of every other country and form of government; their views of progress, by mere physical development. Statistics of magnitudes are marshalled in abundance to prove all kinds of merit, and are especially paraded as proofs of the growth of political virtue. But vast accumulation is not necessarily national well-being, nor indeed even wholesome wealth. The normal commonwealth best lives by diffusion of activity and wealth; by the security with which this diffusion is maintained, and by the sense of freedom and honesty by which it is governed. A slave may have ten thousand dollars in his pocket, and a freeman may have nothing; but the condition of the freeman is the better of the two.

The highest value of the money to the slave is its power to purchase his freedom. If it cannot do this, both man and money belong to a master. It is the relation of the individual to the means which constitutes true national prosperity. Wealth is only true wealth when it furnishes this well-being of society, when it tends towards freedom and manhood. This rule lies deeper than all the rules of barter or the addition of sums. When Gladstone and Herbert Spencer indicate for us a favorable future, based only upon our present energy, we must not be too ready to draw the inference from their courteous prophecies, that all the methods which we have adopted in promoting our industries are virtuous. We permit our national vanity to be stimulated by these plausible statistics and prophetic outgivings. What we need is at times to cease admiring ourselves and to fall into a more careful examination of our ways.

It has been said that "the statistician who knows nothing but statistics does not know them." The real, or at least the chief, value of figures is to illustrate principles. He has an improper perception of their value who can fall into ecstasies over the statement that a ton of wheat may now be carried for half a cent per mile, while the same service cost one dollar before steam was introduced, and who can at the same time ignore the underlying and more important fact that an enormous evil has arisen from this difference by reason of the misuse of the power which



controls the new convenience. A true regard for values would teach him to realize that the greatest conveniences may be bought too dearly if freedom be the price to be paid for them. The statistician tells us that the agricultural labor of one man for one year is equal to the product of 5,500 bushels of wheat, and that the labor of three men for one year will produce subsistence for one thousand other men; and another statistician tells us that a railway magnate has amassed within the past twenty years more than \$300,000,000. The facts set forth in these two statements have doubtless an intimate relation to each other. The first figures express a redundancy of food products which the steam and machinery have given to mankind, and the second a grossly unequal division of the results of activity. The farmer's large product is rendered far less valuable to him, and the consumer's cost is rendered far higher to him, because the intermediary transporter, having laid two lines of rail and obtained the public franchise, is exerting the power of that franchise in taking undue values out of the product, both from the producer and the consumer. What should concern us, in such a case, is the underlying principle; to learn, if we can, what ultimate law is violated, whereby this immense disproportion of power and result is obtained. There are reformers who propose that the accumulations of corporate magnates shall be directly attacked, and limited by law. But this is an unconscious concession that the sanctities of civ-

ilization (which should be equal, as nearly as is possible, to incentive) may be violated in order to produce a reform. The granting to individual corporations of powers which belong to the public, without limiting those powers by such careful restrictions as will insure the equal benefit of society; the permission given by the public for the exercise of these powers in secret and by artificial manipulation, thus enabling their possessors to over-ride public and individual rights—these seem to be the primal causes of the evil; and the relief to society from the untoward results would seem to lie in a careful correction of these causes. It is with this phase of the subject, rather than with the statistics directly, that I have to deal; and the only use which statistics can afford will be to illustrate the force of the true principle. The disposition to take results for causes, in the study of political and economic questions, is by no means uncommon, and it is a course which is fruitful of many confusions.

“In the investigations undertaken by committees of Congress in the United States, the causes assigned by various witnesses who testified before them were comprised under no less than one hundred and eighty heads; and a most universal diversity of opinion was manifested by the witnesses who appeared before the Royal British Commission.”<sup>1</sup>

Among the special causes to which the majority of the Commission itself attached a degree of im-

<sup>1</sup> “Economic Disturbances Since 1873.” David A. Wells, *Pop. Science Monthly*, July, 1877, p. 301.

portance was this: "Changes in the distribution of wealth." Now changes in the distribution of wealth are results rather than causes; they express existing evils, but they do not themselves fully account for the origin of those evils. There are evil incidents which come directly from them, and it is only in this sense that we call them causes. When we perceive that back of them are instances bringing them into being, we come to realize that they are brought into being by a condition of things which lies behind them, and thus in a truer sense they are results. They are causes, it is true, of what immediately follows; but they are also results of what immediately preceded them. Now the removal of such an intermediate condition, whether we call it cause or result, will not remove the underlying evil of the cause. An arbitrary limitation, in given cases, of accumulations, or an arbitrary division of them by law, might temporarily discourage the accumulator; but if the processes by which these accumulations were made are unrestricted, either he or some other will repeat them. No hope of permanent remedy can come from merely removing a result, when the creative cause of that result is left undisturbed. It is only by working back slowly from ultimate results, by passing the intermediate cause—which, as we have seen, is also the intermediate result,—in order to arrive at the primal and fundamental cause, that we shall be enabled to find the real source of the evil to be corrected.

Legislative commissions have been instituted within the past few years in almost every country of Western civilization, and voluminous reports have been made; "causes" that were not causes have been almost universally assigned; results have been mistaken for causes, and causes for results, and results and intermediate causes have been dealt with indiscriminately, as if they were primal causes.

In consequence of this confusion there has been but little progress toward solution of the economic problems before us. The British Commission, to which we have referred, has attributed the existing evils to the changes in the distribution of wealth; to overproduction; to impairment of agricultural industry; to foreign tariff; and to the working of the British Limited Liability Act. Each one of these "causes" when analyzed, will be found to be a result that lies a great way from actual causes, and serves only to complicate the inquiry; and thus it is largely to the disposition to treat these results as causes that the legislative reformer fails in his efforts at reform. In contemplating the multiplicity and complexity of the results of human activity, the mind is apt to become absorbed with them, and fails to perceive their relation to the fundamental laws. As I have said, they confound us by their multitude. If we call ourselves back to the consideration of these laws, as applicable to these activities, we shall greatly simplify the problem; and we shall thus be enabled to realize that, in the immense

energies called into being by steam and electricity, there are two primary things which ought first to be considered, viz.: the methods which have been and are being adopted in applying these energies to modern civilization and the relations which these methods bear to the fundamental natural law. Any remedy for the re-establishment of the normal conditions of society must be founded upon a knowledge of these methods and these relations.

Looking at modern industry in the light of general results, we find it under the control of artificial organizations, a control which is exerted in disregard of individual political and industrial right. Large appropriations of public lands and assistance by means of public credit have been obtained from a government which has been too easily influenced. While human energy has been stimulated by the introduction of steam and machinery, a large part of the fruit of this energy has not only been appropriated by the managers of these artificial organizations, but through the means employed in this appropriation they have violated the fundamental principles of industrial liberty.

If, in the multitude of riches coming from mechanical advancement, somewhat more sifts down to the laborer than did formerly; if his physical lot is better than it was, this of itself will not be a sufficient answer to the demand for right. His sense of justice is outraged by the fact that artificial and arbitrary conditions exist, whereby the great bounty of

nature is so unequally distributed that he is made a thrall. Mr. Giffen for England, and Mr. Atkinson for America, have shown from statistics that the condition of the workingman in the past fifty years has on the whole greatly improved, so far as the supply to his physical wants is concerned. But it is not his absolute present condition, so much as a comparison of that condition or a contrast of it with the conditions around him, that comes into question. In other words, it is the increased disparity which constitutes his ground for discontent. Indeed, it is easy to understand that the bettered physical condition of the laboring man may of itself be a reason for his discontent, when we consider that this better condition has brought with it a better discerning faculty, a better power for comparing and contrasting conditions, and an improved capacity for reasoning upon differences. Hopelessness is born of this sense of injustice. His incentive is disturbed. He does not compare his present with the past of the laboring classes. He measures it by existing surrounding conditions; and it matters little to him that he is better fed than formerly, or better clad, so long as the conditions upon which this better food and clothing are obtained remain arbitrary and unjust. It is this that constitutes his instinctive discontent.

The best securities of civilization, for the accumulator, as well as for the oppressed artisan, rest at last upon the condition of equalized individual se-

curity. And wherever individual right is a principle of the State, property cannot be securely held unless there is a uniform recognition of the right of possession—a general right of contract—an equality of right, as sacred to the small owner as to the large,—a general sense of justice—a condition where every man may have a reasonable prospect of being an owner by the exercise of care, thrift, and diligence. And thus an unequal distribution of the great incentives of life renders the holder of those incentives less secure, and works to the detriment of all. It is this disturbance of the equilibrium of the body politic which furnishes at once the exhaustless and restless energy of the steam interest, and the motiveless inaction of the tramp; the thrift and confidence of the class which in one way or another is artificially protected and stimulated, and the hopelessness of the unorganized, unguarded, and unprotected individual. The individual has this instinctive sense of wrong; and it is because he fails to realize the underlying causes of its existence that his resentment to the wrong expresses itself in something like a direct retort, in violent acts and false theories, and in the formation of such organizations as the Knights of Labor and the Socialists. We may call these injudicious and foolish ways; but they grow out of other injudicious and foolish ways; they are the product of wrongs which lie behind them; they are in the logic of events. The methods of reform which are employed belong to the category of evils which

it is intended to reform, and proceed in unconscious imitation of the very processes which constitute the evil. While the *lex talionis* is not a law of civilization, but of barbarism, the resort to it illustrates the fact that there are barbaric methods among us which have brought it into exercise. One such method generates another. Thus when a corporate power undertakes to over-ride the sanctity of contract, and when Knights of Labor undertake to over-ride this sanctity, the industrial law becomes supplanted by military force, and civilization steps just so far backward. Nevertheless, occurrences like these serve the important function of attracting more general attention to the existence of the disease in the body politic, through the careful study of which the truer means of correction are thus more likely to be at last developed.

Another question connected with steam and machinery, arising from the redundance of the means of subsistence which they create, although an important one, is not often discussed. This is the law of population—the tendency of population to grow more rapidly than the means of subsistence. The consideration of the distribution of products for human consumption is of itself but a partial and inadequate estimate of the whole economic relation. Since this kind of distribution is but a meting out of that which is consumed and appropriated by the race, it suggests, as correlatives, another distribution, or rather a series of distributions, concerning the race itself.



In other words, on one side there is an estimate of the qualities and quantities of the thing consumed and their adaptation to the consumer; and, upon the other side, there is the necessary estimate of quantity and quality of the thing consuming the product, and the adaptation of the consumer to the product. Therefore, comprehended in the whole question of distribution, there must be considered the distribution of the supply of the product as it affects the distribution of the supply or increase of the race. In the distribution of the supply of the race there is involved the distribution of the sexes, the distribution of human faculty and quality, and the tendency towards the increase of the race.

The evils which arise from the pressure of population upon the means of subsistence are, however, clearly not those which oppress the human race to-day. It is by reason of the redundancy of the means of subsistence that to many these particular evils never seemed more remote than they do now. Indeed, many of the evils which are peculiar to to-day arise out of the very opposite of those conditions which are contemplated by the theory of Malthus. Besides the circumstance that they do not appear at present to be threatening, there is a sentimental reluctance to consider them, as being repugnant to our ideas of beneficence. Nevertheless, if they be true, neither the assumed remoteness of the consequences nor an ideal repugnance ought to prevent consideration of them as factors in the great problem.

A cyclone is not a beneficence, but it is a fact which must be taken into account in the consideration of phenomena. When Darwin, by his generalizations, established the fact that proliferation of animal life has its limit only in necessity, this law of population became a central fact of biological science. Happily, it undergoes many important modifications in its application to human life. As Bonar says:

“If the fear of starvation, the most earthly and least intellectual of all motives, is needed to force us to work at first, it need not therefore be necessary ever afterwards. Within civilized countries, in proportion to their civilization, the struggle in the lowest stages is abolished; the weakest are often saved and the lowest raised in spite of their unfitness.”<sup>1</sup>

In this view man is not an animal; he is a citizen, and population is checked, not only by these miseries and the fear of them, but by all the mixed motives of human society. In the redundancy of the means of subsistence which now prevail, may we not therefore come to find an intellectual improvement of the whole race, and therefore a permanent modification of the ratios heretofore existing? It may be that through the employment of machinery to lighten the general burden of labor there will result a reduction of this ratio; or it may be that from the combined resources of modern industry there will come a quickening of the faculties that will tend to

<sup>1</sup> “Malthus and His Work,” by James Bonar, London, 1885, p. 46.

repress excessive increase. Nevertheless, the main features of the law, as applicable to the human race, remain. We must therefore recognize the present ratio of excessive supply of subsistence as more or less transient. There are multiplying evidences that what has been called "World-Crowding"<sup>1</sup> is progressing at an unprecedented rate. Steam, whilst it has for a time inverted the old ratio between fecundity and subsistence, has by so doing only served to stimulate to a greater degree the increase of population. The mouths are coming like germs to absorb the excess. At some time the forces of the means of subsistence and the growth of population will become equal in the race. Whilst, when this occurs, the influence of intellectual advancement may, as I have said, moderate the struggle, nevertheless the struggle in some degree or other must come, and whether it be fierce or mild, of one thing we may be assured, that the rapidity of the present progress of population of America, both by birth and immigration, is bringing upon us each year a severer requirement from republican institutions. The problem to the Anglo-Saxon unit is yearly growing more complex. The power of absorbing, appropriating, and assimilating the hundred millions of people which this land will have within twenty years, must of necessity be far more difficult of accomplishment

<sup>1</sup> "World-Crowding," an address by Robert Giffen, President of the London Statistical Society; "Social Problems," edited by Titus Munson Coan, N. Y., 1883.

than the power of assimilating the existing population. There is an imminent necessity, therefore, for this reason as well as for many others, of applying our sanctions, of examining our fundamental compact, of looking into the principles upon which our government rests, and of seeing that the functions of that government are properly performed, and thus preparing for these tests which are coming with the certainty of destiny. It is manifest that individuality must gain in vitality in order to meet the requirement.

The tendency is common to assume existing general conditions to be more permanent than they really are. We see movement in detail, but fancy the mass motionless. The sum of things seems permanent by its very magnitude. As we do not readily see the slow, underlying movement, we infer a stationary condition. Nor is it by the comparison of one year with another that we can properly learn the larger character of progress. The immediate consequences too closely follow the activities to permit such a comparison. It is only when we can stand, as it were, at some distance from the acts, that we can obtain that larger conception which will enable us to appreciate the larger relation of things and the progress which belongs to them. But every thing in its progress gathers new influence to modify and change pre-existing facts. Thus the power of steam, regarded for a long time as an unqualified convenience, is gradually beginning to be

associated, in the public mind, with the incidental wrongs of its management, and this tends to awaken the underlying intellectual force, the individual sense. We begin to learn that energy has been generated more rapidly than it has been appropriated, and as we realize this, the formative character of this great factor, hitherto unperceived, becomes apparent. The mileage of railroads in America has grown at an immense rate in the past twenty years, but it is not at all likely that it will continue in the same ratio. In twenty years from now we shall have nearly twice our population, but it is not at all probable that we shall have twice the mileage of railways. We are therefore arriving at a stage where the ratio of building will be changed; where there will be a less proportion of miles of railway to the inhabitant than we have now. With this change there must also come a change in the relation which the railways occupy to the public. The railways are accomplished facts; and as we gradually come to accustom ourselves to the conveniences which they have brought, and to feel the pressure of some of the arbitrary exactions which have been made incident to these conveniences, we may expect the awakened community to study with more intelligence those underlying laws of industry and economy, and through this study to readjust the artificial conditions to nature; and thus to marshal into service this artificial force as a handmaid to the command of the individual force.

The license which the railway organizer has enjoyed has in part come from the desire of the public to have railways. The world having acquired railways, the license will thus be likely to be brought within more effectual guards. De Tocqueville, in his last important work, notices how much more the Frenchmen of the present day resemble one another than did those of the last generation. But it seems to me that, in consideration of the formative character of the steam factor in our civilization, this tendency towards sameness must be regarded as more or less transient,—as an influence which will receive its check in the revival of individuality, stimulated into greater activity by the very repression.<sup>1</sup> Until lately, as I have indicated above, there has been no systematic legislation towards the restraint of the methods by which our material development has been acquired. On the contrary, the legislation has all tended to stimulate those artificial methods. But we have at length created the first act of tentative legislation in the opposite direction, and this has been received with so much favor that there is reason to believe that it is but the beginning of a systematic process.

The formative character of modern invention in its relation to civilization may be illustrated by the invention of gunpowder. At first, it was a merely destructive agent. Gradually, however, subdued under the conditions of growing civiliza-

<sup>1</sup> Mill on "Liberty," New York, 1879, 130.

tion, it widened the division between militant and industrial life. It brought the professional soldier into being, and thus it became possible for industry to be pursued, not as an incident of military occupation, or as secondary to it, but entirely separate from it, and therefore destined gradually to grow superior to it. From this the militant conditions became at length the servant of industry, and war became the preserver of peace. Similarly, we may expect that steam, first interfering, as I have shown, with industrial law, in calling into being arbitrary methods, will, as its industrial conditions become better understood, fall into its place as the promoter of liberty, as well as of civilization. Instead of being an interferer with it as it now is, it will become one of the strongest means for its enforcement.

Viewing the influence of the steam power upon industrial right for the past thirty or forty years, it presents the aspect of a huge task-master standing between the producing mass of mankind and the consuming mass. On the one hand it opens up new territories, sends its servants into them, and stimulates them to production; and on the other it delivers the means of subsistence in enlarged abundance, and stimulates the consumer to an increase of population. While it thus carries the product from one to another, it appropriates to itself all of the value that can be taken out of that product, to enable it further to enlarge its power and make it lasting. It is manifest that the physical re-

sources of the world have their necessary limitations. There is the limitation by reason of the area itself, and therefore, in the occupation of territory and enlarging of production there must be a time when the area will be occupied and production will be equalled by the growth of population ; when the supply of the means of subsistence will come to be absorbed. If the tendencies of ratio be as Malthus has given them—the general tendency of the increase of population greater than the general tendency of the increase of the means of subsistence—then, notwithstanding the present interruption of this ratio, that time may not be very far remote. Can it be possible that this increase of production, thus over-stimulating the increase of population, is only to bring us again to face the crisis of famine and death, and in a more intense degree? Is this the wall of adamant to which our civilization is marching? Shall we prove at last that life is an “insatiate cormorant” which, “consuming means, soon preys upon itself”? If the biological law which has been so clearly demonstrated by Darwin’s generalization be in all its sequences applicable to the human race, then this must be the inevitable result. If it is inapplicable in any degree to the human race, it must be by reason of some higher mental, or lower physical, quality belonging to that race. In other words, it must result from the progressive physical incapacity for increase, or from some intellectual development which shall constitute what Malthus



calls "a moral restraint upon increase." A physical incapacity would be totally inconsonant with the progress of civilization. There is then left nothing but the elevation of the individual into a condition of moral self-restraint, so that if the tendency of human life be forward in the line of civilization, it points definitely to the accomplishment of this end; and, as this is also the end upon which ultimate individual freedom fundamentally stands, it of necessity points to a higher democracy. The same prudence of nature which permits the world to preserve itself permits it also to govern itself. It is thus that the tendency towards democracy, like the tendency towards self-preservation, has its being in the sum of all tendencies; and thus the paradox which I indicated at the beginning of this chapter may be explained. The steam factor proves formative. At first hostile in its methods to the higher qualities of that civilization whose material advancement it furnishes, it afterwards becomes modified by the quiet underlying persistent force of the individual sense. The tendencies of civilization have their largest expression in the central principle of evolution; since all civilization is marked by the two qualities of progress, and progress in a fixed direction; and the sum of phenomena of existence shows this progress, as Mr. Spencer has pointed out, to be from the indefinite and homogeneous, through the various stages of differentiation, ever enlarging, toward the heterogeneous and the definite. In other words, it is from

the homogeneity of mankind—the likeness of one to the other—the lesser degree of individuality—to the heterogeneity of mankind, which expresses the greater unlikeness of the one to the other, and the largest type of individuality, and thus the largest play of nature's forces through individual life.

The question then, broadly stated, is this : has steam—this unprecedented element of strength—come to rule and finally defeat civilization, or to be ruled by it? Must human liberty be subjected to it, or must it be made subject to human liberty? If it is to create a loss of individuality, to impel the race towards a homogeneous condition, then its civilizing tendency in the largest sense does not and cannot exist. If in furnishing convenience it permanently represses the individual instinct, it must prove more powerful than political liberty, and can bring only slavery. If, in a word, it be not appropriated by liberty, however beneficent it may be in some respects, it must engulf it. But such a conclusion does not accord with the sum of the tendencies of the world's growth from the beginning. From the time when men lived in the woods and the caves to the present, this great general tendency has been just in the opposite direction. When new elements came into civilization, they were organized and appropriated: They often had, it is true, at first a deterring effect, but the force of civilization, when it at last came to appropriate these elements, made them to further the general direction. As it has

thus formerly been the case with every material improvement that has been made, it is not probable that civilization will now fail simply by reason of the greater magnitude and multitude of its constituent elements. In other words, it is not probable that evolution, which preserves one general direction from sameness to difference, will fail in its larger and more progressive stages.

We shall not find any solution of the problem by assuming that those principles of government which have been verified by the experience of the past have become useless under the new and more complex surrounding conditions. We shall find, on the contrary, that our failure to progress toward the solution of the problem results from our having forgotten or overlooked these principles. It is not therefore necessary that we should look about to discover new principles, but it is necessary to re-examine those which are already known, and make a rigorous application of them to the new and complex conditions.

What we have practically and particularly to concern ourselves with is the influence which this last and largest gift to mankind exerts upon human freedom. In order to measure that influence, it will be necessary to keep in mind the fundamental principles of industrial freedom; and to gauge all conveniences, all material progress, and all political association, by these principles. When we come to apply this test, if we find that our temporary successes fall out of

accord with it, and cannot be brought into accord, then the methods which have produced these successes will have to be abandoned, no matter what temporary physical conveniences they may have produced. This is inevitable if freedom is to continue. But, for my part, I do not believe that the subjection of the physical forces to the control of the rule of political freedom will involve any sacrifice of the best fruits of industry. On the contrary, this subjection will, I believe, tend directly and naturally to produce the largest, most permanent, and most efficient industrial well-being that mankind under the most favorable conditions is capable of creating and enjoying.

## CHAPTER III

### THE INDUSTRIAL CORPORATION

THE corporation, as a device for furthering industry, when it is judged by the definition which I have given of industrial liberty, must be regarded as something of a political solecism. It is an artificial structure for which no adequate substitute has yet been devised, and its chief cause of being, even in the qualified kind of republic which we have, is that it is a means of public convenience. The corporation came into existence under conditions which were anything but republican in their character, and from time to time it has been clothed with other qualities which are alike unrepublican. As it is today constituted and conducted, it confronts us as a serious threat to the harmonious progress of the republican idea.

A brief analysis of what is called the *quasi*-public corporation, which is the kind with which we have mostly to deal, will serve to make this proposition more clear. It contains, among its various antagonisms to equal political right, many which have accompanied it from the beginning, and some which have been imparted to it by modern use and legisla-

tion. It is substantially a perpetuity. In railway corporations, for instance, the deaths as they occur among the shareholders from time to time, the transfers of shares, as they are constantly occurring, and the deaths and removals of officers, make but little difference in the general policy and conduct of the company; and since it moves *in solido*, without material change on account of these incidents, its movement is necessarily continuous, and it has a life practically unmeasured by any definite time. Another quality of the corporation is, that there exists in it a limitation of the liability of the shareholders. Thus, however bankrupt it may become, the liabilities of the shareholders do not usually extend beyond the loss of their shares. If it become indebted beyond its assets to any extent, the loss falls somewhere else than on the owners or managers who create that loss. There is thus a separation of power from responsibility for the misuse of that power. Besides these features, there is in all these associations, as they are at present managed, a dis severance of control from ownership. The conferring of control by the shareholders to the president and board of directors is assumed to be the result of examination, deliberation, and choice, but in point of fact it is usually of the most perfunctory character, and when conferred, this control is but little under the inspection, and more rarely under the influence, of the shareholders. It is true there are meetings of the shareholders, elections of officers, and audits of

accounts ; but the meetings are generally for hearing rather than for determining any thing ; the elections are usually upon made-up tickets largely voted by proxy, which is a mode of voting not recognized except by special right contained in the charters ; and the audits usually concern merely the ministerial details of the business. It is rare indeed that these gatherings are either deliberative or critical, or that they consider the policy of the road or the manner of its control, which is thus by common consent left entirely to the discretion of the officers. There is assumed to be a large warrant for this course, derived from practical experience ; the theory being that such absolute control is necessary, in order to promote efficient action in the constant contests and competitions between the railways ; that the power used must therefore remain uncircumscribed in the hands of those immediately using it. Indeed, this is treated as an axiom of railway management. It is largely from this theory that in all direct movements of policy the wishes of the shareholders are as little regarded as those of private soldiers in the rank and file of an army. While this theory may have some reason, so far as concerns active competition, the great considerations of public policy and private honesty stand against its continuance. Such control is apt to be, and often is, employed for the manipulation of markets against the interests of the shareholders ; for the diversion of the ownership from owner to custodian, both of the property which be-

longs to the shareholder and of the right which belongs to the public; and for general discriminations not provoked by competition. What conduces largely to this control, so far as the shareholders are concerned, is that the ownership of the shares is scattered not only over this country, but throughout Europe, and that a very considerable proportion of the stocks of many of the railways, especially the most active, is held by foreign owners. Of the Pennsylvania Railroad shares, for instance, two fifths are owned in England. Besides this, the ease with which these shares are bought and sold on the exchanges of London and New York, and the frequency of such sales, tend to give to the shareholding ownership something of a migratory character which is not conducive to careful inspection or control.

Another unwholesome quality of the industrial corporation under existing management is that which permits the individuals who manage or control one corporation to deal with themselves under cover of a separate corporate franchise, as if they were separate individual persons. Through this means the managers of a railway, by association with others, or among themselves, obtain franchises, with which they create an organization for the purpose of preying upon the profits of the railway corporation, which they control but do not own. Thus there is established, by legal fiction, a duality whereby there is diverted from the real owner to the ownership of the custodian a part of that property



which is held in custody. This is a process which, as I shall hereafter endeavor to show, has been one of the largest and most fruitful causes of existing industrial evils.

From the circumstances here indicated it will be found that there exists between the managers of corporations and the shareholders an essential relation of trust which, as at present very loosely realized, has no further guard for faithful performance than that grounded in the expectation of these shareholders to receive their usual dividends.

But beyond this trust there exists also in all *quasi*-public corporations another essential duty, namely, that which the whole corporation owes to its creator—to the citizen and to the sum of the citizens constituting the public. I know that this latter relation is one which has not been treated as falling within the strict domain of trust. It is true it has been called a trust, but vaguely, in an ethical rather than in an economical sense. Nor has any attempt ever been made to throw around it that supervision which is essential to its proper administration. And our failure in this regard has gotten us into many of our difficulties by preventing us from placing about it those essential guards which secure honest and faithful performance of duty. It has in all respects as much of the trust quality as that which exists between the managers and the shareholders, and it is altogether more important. It is only by so treating it that a proper observance of the duty involved, whatever it

may be called, can be secured. I base the idea of the existence of trusts in modern industry upon this principle: that whenever any man or set of men hold or manage property which belongs to others, they necessarily hold and manage it as trustees. Whether we call the relation a trust or not, it is one which arises out of the necessities of the case; and when property so held and managed consists of a franchise of a *quasi*-public kind, the controllers of that franchise, from like necessity, stand in the relation of trustees to the grantors of that franchise, and the trust thereby created is of a public kind, because the custodians are the servants of the public for whose convenience the franchise was granted.

We seem to be suffering in this country from too strict an adherence to the law of precedent, or rather from too narrow a view of the application of precedent; from too narrow an interpretation both of the nature of the corporation and of the trust as applied to our larger industrial advancement. Many trusts have grown out of the new relations of modern industry. They have sprung from the multiplicity of facts and from the complex relations in which these facts stand toward each other. Statutes in some of the States aim to prescribe the creation of the trust relation within narrow limits.<sup>1</sup> They determine, in

<sup>1</sup> New York, Pennsylvania, Connecticut, Kentucky, Vermont, Michigan, Wisconsin, Minnesota, California, Dakota, North Carolina, and Georgia. ("American Statute Law," F. J. Stimson, sec. 1703.)

substance, the allowable objects of trusts to be the selling of lands, receiving of rents and profits of lands, the applying of them to the use of any person for his life or any shorter time; trusts for the accumulation of rents and profits for the time by law allowed; for the benefit of any person, where the trust is fully expressed and clearly defined, and for certain public and charitable purposes. But in an important sense such a limitation is beyond the power of the legislature. Legislation cannot change a structure by giving it a new name. It cannot limit a growth which comes out of necessary industrial conditions, by calling it something other than it is. If the legislature is to succeed in preventing the existence of a given trust relation, it must prevent the industries from which that relation necessarily grows; for these industries are the causes, and the fact of the trust follows by the law of logic and nature, as effect follows cause. The legislature must abolish the corporation and the railway, with the relations which the corporation and the railway necessarily hold to the public, if it would effectually prohibit the existence of all other trusts save those which it has specifically prescribed. These relations have sprung into being in the flowering of modern industry, and it is only by examining their developed structure that we are enabled to learn whether or not they contain the essential elements of trust. The employment of corporate methods is fruitful of this kind of growth; and the adequate governance

of these relations can only be accomplished by the realization of the real facts and the study of the real substance.

The technical distinctions which we persist in maintaining between the public and the private corporation, have also limited our view of this broader scope, while the reasons for these distinctions, by the enlargement of industry, have in many cases disappeared. Thus, for instance, an immense change has taken place through industrial growth in the relations between the government and the individual. Formerly, every thing that was of a public character fell within the domain of the government; but by the enlargement of industry and the enlarged employment of the corporation we have transcended this bound, and the corporation now takes a necessary part in the service of the public. The functions of the government, and the functions of the *quasi*-public corporation, as they are exercised to-day, often trench upon each other. They are powers which to some extent and in some places necessarily overlap. It therefore requires a nicer examination of the details of the functions of each, and a clearer delineation of these functions, than any we have before made. By the distinction, as it has heretofore existed, between public and private corporations themselves, all corporations have been placed in the private category, except those which have been made a part of the political or municipal machinery of the government. But, in considering the essential qualities of the

modern railway corporations, we cannot fail to find that they employ powers which directly affect the public; that in the course of their administration this cannot be otherwise, and that therefore they cannot any longer properly fall under the old distinctions. They cannot therefore safely be treated as private. For instance, from the agreements which any two *quasi*-public corporate bodies, such as railways, make with each other, very essential consequences proceed: not only for the public, but for individual political right. We find that their necessary powers often enable them to interfere with the freedom of private contract between citizen and citizen, and to ally themselves with certain citizens and interests to the detriment of other citizens and interests. Obviously it is an abuse of terms to call a power which is accompanied with such consequences a private power. That power is essentially public and political. To allow that a railway company may make agreements in secret, upon the assumption that it will not violate a public right, is an impossible concession. Experiences multiply around us constantly to prove that railway compacts made in secret are not for the political common-wealth. The motives which promote railway enterprise are mainly those of private gain; and when these are accompanied by great powers, which may be exercised in secret, their inevitable tendency is to override both public and private political right. If we are to discover the qualities of agreements between railway

corporations only by the consequences, we have no guaranty of right; since all experience has shown that secret compacts do exist, and that they do great injury, long before the public can learn of their existence. The public being interested, the public have a right to a knowledge of the methods employed. This right rests upon the essential public character and quality of the franchise. It is not a matter of legislation; it is an inherent thing. The franchise should be treated as public, because its largest duties are to the public.

Similarly we are in the habit of contemplating trusts with reference to antecedent conditions, of confining them to the tenure of lands and private estates; whereas, by the enlargement of industrial conditions, the railway management is forced into direct relation with the citizen and with his political rights. Thus the facts have outgrown the application of the principles; or rather the application of legal principles has not kept pace with the growth of modern industry. The classification of the corporation as a private institution, or even as a *quasi*-public institution, and of trust as a private relation, although adequate when industry was conducted entirely as private enterprise, and when trust was applied only to the tenure of lands and private estates, has as we have seen, become obviously inadequate since industry and its relations have thus grown to be essentially public.

That the latter of the two kinds of trust which I

have indicated is altogether the more important, will be evident from an examination of the fundamental relations which exist between the creator of the trust and the created. A power derived from the people, the exercise of which in any degree affects their political or economical conditions, either towards each other or towards that power, of necessity carries with it a duty from the creature or the corporation to the creator. This of necessity also partakes of a political character. The power thus granted being inseverable from the grant and involving an inseverable public duty, the relation thereby established grows out of the very fact and can be no other than a public and imperative trust. This is paramount to that which exists between the officers and the shareholders; because, while that concerns only a comparatively few individual interests for private profit, this between the corporation and the public concerns the whole people; and this public concern is the essence of the consideration by which the franchise came into being—it is the whole motive for which it was conferred. Certain corollaries arise from this, of which I may suggest one or two.

When a corporate franchise is created by a State whose existence depends upon the delegated power of the people, the franchise so created cannot legitimately confer any greater power than that which belongs to its creator; and any attempt to exercise any greater power by means of such franchise is, so

far as such attempt is successful, necessarily destructive of the ends and aims of republicanism, or indeed of the end and aims of any government which assumes any sovereignty. If a corporation may be given a franchise by a people, through their delegates, to exercise any power, by implication, however slight, which is unrepresentative in its character, the government which has conferred it has ceased to be a republic. These corollaries may appear commonplace, but the habit which we have of contradicting them in our daily practice seems to me to be a warrant for their repetition.

There are then the two kinds of trusts, which for definiteness I will re-state: First, that which subsists between the *quasi*-public corporation and the shareholder, of the private and commercial kind, for profit. This we may designate, for the sake of distinction, as *the lesser trust*. Second, that which subsists between the *quasi*-public corporation and the citizens, as political equals. This, having an essentially public character involving equal political right, we may designate as *the larger trust*, or the trust for public right. It is necessary that the difference between these two should be clearly borne in mind. The first or lesser trust is essentially private and commercial. It is limited to the owning shareholders of the corporation. It is a trust arising out of the relations which those shareholders hold to each other as parties and privies. It is true that by its violation there come to be involved questions of public policy



and right, and that this violation has been the means of an immense inequality in the distribution of the fruits of industry. But nevertheless, in its structure it is a trust which is created by the act of the parties themselves, and comes under the definition of private trust. The other, which I have defined as the larger trust or trust for public right, is always essentially public. It is not only industrial but political as well. It concerns every individual as a citizen in the enjoyment of his equal political and industrial rights. It thus immediately affects the whole public. It arises, not from any agreement of parties, but results as a necessity from the act of creation of the franchise. In its higher quality it is constant in its effect upon the right of citizenship and political being, and cannot be divested of this influence. When we consider that the chief motive of the grantee of such franchise is private profit, or profit in which the public or the individual as a citizen of the republic does not directly partake, we discern in this an interest which is often apt to be in conflict with the public right. It must be plain, therefore, that such a grant rises out of the category of contract. There inheres in it the reservation of the sovereign grantor, which cannot be divested. The incident of the larger trust relation thus becomes vitally necessary for the preservation of the supreme motive of the grant, that motive being the securing and maintaining of convenience in accordance with and subject to the equal right of the

citizen,—a motive which involves the very existence of the republican State. The lesser trust, being merely for private gain, must always be held in strict subjection to the larger. Any other course means the inevitable surrender of so much of the principle of political freedom.

The Dartmouth College case, which will hereafter be more fully discussed, has become a prominent case because it has been industriously employed by the railway interest to give to the relation of the State with the corporation the character of contract, with the corollary that the corporation is to be unrestricted, as a high contracting power, in the use of the franchise once obtained; in other words, that this franchise is to be construed in all respects as a contract between equals. To this end that authority has been wrenched from what seems to me to be its clear legitimate import. The particular case itself involved only the question of a purely private and eleemosynary corporation; but the railway interest has sedulously sought, in applying it to railway corporations, to ignore the idea of any public trust such as I have endeavored to show as being inherent in the grant of the franchise. But it will be seen, if what I have just advanced be true, that such a construction as the railway interest insists upon would make the franchise a gift of far more power than a republic could possibly confer,—a gift which by the giving would destroy the giver,—a republican suicide.

A brief history of the growth of the private trust relation, and of its influence on industrial progress, will serve to illustrate more clearly the necessity for the application of the principles which should govern the larger relation to existing industrial conditions. Throughout the history of England the abuse of custody was one of the most powerful hindrances to the progress of industry, until the private trust relation came to be duly defined and administered; thenceforth this relation came to be a most efficient means for the promotion of civilization. The abuse of the private trust relation, whilst it was unchecked, created and fostered iniquities in the narrower scope of civilization, which grew to such magnitude that they were counteracted only by revolution. Nothing was ever more insidious than the means employed by the ecclesiastics of the sixteenth century for absorbing the land of the kingdom by trust devices; nothing more adroit and cunning than the evasions to which these ecclesiastics resorted in sustaining their devices. Driven by legislation from the employment of uses, they invented trusts. By one art and another they gradually absorbed many of the best lands of the kingdom for the service of the church, and thus impaired incentive and weakened industry. The first decisive blow which they received was from Henry VIII., when this absolute monarch seized their lands and divided them among the nobles. This involved a revolution so great as to put an end to the power of Romanism in England,

and largely to secularize politics. By the lifting of this burden a new and marked era of industry for Western civilization was reinaugurated. Nevertheless the Reformation and the appropriation of the ecclesiastical domains at first tended rather to confuse than to reorganize on a proper basis this trust relation. The courts of chancery remained for a considerable time mainly in the control of ecclesiastics and of statesmen who were not lawyers; and it was really not until the reign of Charles II. that the trust relation became completely appreciated and understood. From this time, so far as private trusts were concerned, order grew out of chaos.

The man who, as Lord Chancellor Campbell says, is recognized in the Hall of Westminster to this day as "the father of equity" is Sir Heneage Finch, afterwards the Earl of Nottingham. His influence marks, with a distinct outline, an epoch in equity jurisprudence. As a chancellor, he is described by Blackstone as "a person of the greatest abilities and uncorrupted integrity; and endued with a pervading genius, that enabled him to discover and pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, coöperated in establishing his plan, and en-

abled him, in the course of nine years, to build a system of jurisprudence and jurisdiction upon wide and rational foundations.”<sup>1</sup> Through his work the private trust relation has become exactly defined and well guarded. As Chief-Justice Mansfield observes: “Trusts were not on a true foundation until Lord Nottingham held the great seal. By steadily pursuing from plain principles trusts in all their consequences, and by some assistance from the legislature, a noble, rational, and uniform system of law has since been raised. Trusts are made to answer the exigencies of families and all other purposes, without producing one of those inconveniences, frauds, or private mischiefs which the statute of Henry VIII. (chap. 10) was intended to avoid.”<sup>2</sup> But the accomplishment was not an easy one. Many of those who held relations as custodians resisted with every device in their power the bringing of the trust relation within more careful judicial investigation and control; and this resistance was largely promoted by the jealousies of the lawyers of the Common Law. The reason for the erection of equity courts lay chiefly in the inadequacy of the Common Law to bring relief from the violation of relations which the church had created in the form of uses and trusts. Form was then given by the lawyer, just as it now is, to the support of

<sup>1</sup> “Blackstone’s Commentaries,” Book III., p. 55.

<sup>2</sup> *Burgess vs. Wheate*, 1 Eden, 223; *Phillips vs. Bridges*, 3 Ves., 127; *Kemp vs. Kemp*, 5 Ves., 858.

abuses, while the remedy for the correction of the abuses was wanting. The evil had grown to enormous proportions, and heroic methods became necessary. It was by such methods that the trust relation at last came to be clearly defined, so far as that relation concerned private estates.

Among the first guards thus thrown around the private trust is that of constant and judicial surveillance for the protection of the interests of the *cestui que trust*, and a clear set of definitions of the powers, duties, and liabilities of the trustee. No relation is more clearly defined or more sacredly held. This definiteness rests upon the realization of the destructive tendency which follows, of necessity, the permitting any one in possession or control of the property of another to occupy any but the simplest, most definite, and most direct relation of stewardship to that property. It therefore excludes the possibility of such a thing as a dual relation, or the erection of any indirect methods, whereby the trustee can convert to his own ownership any part of the estate which he holds in the capacity of trustee. The trustee can make no profit from his possession or control. He is required to account to the last cent for all that comes into his hands, and all that goes out by way of disbursement. The influence which the possession gives must be used for the advantage and profit of the beneficiary; never in the least degree for the personal emolument of the trustee. He may not buy up debts against the trust estate. He

is bound to use his skill in behalf of the estate, nor can he deal with any partners whereby any interest can go indirectly to him as trustee. He can set up no adverse claim against the property. He may be liable to great losses whilst he can receive no profits, and this relation is made stringent, in order that he may not be tempted from any motive to embark the trust fund upon the chances of speculation. His accounts are made the subject of careful judicial audit. No secrets can oppose themselves between him and his *cestui que trust*, and all malfeasance is treated as criminal.

Thus the guards were made adequate to govern the trust relation as it existed before the great developments of modern industry. These guards were created, not by technical inspection, but as the result of structural analysis. They came from the application of principles to the private relations of trust.

I think it may be confidently asserted that since the great fundamental organization of trusts upon a private basis was accomplished by the Earl of Nottingham, and applied to those relations which existed at the time of that organization, there has been no systematic attempt to widen the application of these principles to the enlarged industrial and political conditions. The work which Nottingham accomplished within nine years has been generally treated as a completed work. It may be said to have remained almost crystallized from that time to the

present. The principles which he established were the same then as they are now ; they have stood the test of time. Whilst there is not the least occasion to seek any change in these principles, we need to extend the application of them to the changed social phenomena, to the more complex facts of political and industrial life, which have since then come into being. Nottingham systematically applied organic principles to the private relations of trust. These identical principles ought now to be applied to the industrial relations which are essentially public. As we have seen, in the private relation, where one holds the property of another, or the power from another to exercise any right, such holder is universally recognized by the law as the trustee of that property or that right. Why should the fact that the custodian in question is a *quasi*-public corporation confer immunity for the violation of custody? The relation of custody which the corporate manager has is plainly one of trust. In private relations, a custodian is held to strict account for his custody, and for the performance of the duties of that custody openly and without concealment—because concealment in a custodian is ever a badge of fraud. Courts are created to enforce this performance, and the failure of such performance is made a crime. The necessity for publicity is even greater from the custodian of the *quasi*-public corporation, since upon this publicity all political right depends. Why should we fail to apply the same rules? We have,



as I have said, tribunals to enforce the administration of private trusts; why should we not erect tribunals competent to enforce the administration of the public trust? Why should we not visit the failure of performance with like penalties in the one case as in the other? The intrinsic qualities of custody exist here. All of the reasons for their recognition apply with the fullest force in this greater field which modern industry has enlarged from the private to the public relation—to this public relation which is necessarily by far the more important, concerning, as it does, not only large material industrial interests, but vital political rights.

It may be noted as a rather curious fact, in illustration of the half-way application of the principles governing trusts, that this limit of our regulation of trusts to the private relation, this failure to supplement the regulation of the private custodian by the regulation of the conduct of the *quasi*-public custodian, is in some sense the cause of those flagrant violations which characterize the mismanagement of the interests of the shareholders in the *quasi*-public corporation. The very confidence which has grown up in the community through the strict guarding of the private-trust relation, and the honest performance of duties which results from such guarding, is a confidence which has made possible the violation of that larger trust relation between the corporation and the public, which is not so specifically guarded. Fraudulent conduct in corporate management flour-

ishes because the citizen has learned, through contemplation of that trust in the private relation which is carefully guarded, to place property in the hands of others for custody; nothing can more emphasize the necessity for extending the same rules to the corporate relation. The very character of such frauds shows clearly that, because they become possible, the moral obligations of which they are the breach must have been more than proportionately developed. As Sir Henry Sumner Maine says: "It is the confidence reposed and deserved by the many which affords facilities for the bad faith of the few; so that if colossal examples of dishonesty occur, there is no surer conclusion than that scrupulous honesty is displayed in the average of the transactions which in the particular places have supplied the delinquent with his opportunity."<sup>1</sup>

In conclusion, I will briefly recapitulate the positions which I have aimed to set forth:

First, that inasmuch as the great object and end of free government is to serve the rights and promote the happiness of the individual members, the powers which are delegated by those members to that government constitute a trust for the benefit of the individuals by equal right; and that this trust is paramount to all other trusts, public or private.

Second, that among the delegated powers is that attribute of sovereignty in the exercise of which private property may be taken for public use, and

<sup>1</sup> "Ancient Law," by Sir Henry Sumner Maine, New York, 1875, p. 197.

the power to create artificial agencies to further accomplish the ends of government; and among things not delegated, either by the individual to the State government or by the State governments to the Federal Government, is a power to do anything not in the interest of all the political units constituting the people.

Third, that when government, in the just exercise of these functions, creates artificial agencies for commercial purposes, and delegates to them, either by necessary incident or directly, a portion of the power of the State, the government thereby creates a public trust which must be administered in the public interest; and that if such artificial agency attempts anything beyond this, or in contravention of the common right, its act is so far *ultra vires* and void.

Fourth, that such trust is to be surrounded by the same specific guards as will secure the same regard for the rights and interests of the individual, and the sum of the individuals constituting the public *cestuis que trustent*, as I have pointed out in relation to private trusts.

Fifth, that the profits which the State may allow the trustee of the larger trust to make are essentially in the nature of compensation for the performance of the duties of this larger trust; and this right to compensation must always be subordinated to the chief object of that trust.

The recognition of these propositions I hold to be indispensable to the very existence of a real republican government.

## CHAPTER IV

### THE RELATION OF THE RAILWAY AND THE "TRUST" TO INDUSTRIAL LIBERTY

I CANNOT better demonstrate the extent to which our employment of the corporate structure has caused us to depart from the spirit of our fundamental laws than by instituting a contrast between the theory upon which the government grants a franchise and the actual methods by which such franchise is used. According to democratic theory, individual and public political right are far more important than any convenience which a corporation can confer. The true office of the delegate who directly grants the franchise is, necessarily and always, that of a guardian of the right of his constituents, in preserving this as an equal right for each of those constituents.

In this guardianship the delegate can never act as the promoter or champion of any corporate franchise granted by him. According to this theory, such franchise is granted by these delegated guardians solely for the furtherance of equal public convenience. The delegated guardians, with an eye single to the public good, are assumed to environ the grant itself with strict limitations, in order that

the powers granted shall not and cannot be employed for any thing else than for this public good ; the chief end being always the furtherance of public convenience, and the sole private interest granted being the right to reasonable compensation for equal service rendered ; and this, to be reasonable, must always be in subordination to the public convenience. Accordingly, then, the grant is made to the individuals, not as favorites, but because they are ready to engage in furnishing a public service in an industry the direct management of which does not lie within the legitimate province of government. The persons receiving this franchise do not in any sense become the absolute owners of any public or *quasi*-public right. The proper ownership is confined to the capital which they invest and to the mechanical means which they employ. Their franchise is simply a privilege for the employment of these means. And inseparably coupled with that use there is a duty, not only subject to the strict construction, but also to the continued and careful control of the creator, who can lose none of his power and forego none of his duty as custodian of the permanent public right, in exacting performance from the holders of the franchise. This view, so far as it relates to the question of ownership of railways, has been often and clearly set forth ; and never more clearly than by Mr. Justice Bradley in the case of *Wabash, St. Louis, and Pacific Railway Company vs. Illinois*, in which he says :

“The highways in a State are the highways of the State. Convenient ways and means of intercommunication are the first evidence of the civilization of a people. The highways of a country are not of private but of public institution and regulation. In modern times, it is true, government is in the habit, in some countries, of letting out the construction of important highways, requiring a large expenditure of capital, to agents, generally corporate bodies created for the purpose, and giving to them the right of taxing those who travel or transport goods thereon as a means of obtaining compensation for their outlay. But a superintending power over the highways, and the charges imposed upon the public for their use, always remains in the government. This is not only its indefeasible right, but is necessary for the protection of the people against extortion and abuse. These positions we deem to be incontrovertible. Indeed they are adjudged law in the decisions of this court. Railroads and railroad corporations are in this category.”<sup>1</sup>

A corporation, therefore, lives by permission, and only by permission, to serve the public and to further enterprise for equal convenience; and any act which disturbs in any way the equality of this service is a usurpation of power. The delegates of the people granting the privilege, as the guardians of this political right, must not therefore be biassed in any way in behalf of the receivers of the franchise, and they cannot, without dereliction, acquire any active

<sup>1</sup> U. S. Supreme Court Reports, 118, p. 586.

Although this citation is made from a dissenting opinion (in which Chief Justice Waite and Mr. Justice Gray concurred with Mr. Justice Bradley), the general principles set forth are, as Mr. Justice Bradley says, adjudged law in the decisions of the Supreme Court.

interest in, or exercise of, the powers conferred by the franchise. They cannot accept any position of agency or attorneyship for such power, because obviously any relation, however slight, which commits them to corporate influence, must in strict construction be in dereliction of their larger guardianship. They are guardians as representatives of that right with all which that term imports; and just so far as they disregard this relation, do they lower the pledge of their office as representatives of their constituents. This relation is one which admits of no shades or degrees; it is all or nothing. As it is essential that the representatives should be the unbiassed censors of the privilege which they have conferred to the corporation in trust, they should, in the exercise of that censorship, require an exact accounting, in all its details, of the privilege which they have granted. To do this they cannot be its servants. Even if it were conceded that the corporate idea were not fundamentally antagonistic to the republican idea, yet the interests of the corporate management and of the corporate shareholders are in many points too essentially different from the interest of the citizen to admit of any double relation between them. These interests do not coalesce, and they cannot be united. This was fully recognized when Congress, in passing the Inter-State Commerce Act providing for the appointment of a commission, prescribed that "no person in the employ of or holding any relation to any common carrier subject to the

provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment." I do not mean to say that the rigor of the rule extends to the ownership, by the legislator, of stock or bonds in a railway, or to mere pecuniary interest therein. Such interest may possibly not constitute a bias to the legislative owner whose stock or bonds have been obtained by *bona fide* purchase. The mere owner of stock or bonds does not by such ownership owe any service to the corporation. Nevertheless this interest must be the extent of his relation. The principle unquestionably proscribes the holding by the legislator of any office or employment which involves a duty to the corporation, because in this relation he takes upon himself obligations which are in essential conflict with his obligations as a representative of the people.

The dereliction of trust in railway management, both of the lesser or private trust as well as of the greater or public and industrial trust, did not spring into sudden growth; it was the result of slow and insidious development. In the more primitive stages of railway management, when the roads were shorter, and before trunk-lines and consolidations had been organized, the president and directors were chosen with a view to their fidelity to their office. Their duties were then exercised under the circumspection



of the owners and shareholders, and managed generally for the benefit and profit of those shareholders; and thus the private trust, at least, was preserved.

The earlier derelictions were not those of the minor trust against the shareholders, but consisted in violations of the larger public trust. In fact, they were committed in the interest of the shareholders. Thus, in Massachusetts, a railway called the "Western" was projected between Worcester and Albany, to open trade between the West and Boston. Seeing the advantage of such facilities upon the general prosperity of the State, the Massachusetts Legislature advanced money and pledged the credit of the State to the enterprise, stipulating that the State should have the option of taking the road from the shareholders whenever the earnings of the road should amount to sufficient to repay in dividends the capital they advanced for its construction, together with seven per cent. interest from the time it was paid in. When the road was finished it was found, in consequence of the wonderful industrial growth of the West, that it commanded more business than was anticipated. Had the carrying ability of the road been increased in proportion to the demand and worked to its capacity, the conditions would have been fulfilled some years before, and the State would have had the right to enter upon its possession, according to the terms of the charter. But it was evidently not the intention of the corporation to surrender such a valuable franchise, so that the road did not increase its

carrying capacity in proportion to the demand. Keeping its rates high, it actually turned business from the West to New York, and away from Boston. Still, in spite of the impediments which it placed in the way of the business it was built to promote, its earnings were more than enough to fulfil the stipulated conditions. This difficulty was met by one of those combinations which characterize railway financiering. In 1866 permission was obtained from the legislature to increase the capital stock for the purpose of improving the road. This being done, a dividend of two million dollars was then made to the shareholders without asking a cent in return; but the capital stock of the road was thus increased and the rate of dividends lowered to the desired point. This is one of the earlier instances in which railway managers have shown, not only their contempt for legislative control, and their ability to direct it for their own purposes, but also one of their then new methods of financiering—of creating fictitious capital, which is one of their chief appliances for the increase and control of capital and for the concentration of power.<sup>1</sup> But legal forms soon came to be more carefully thrown around all the railway processes. As the railway shareholders increased in number and became scattered over Europe and America, and as transfers in the exchanges became more common, and shares became market commodities to be dealt in daily, the guards for honest management became less strict.

<sup>1</sup> *Westminster Review*, January, 1871, pp. 70 and 71.

In the first stages of the violations of the lesser trust, part of the profits of the roads were diverted from the shareholders by the establishment of personal relations between the managers of the road and certain individual shippers. This was soon found to be too primitive and inefficient as a means of managing so large an enterprise, and, from the need of greater facility for accomplishment, permanent channels were organized for the diversion, from the owners to the custodians, of the excessive profits which resulted from the great growth of industry. This systematic diversion proved to be far more profitable, so far as the managers were concerned, than any process of watering stock in the interest of shareholders, or than any other process of accounting to the real owners for the excessive earnings. The new scheme of appropriation thus organized methodically in due form of law, I shall hereafter designate as the parasite, and I will endeavor to give an illustration of it by an instance of its employment in the management of the Pennsylvania Railroad Company.

Early in the history of this company, the parasitic corporation made its appearance, at first in proportions that were not formidable, to appropriate and absorb the more moderate excess of earnings which were then made. A coal company was formed upon the line of the road with what would now be called a moderate capital, something less than a million dollars. The land was purchased with the proceeds of part of the stock, and a large proportion of the re-

maining stock was given to the active managers of the Pennsylvania Road. Although a small amount of money was paid for this, the main consideration of the transfer was the influence which these managers promised and were expected to exert in behalf of the parasite coal company and against any attempt at competition. Thus the substantial consideration, so far as the railway manager was concerned, consisted in the employment of his fiduciary power, as a railway officer, for securing the diversion of a part of the earnings which belonged legitimately to the shareholders, from his road into the possession of the parasite coal company, thence for re-division among the shareholders of that parasite. This, with modifications suited to circumstances, is the basis upon which every parasitic corporation which has since been erected subsists and flourishes. The "Union Line" was thereafter established upon the Pennsylvania Road and its western connections. While this company has since acquired a large capital and plant, its original capital consisted chiefly of the power derived from the illicit relation that I have indicated. In other words, it was organized at first with a capital based only to a small extent upon actual money, very largely upon the earning power derived from an arrangement with the managers of the road, by which the profits of the road were diverted from the real owners.

There is an assumption of convenience and efficiency for the office of the parasite which is not

without some warrant ; but the more real reason of its being lies in the fact that it enables the managers of the road to contract in their official capacity with themselves as individuals, and to associate themselves with the shareholders of the parasite, for their individual profit and interest and against the profit and interest of the owners of the railway. All of their contracts tend indirectly toward absorbing the earnings of the railway corporation, and to the advantage of the parasitic corporation. The regularity of organization of the parasite is carefully secured. Every requirement of legal form is punctiliously observed. The whole arrangement is made to present the exterior of an honest, legitimate, commercial enterprise. It is assumed to be an ally secured by the officers of the road, without any other aim than that of protecting and promoting the interests of the shareholders. To give the exterior of the artifice the appearance of an independent company, a number of persons are selected from the community who are induced to become shareholders. Such shareholders are expected to take no part in the management of the parasite. They purchase, as investors on the basis of its earning power. These investors not only give it a semblance of autonomy, but also tend to give it a standing as a legitimate commercial enterprise.

When these parasite corporations were first organized, it was the custom of the president of the railway company, in his address to the

shareholders, to set forth the difficulties which he encountered in securing the organization of the ancillary company to do the necessary and arduous work of furnishing business for the railway. He congratulated the shareholders upon his success in securing this co-operation and the great advantage that resulted thereby to these shareholders. The assumed necessity of the ancillary corporation for bringing traffic to the road was especially dilated upon, and an exaggerated intimation was given of the investments which were made in this ancillary corporation, in whatever stock it may have had in cars or otherwise. The fact that some investments were made in the parasite stock by those who had nothing to do with its management, was set forth as indicating the interest which the public took in sustaining the enterprise. But in all this showing of the president there was a careful concealment of those interests and affiliations between the railway managers, for their personal interests, and the parasite, a concealment of that which constituted the real motive of the president for furthering the organization.

It is impossible that the shareholders of the railway could have realized at the beginning the secret relations which thus existed between the parasite and the managers of the road. To assume this would be to assume that these shareholders could have said in terms to the president of the road:

“ We agree that your salary shall be \$25,000 per

annum, but we do not exact from you on account of this payment, fidelity to our interest. You may manage our property in such a way as to realize the largest profit you can exact from the public. As this may be limited by competition with rival companies, you may compensate the limitation by making exactions upon patrons who live at local points. As you may have the opportunity arising from the great growth of industry to realize vastly more than will be sufficient to pay the interest on the bonded indebtedness and moderate dividends to us as shareholders, you may so adjust your contracts with parasitic corporations, in which you are allowed to be the chief shareholder, as to appropriate to yourself and your associates all that may be acquired in excess of the interest on the indebtedness and moderate dividends to be paid to us. The only further suggestion we have to make is that you observe in all this strict compliance with legal forms. Under such compliance you may violate your trust, your custody, your faithfulness to our ownership, and make whatever distribution you may be pleased to make with your associates under the rule of 'addition, division, and silence.'"

If, therefore, the shareholders gave to the managers the power which in fact those managers have used, we must assume that they deliberately intended to confer upon the railway presidents, directors, and their associates, not only the power, but the privilege of a systematic and enormous appro-

priation of property which did not belong to them, and that these shareholders further deliberately intended to treat this malversation as a species of business sagacity, if not of virtue. Sane men do not thus regard their rights of ownership. In point of fact, the shareholders at the beginning did not know, and could not have known, the real functions of the parasite. They judged of its character by the official presentation of its formal exterior, not from a full knowledge of its secrets. As they were inclined only to expect regular dividends, they were not inclined to be critical. Indeed, as many of them were non-residents and foreigners, they were unacquainted with the manner of conducting the details of the business. Moreover, the facility for dealing in shares afforded by the markets gave to the ownership of stock a migratory and transitory character, which did not conduce either to criticism or examination. Then also, there was the pretext of competition with other roads to limit apparent earnings; and, added to all this, the railway management was regarded as something vast, profound, inscrutable, and not to be measured by ordinary rules of business; or to be held amenable to critical examination.

As for the general public, it was so gratified with the new material conveniences that it showed but little disposition to make critical inquiry into the processes. Any idea of aggression upon political rights was not thought of in connection with the railway management, and the public were inclined



to regard that management as a matter of private control. It was under these circumstances that the parasites were organized, grew, and refined their processes. By degrees their managers acquired that skill by which they measured the amount which it was necessary to allow to the railway company for moderate dividends to the shareholding owners, and for interest on the bonded indebtedness; and this in some instances, at least, was the extent of the profits which they permitted. It was an essential part of the system, that all of the betterments and permanent improvements of the railway were to be made by new demands from the owners and the issue of new stock. Thus the great bulk of the receipts coming from the growth of the industry was sent through the secret channels erected at the termini of the road for exacting tribute, not only from the road, but through discriminations from the public also.

Under these conditions and by this management, a few individuals at the head of leading railroads have arisen from obscurity into immense affluence and power. These men are not, in general, engaged in any manufacturing or commercial enterprise. Their whole occupation has consisted in directing and managing these artifices of appropriation. And yet their malversation has made them prosperous and wealthy far beyond the wealth and prosperity of the men who have pursued the most profitable lines of regular industry. The railway

president, in association with them has realized many times the amount of his large salary by systematically depleting a property which he was chosen as the guardian to protect.

I will not presume to sit in judgment upon any of these actors as individuals. I know that many of them in their family and social relations are exemplary citizens; and personal attacks are an unworthy and an irrelevant resort in any effort to discuss a serious economic problem. When, therefore, I at any time have cause to speak of persons, it is not with the thought of making personal charges or of pointing out individual peculiarities, but because they happen to be related to a problem which is the subject of discussion. Besides, as I shall endeavor hereafter to show more specifically,<sup>1</sup> the responsibility for this condition is a divided one. What is constantly to be borne in mind is that we are considering an artificial system; a system which has arisen out of the state of the law, the tendency of the public to construe that law, and the condition of the public opinion from which the law is born. I do not mean, of course, that individuals are not accountable. But as I believe part of the responsibility for this system rests with the public.

There is one corollary which I cannot forbear mentioning here, although I will consider it more fully in a later part of this work. It is, that the persistent and successful disregard for public and pri-

<sup>1</sup> Chapter VII.

vate right manifested by the railway manager needs to be considered in its influence on such organizations as the Knights of Labor. When we note that the highest guerdon of success has accompanied the methodical appropriation by the trustee and guardian of the property of others, and that the power obtained through the corporate structure has been employed for trampling upon the right of private ownership and the sanctity of contract, may we not in these acts find all that inspires the Knights of Labor to disregard the rights of private ownership and the sanctity of contract? Whilst the laborer may not reason accurately upon all the details, he cannot fail to feel instinctively the salient consequences which lie all around him; he cannot fail to see that the greatest of the fortunes that have been heaped up within the past twenty years owe their being, not to the creation of industry, but to a species of legerdemain through which the fruits of other ownership, held in trust, have been transferred to these custodians. If men placed in charge of property under what ought to be held as the sacred obligations of custody, appropriate that property to themselves, why may not the laborer, who has no such nice obligation, disregard the law of ownership in a less degree? When the fundamental truth shall be firmly grasped and held, that the guardian of the property of another cannot appropriate that property to himself, the Knight of Labor will have less reason for his own more violent but less insidi-

ous denial of ownership, in which there is no trust relation involved.

When we come to realize this we shall be enabled to conclude that the railway problem is not one which involves simply the mechanical and ministerial management of railway facilities, nor one which is to be judged by mere regularity of form. We shall find it necessary to go behind the form of things, however regular and legal they may be, and to search out the heart of the mystery by determined examination of the structure. When we reach this point in the line of progress, I think we shall also find that neither the assumption of enterprise of the railway parasites, nor the philanthropy of those who condone these corporate practices, can convert the essential wrong by which the acquisitions are made into sound morals, or make it accord with individual political right. We shall find, moreover, in the parasites the chief causes which have brought into being the Knights of Labor and such artificial alliances as those of Communism and Socialism.

I have thus given instances of the parasite in the Pennsylvania Railroad management. These may serve as illustrations of the genesis of the whole system, since the parasite corporation, wherever used on the railways, involves the same kind of dereliction. In its simpler forms it varies only in the details surrounding its use.

Among the four trunk-lines to the seaboard, the Baltimore and Ohio Railway Company is the only

one which has not made use of this device for the division of shareholders' profits. The manner in which these four trunk-lines have been conducted, and the result of their management in building up the fortunes of the managers, may be shown by a brief reference to the characteristics of each.

The managers of the Baltimore and Ohio have exacted from their local patrons, even more rigorously than any of the other lines, "all that the traffic would bear." Their policy has generally been quite as selfish as, and more narrow than, that which marked the management of any of the other trunk-lines. Thus, for instance, they did not wait to be driven by destructive competition with other roads, to recoup themselves by exacting excessive tribute from local patrons. On the contrary, at times when such competition did not exist, they carefully measured the capacity of local industries along the line of the road, and took all save so much as would allow those industries to exist. They never entertained for a moment the policy of fostering local traffic, but pursued their exactions as a system. In consequence of this these local industries along the line of the Baltimore and Ohio road are fewer and feebler than those along any other of the trunk-lines. But I do not think these managers ever created a parasitic corporation for the purpose of diverting earnings from shareholders. In this respect they form the single exception among the trunk-lines. The sum of all their exactions went to the shareholders. On

this account, notwithstanding the narrowness of the policy of these managers, and in spite of the fact that they have been outwitted by the managers of the competing trunk-lines in almost every direct contest, still they have paid the full earnings of the road to the shareholders, in large dividends, and thus they have maintained a much higher market value for their stock than any of their more energetic competitors; while the fortunes of these individual managers, having been in the main more legitimately made, through their interest in the road as shareholders, are therefore not comparable in bulk to those that the managers of the other lines have amassed.

The Pennsylvania Railroad management was a different thing. By the formation of a number of parasitic corporations and the alliance of the managers with them for the abstraction of earnings, they distributed their illicit profits and, by this distribution, diffused the sum of these among a considerable number. Their illicit fortunes, therefore, being thus distributed, did not amount, in the particular case of any one of these managers, to more than ten or twelve millions of dollars.

The characteristics of the New York Central Railway management were that those in control had fewer associates for division of diverted profits. The managers skilfully linked roads together and formed a trunk-line; depressed the values of contributing roads; seized the ownership of these roads and converted them into parasites for wholesale diversion,

always, however, as strictly as possible under the forms of law. The illicit profits from all sources flowed into one reservoir and made the bulk of accumulation, in the instance of the Vanderbilt management, the most enormous individual accumulation which this country has ever witnessed.

The management of the Erie Railway, again, was different from any of the others; for with all of the others, as I have said, there was a careful compliance with the forms of law. These managers got possession of the road, not with the consent or wishes of the owners, but by a trick; and they thereupon engaged in a process, of what Mr. Adams calls "commercial freebooting." They manipulated legislatures, and, with the assistance of two New York judges, to whose courts they referred the owners of the road and the outraged public, they maintained their possession and control; they proceeded to lay under tribute the whole community and every public and private interest within their reach. They made wars of the most destructive competition with the competing trunk-lines. They illustrated the anomaly of a bankrupt road, in the possession of "skilful robbers," that was stronger for the purposes of diversion than were the solvent roads. The managers of the bankrupt road acknowledged allegiance to no one, and rendered no account to shareholders, but at times appropriated every thing; while the managers of the solvent roads were under the necessity of paying some part at least of their revenues to

meet the interest on the bonded indebtedness and to make moderate dividends to the shareholders. Even when this road was finally wrested from its managers, the surrender was made by them the occasion of a gigantic manipulation upon the market in Erie shares, to the immense profit of the managers and to the corresponding loss of the public. Although the power thus used under the corporate structure was enormous, these men took desperate chances, and their accumulations therefore are difficult even to estimate.

It will thus be seen that the managers of each of these roads, except the Baltimore and Ohio, have, although with a different use of the parasite, accomplished substantially the same end—viz., the secret diversion of profits from the owners of the roads to themselves. The managers of each of these roads, including the Baltimore and Ohio, have, although with a different use of the corporate power, accomplished the like purpose of steadily pushing the aggressive interest of the railway to the sacrifice of the political right of the community.

Until about 1870 the profits of the parasite on each of the separate railways were restricted by the competition from similar parasites upon the competing lines. The projectors of the "Standard Oil Trust" elaborated this simpler condition. They erected a structure by which they coupled all of the secret interests of the managers of the several trunk-lines, so far as their interests referred to the shipment



of petroleum. They thus made a basis for division of the profits of this product between one great parasite and the managers of the different railways. By this device all competition which formerly existed between the parasites of the different trunk-lines was overcome through consolidation. Nothing less than this would give such exclusive control as would throttle all of the competition. From this design the "Standard Oil Trust" came into being. The growth was thus from the simple parasite to the complex parasite. This involved the seizure of a whole industry. The petroleum industry afforded a peculiar opportunity for this scheme. The production of oil was confined for a long time to a limited area, principally within the State of Pennsylvania. It was thus susceptible of being seized and held in exclusion. What added to the opportunity for monopoly was the uncontrolled rivalry which prevailed among the producers of oil themselves—a rivalry which always characterizes a mining field. The producers were stimulated to excessive competition in the hope of large discovery. The exclusive control of the carrying of their product by means of a pipeline, the alliance of this line with the railway managers, and a monopoly held by the "Trust," rendered these producers an easy prey to any exactions which this monopoly might choose to make. Thus a whole industry was seized. This "Trust," standing between the producer and the consumer, and through alliance with the railway managers control-

ling the only means of communication, proceeded to exact from both producer and consumer the largest possible margin and to hold the industry in its grasp. Involved in this seizure, also, there was the taking from the railways in rebates a large part of their legitimate earnings. These were paid to the complex parasite, thereafter to be divided between the organizers of the parasite and the managers of the railways.

The organization of the "Standard Oil Trust" itself has been a gradual growth. Viewing it from the beginning, its capitalization has to a comparatively small extent been made with money—to a very large extent with power. The actual amount of money employed as the nucleus, considering its present magnitude, was very moderate.<sup>1</sup> The actual amount which it now has in capital and plant is nearly all derived from the past employment of its power. The real capitalization, therefore, consists in more than fifty corporate structures, whose franchises are derived from the different States, and in the power employed by means of the control of these structures in the unity of the "Trust." The wealth of the "Trust" is estimated upon the market by its dividend-paying capacity.

<sup>1</sup> Mr. Hudson, in his work, "The Railways and the Republic" (New York, 1886, p. 68), states the amount of the first actual investment as \$300,000. In the testimony of H. M. Flagler, one of the officers of the "Standard Oil Trust," given before the Committee on Manufactures of the House of Representatives, April 27, 1888, it is stated that the first corporation from which the "Trust" eventually grew—the Standard Oil Company of Ohio—was organized in 1870, and was capitalized at \$1,000,000.

The "Trust" certificates which are issued to represent its capital bear such a market price as yields the investor six or eight per cent. per annum in dividends or interest. Its capital by this estimate is over one hundred million dollars, but its plant—its capital in money,—including its accumulations, enormous as these are, is really not more than one third of that amount.<sup>1</sup>

In the early days of the progress of this monopoly it had a far closer alliance with the managers of the Erie Railway than with those of any of the other trunk-lines. Indeed, it may be said that its first

<sup>1</sup> J. F. Hudson, in his work on "The Railways and the Republic," p. 84, infers "that the rebates paid the 'Standard' during the period of its growth from an ordinary corporation to a complete monopoly were equal to its entire increase of wealth for that time. In other words, its entire profits were comprised within the discriminations made in its favor by the railways." Whether this inference is entirely correct or not, it is, of course, impossible to say. "The first legal avowal of its rates was in the case of *H. L. Taylor et al. vs. The Standard Oil Company*, in which it was alleged by the plaintiff that a rebate of \$1 per barrel had been paid by the railways to the 'Standard.' The reply of the 'Standard' admitted a payment of rebate, but denied that it was of the amount named." (See "The Railways and the Republic," p. 84.) It is further developed in the examination of Mr. A. J. Cassatt, third vice-president of the Pennsylvania Railroad, as a witness in the case of *The Commonwealth vs. The Pennsylvania Railroad et al.*, before the Master appointed by the Supreme Court of Pennsylvania, in 1879 (see printed testimony in this case, pp. 661-737), that rebates were given by the Pennsylvania Railroad and its connections to the Standard Oil Company (which is identical with what is now known as the "Standard Oil Trust"), varying from 49½ cents to 64½ cents per barrel of crude petroleum, for shipments from the oil regions to the seaboard, the difference in the amount of rebate being due to the difference in the points of shipment and destination; that the Pennsylvania Railroad began paying these rebates in Feb., 1878, and was still paying them at the time Mr. Cassatt's testimony was given (March, 1879). Mr. Cassatt also testified that an additional rebate of 22½ cents per barrel had been regularly paid to the American

growth is due to association with the management of this road. The immense leverage afforded by a bankrupt railway in possession of "freebooters" was used with all its force to compel where it could not induce illicit arrangements between the parasite and the trunk-lines, and the result was that the alliance became complete with all these trunk-lines except the Baltimore and Ohio Railway. With the managers of the Baltimore and Ohio, who, as we have seen, accounted for all the earnings of the road to the shareholders, the parasite was compelled to make special terms in accordance with the policy of

Transfer Company, one of the companies belonging to the Standard Oil Company, as a "commission," and that this sum was paid to the Standard Oil Company not only upon shipments made by the Standard Oil Company, but upon all shipments of petroleum made by any shipper. Mr. Cassatt, as a witness, also expressed the belief that the other trunk-lines paid to the Standard Oil Company the same rebates and "commissions."

When we consider that the shipments of crude oil from the oil regions to the seaboard for the year 1878 averaged something more than 20,000 barrels per day in crude equivalent (see testimony in this case of Samuel F. Stowell, pp. 124-251), and that of this the Standard Oil Company shipped at least 80 per cent., or 16,000 barrels per day, we may infer that if upon these shipments that company received even 72 cents per barrel in rebate and "commission," the total sum thus received from the trunk-lines daily would be \$11,520, or for the year, estimating it at 300 days, \$3,456,000. This sum, of course, does not include any rebates paid by any other than the trunk-lines to the seaboard, and therefore does not indicate any rebates which may have been received by the Standard Oil Company from any of the Western or Southern roads.

But, whatever the exact amounts may be, there is developed in this testimony the character of the scheme. Obviously there is nothing in these methods which will entitle the "Standard Oil Trust" to claim the creation of an industry. It is an artifice for the subjection of one, for the appropriation of the energy and property of others. It is thus a huge illegitimate taxing machine for levying contribution from an industry and from the railways.

that road. But with the managers of the other trunk-lines its relations were not only complete but profoundly secret. To illustrate the manner in which the absorption grew to completion, let us take its relations with the managers of the Pennsylvania Railroad Company. This railway company possessed an exceptional advantage over all of the other trunk-lines in the fact that the oil-producing industry was nearly, if not exclusively, limited to the State of Pennsylvania, and thus, geographically, to a large extent within easier reach of the Pennsylvania Railroad than any other. For a time the managers of this road availed themselves of this advantage, and in the earlier history of the oil development established their own particular parasites for diverting the profits from the shareholders of their own road to themselves. These parasites were known as the "Empire Transportation Company," which had some capital in tank cars, and the "Union Pipe Line," located in the oil fields, with tanks and line for receiving and storing oil and delivering it from the wells to the railway stations. They were for a long time the exclusive carriers of oil upon the Pennsylvania road, and effectually exerted their usual functions of diverting the larger part of the profits of carriage from the shareholders of the road to the managers. But the managers of the "Standard Oil Trust" at length gained even a closer alliance with the managers of the Pennsylvania Railroad than that which existed between those man-

agers and their own parasites; and in 1877 these local parasites, the "Empire Line" and the "Pipe Line," were compelled at the command of the railway managers to capitulate to the larger parasite, the "Standard Oil Trust." The capitulation was secured upon rather easy terms to the minor parasites.<sup>1</sup> The few outside shareholders (those who were not in the management, but had purchased their shares for value upon the basis of the earning power of the parasite) were simply informed that the corporations were dissolved. These outside shareholders were paid something like fifteen dollars per share premium upon their stock; and thereupon the new and complex parasite, the "Standard Oil Trust," took the place of the old and simpler parasites, and the control was complete.<sup>2</sup>

<sup>1</sup> Testimony of Joseph D. Potts before the Committee on Manufactures of the House of Representatives, April 27, 1888.

<sup>2</sup> The capitulation of these minor parasites to the "Standard Oil Trust" was not accomplished without a severe contest and a war of rates between the New York Central, the Erie, and the Pennsylvania roads, in which war the managers of the New York Central and the Erie were the close allies of the "Standard Oil Company." Concerning this contest, the investigating committee appointed by the Legislature of New York, in their report, say:

"The Central and Erie Railroads joined hands with the Standard, and proceeded to enforce its demand by a war of rates, which terminated successfully in October of that year. The oil traffic, instead of being more profitable to the Central and Erie, has certainly been less remunerative since that war than before. We are unable to find the slightest respect wherein it resulted to the advantage of these roads. The Standard got the 'plum,' and as a result it owns exclusively the terminal facilities for handling oil of the four trunk-roads."

The doubts of the committee with reference to the resulting advantages to the Central and Erie roads might have been resolved by a more search-

The chief cause assigned for this alliance by the railway managers, whenever its propriety has been questioned, has been that such an arrangement prevented destructive competition for the freight between the roads; but the real reason consisted in the fact that the managers of these roads derived, through indirection, from the "Standard Oil Trust" larger individual revenues than any interest in their roads could or would give them; and this has been the effectual bond for the continuance of the relation.

It may be said that all the inner secrets of the hybrid "Trust" are profound. They are hidden within the breasts of one or two men, too well guarded to enable our courts or committees by any existing processes to bring them to light. But, no circumspection can keep all of the results of these secrets entirely and permanently from the public. If we cannot precisely define them, we are still enabled, by the immense potency of the results, to infer the general character of the structure which contains them. I venture to say, as an inference from what we know of the character of the methods of the "Standard Oil Trust," that the books of that "Trust" do not show the names of any of the managers of the rail-

ing examination of the relations of the "Standard Oil Company" to the managers of the Central and Erie roads. It is more than possible that whilst the roads themselves were not benefited, the managers of those roads were. Whatever independent refining industry there was along the line of the Pennsylvania Railway, or for that matter along the line of any of the trunk-lines, was gradually paralyzed or absorbed; and thenceforth the large activity of the business was transported to the central point of distribution in Cleveland, Ohio.

ways as holders of "trust" certificates; that the interests of railway managers in that "Trust" will be found to be secured to those managers through contracts and arrangements which do not render it necessary that their names should appear in any way as beneficially interested in the "Trust" itself; moreover, that the railway managers, wherever their services are enlisted in behalf of the "Trust," are recompensed by an interest in the "Trust"—an interest which they do not absolutely own, but which they enjoy as dependent upon the continuance of their authority with their respective roads; that this interest therefore ceases with the death of such managers or with their removal from office; and that thus there will be found, for the efficient guarding in secrecy of the relations between the managers of the "Trust" and the managers of the railways, a "trust" within a "trust."

Let us now look at some of the possibilities of accomplishment by the employment of this hybrid "trust" device, and also at some of the possibilities for its eluding any investigation which may be instituted by judicial processes into its secret methods. A number of parasitic corporations, bound into unity of possession, power, and interest by the hybrid "Trust," may be so managed that each one of the constituent corporations may preserve to itself all of the outward appearance of autonomy. Each one may keep its accounts as if it were a separate and independent individual. The accounts are subject to audit by the



unified power, but there is not necessarily any thing in them to indicate any dependence upon, or relation to, that unified power. For instance, one of these parasites is called a pipe-line. It is organized for the exclusive purpose of receiving and storing the product of the oil region. Another is established for the apparent purpose of conducting shipping facilities at the terminal points of the railways. To all outward appearance it is an independent corporation, and, as such, may deal with the railways by independent contracts. A third parasite is erected for the purpose of constructing, using, and leasing freight cars, on terms which may be agreed upon between the managers of the railway and itself as an independent company, for carrying freight from point to point. A fourth is erected for conducting the commercial enterprise of buying crude petroleum, refining it, selling it. Each of these corporations thus separately organized is separately officered. They stand before the public as separate and autonomous corporations, with independent contracting power, and without any apparent or outward relation to each other. When any one of them is summoned to court, before the court it alone is a party to the cause. Under these circumstances, how is the individual shipper, competing in the refining industry, to obtain complete redress for discriminations exerted against him by such a "trust"? When the managers of a railway are summoned under the charge of discrimination against an indi-

vidual shipper of oil, they may easily show that no such discrimination exists, as between such shipper and the particular corporation belonging to the "trust" which is engaged in refining and shipping. Neither the books of the railway company nor those of the minor parasite need divulge the slightest appearance of discrimination anywhere, nor need there be in their direct relations the existence of such discrimination; even the freight agent contracting for freight may be ignorant of them. Another corporation, a creature of the "trust" but to all appearances entirely independent, not a party to the suit, may have contracted with the railway company upon a subject which does not directly concern transportation, and may have effectually concealed within its contracts the rebates to be paid the hybrid "trust," which do not appear in the contracts between any of the shipping corporations and the railways. Nevertheless, these corporations are all the servants of one power, each one making its separate contribution to one fund, and all held in unity by the hybrid "trust" bond. In one of the cases lately before the Inter-State Commerce Commission, which I shall notice more fully hereafter, the particular corporation belonging to the "Standard Oil Trust" which was brought into the case was the Standard Oil Company of Kentucky. The examination was necessarily confined to discriminations which were made against the complainant, by the railway, in favor of this particular corporation belonging to the "Trust." Whilst acts of discrimination were

found in those relations upon which to warrant a finding by the Commission against the railways, the association of the "Standard Oil Trust" was not, and could not, under the circumstances, have been investigated. The relationship which existed between the individual officers of that road and the hybrid "Trust" itself, as a "trust," were not touched. In order, therefore, to determine, as between the independent shipper and a corporation which is owned by the hybrid "Trust," whether there exists any exceptional advantages to such corporation over the independent shipper, it will be necessary not only to ascertain the bond of union of each of these contributing "trust" corporations, but also to ascertain any secret relations which exist between the sum of the corporations constituting the "Trust" and the individual railway manager or any combination of railway managers. If, concealed beneath separate contracts, made by apparently distinct corporations, there exists a unity of interests which supports a hidden relation between the "Trust" and the railway managers, by which insidious advantages are given by the railway through indirect channels, the fact of such discrimination can only be ascertained by a knowledge of these circumstances. If the railway managers have an interest in the aggregate parasite corporations which constitute this "Trust," and if these managers receive their compensation for discriminations through channels as concealed and indirect as those through which they make the dis-

criminations, the fact of such discrimination will never become known until all these circumstances are revealed. Until the sanctity of secrecy is denied the "Trust," and judicial examination is made more searching than corporate concealment, no adequate correction of the evil can be hoped for.

Considering the "Standard Oil Trust" as a whole, it is a huge combination of corporations with franchises derived from almost every State. These are held in complete unity of possession. This "Trust" stands, in a country which is assumed to be a republic, in almost absolute control of an industry. It has seized this industry, and effectually controls all the rights of the individuals engaged in it. It thus in this field exercises an influence immeasurably greater than any that the government itself would dare to exercise. It is an organization managed in its minutest details, with the order, precision, and regularity of a government department. For its chief capital it has the working power of its unified charters and profound secrecy. So far as concerns administrative power, within its field of action it is far stronger than the government itself. Here, beyond the reach of the courts, the hybrid "trustees" survey the field of their past gains and contemplate their future conquests with a confidence which will not easily be shaken.

## CHAPTER V

### THE INFLUENCE OF THE "TRUSTS" AND OTHER PARASITES UPON INDUSTRIAL LIBERTY

I HAVE hitherto treated of the parasitic corporation in its relation to the management of the railway. It has played its part also in the construction of the railway—a part which, although prominent, I shall merely allude to here before proceeding to notice other parasitic growths which have lately come into prominence, especially in our cities. Mr. Adams, in an essay on "The Granger Movement," has forcibly described its function in the construction of the railways throughout the West. "It began," he says, "high up in the wretched machinery of the construction company, with all its thimble-rig contrivances for transferring assets from the treasury of a corporation to the pockets of a ring. Thence it spread downward through the whole system of supplies and contracts and rolling-stock companies, until it might not unfairly be said that every thing had its price."<sup>1</sup> As a constructive agent the parasite reached its climax in the building of the Union Pacific Railway, through the employment of the "Credit Mo-

<sup>1</sup> C. F. Adams, Jr., *North American Review*, April, 1875, p. 402.

bilier," and in the building of the Central Pacific and Southern Pacific railways, where it was employed for the usual purpose of diversion on an immense scale.

Besides the parasitic growths on the railway system, I will now notice some of those of the complex or hybrid kind which are unconnected with steam railway management; those, namely, that serve the purpose of appropriating to the "trust-manager" that large margin of profit which comes from the corporations furnishing light and locomotion in the large cities,—the gas corporations and "trusts," and the street railway corporations and "trusts."

There are circumstances which afford reason for inferring that there are members of the "Standard Oil Trust" who are in close interest and alliance with the gas "trusts." The "Standard Oil Trust," as we have seen, is in substantial control of all of the products of petroleum in this country. One of these products, benzine, is an important element in the manufacture of the kind of gas which the "trusts" furnish. This is a comparatively new kind, sometimes called water-gas, the result of certain late discoveries in the art of making hydrogen gas and carburetting it with the lighter products of petroleum. The gas thus made is much less costly than any heretofore manufactured by the use of coal and rosin. The normal tendency, through the cheapening of this new process, would be to give the advantage of the reduced cost to the consumer. If anything like the

old high prices are to be maintained, therefore, this can only be accomplished by rigorously stifling competition. By maintaining these old prices, or any thing like them, the profits arising from the furnishing of this new gas are very great. These facts have addressed themselves with great force to the cupidity of the organizers of "gas trusts," and have called into being the usual artifices for exterminating competition and securing a firm and permanent hold upon the profits. From the fact that the "Standard Oil Trust" controls the product of petroleum, and from the methods which the "gas trusts" employ, it is fair to infer that the scheme is inspired by the genius of the "Standard Oil Trust." Indeed, the dexterity in the employment of these methods is such as only experts understand, and the managers of the "Standard Oil Trust" are undoubtedly such experts. They have the faculty of adapting artifices to circumstances, which is only derived from continuous practice. The managers of the "Gas Trust" have shown great versatility in suiting their schemes to the various conditions which they have to encounter in the different localities. Thus, they have adopted destructive competition in one city, diplomacy in another, and have combined the two in a third.

The first considerable effort was made in several of the seaboard cities, where they rather pursued the course of throttling, by destructive competition, the gas industry which they found opposing them.

They furnished gas to consumers often without much reference to cost of production. Meanwhile, they actively and aggressively pursued the work of destruction. The money for conducting this warfare was, of course, not derived from the resources of the company conducting it, but from the outside resources of the organizers, and the contest was relentlessly pursued until the opposition was absorbed into the monopoly, and given a share of the joint stock. The monopoly thereupon established its prices, which, although limited by legislative enactment, afforded large profits which have become permanent by practically exclusive control. It may be said that their mode of procedure is in general as follows: Where they find two or more gas companies in a city, they propose the erection of a "trust," with what they euphemistically call a new capitalization, a division of the stock, and usually a new issue of bonds; and where this is resisted by any of the existing companies, they procure the control of such as they can by purchase of stock or agreement, and wage a destructive competition until they bring the recalcitrant companies to terms. It may be that in the progress of their competition they will proceed to buy up the depreciated stock of their adversaries. It is not unlikely, however, that, with their show of power for destructive competition, they often succeed in making terms without the resort to warfare.

In Chicago they began tentatively as early as



1886. They made themselves known in their "trust" capacity through the announcement that they were organizing for the purpose of securing to the citizens the "advantages of economic and harmonious management." The manner in which this laudable purpose was finally accomplished has been partly revealed by a suit which was instituted by the executors of Emanuel Hoffman of New York against the several Companies concerned in the organization of the "Trust." The relation of one of the Chicago companies, the "Chicago Gaslight and Coke Company," to the transaction illustrates the real purpose which actuated the organizers. The *New York Times* of November 20, 1887, in its editorial column, sets forth this relation in the following clear statement. It says:

"The Chicago Gaslight and Coke Company was incorporated nearly forty years ago with a capital of \$100,000. Its earnings have been enormous. By the use of them and without the additional contribution of one dollar by the fortunate stockholders the capital was raised from \$100,000 to \$5,000,000, while very large annual dividends were declared. Statements showing the company's condition have been placed upon its books every month. On the 30th of August the books showed that the company's assets were \$6,465,002 (for the most part real estate), while its liabilities were \$5,469,052 (including issued capital stock to the amount of \$4,984,200), and the surplus was declared to be \$1,319,041. This statement closely resembled those of the preceding months of the year. The company had been making money. Regular

dividends had been paid up to and including the one for January 1st, and the books show that the net earnings for the first nine months of the year were sufficient to warrant an annual dividend of eight or ten per cent. But on July 1st the usual dividend was passed and the official statement for September 30th showed that the affairs of the company had undergone a great change. In short, the company had suddenly become insolvent.

“The liabilities had been raised from less than \$5,500,000 to \$12,698,968 by the addition of \$7,650,000 in mortgage bonds. Why had the property been burdened with this mortgage? In the spring a band of speculators from Philadelphia . . . devised a scheme for gaining possession of all the gas companies in Chicago and monopolizing the city's gas supply. They began with this company and quietly bought a very large majority of its stock. They were assisted by two or three residents of Chicago. On March 12th, at a stockholders' meeting, they ousted the old directors and elected a new board . . .

“Having obtained control of the company, these speculators proceeded to exploit its resources. They needed money for use in making the trust or for other purposes. On August 27th the directors issued upon the property of this prosperous and solvent corporation a mortgage of \$10,000,000, ostensibly for the extension and development of its works, although they now admit that the money was used for other purposes. A deed of trust covering the company's property was delivered to the Fidelity Insurance Trust and Safe Deposit Company of Philadelphia. Of this mortgage bonds to the amount of \$7,650,000 were bought by the Union National Bank of Chicago. The Philadelphia company was ordered to deliver the bonds to the bank. On October 4th the directors who had issued the mortgage declared a dividend of \$38.25 on

each share (par \$25) of the company's stock. Immediately thereafter the same directors, meeting as stockholders, with the addition of one E. J. Matthews, ratified this declaration. The Union National Bank provided the money, and the gas company drew checks to the order of the stockholders in payment of this dividend of 153 per cent. It then appeared that Matthews held 198,383 shares (or the entire capital stock issued, except 977 shares), and to him was paid \$7,588,149. Matthews is supposed to represent the syndicate as a kind of middle man. In this way the proceeds of the mortgage were bagged. Matthews turns up as the holder of \$14,000,000 of the Chicago Gas Trust's capital stock, which is \$25,000,000."

With the leverage of power thus obtained by the parasite, these organizers have gathered together the charters of the gas companies of Chicago under the immense "Trust." Under the forms of this "Trust" they have issued mortgages and stock, "trust" certificates representing an immense capital, a part of which is plainly fictitious. Having divided the bonds and certificates among themselves, part of this stock and these bonds are offered to the community at a price upon which the bonds will yield a reasonable rate of interest and the stock a moderate rate of dividend. Upon this basis these bonds may be, and probably are, sold to investors, and a little less than half the certificates are likewise disposed of to the investing community. In this proceeding they have aimed to accomplish a threefold definite purpose. First, they have secured an organization whose accounts of receipts shall exhibit to the public a revenue simply

sufficient to pay reasonable interest on the assumed capital. They have thus endeavored to give to the organization all the appearance of a legitimate commercial enterprise with moderate gains for actual investment. This delusion they would doubtless have succeeded to some extent in establishing had it not been for interfering litigation. Their second purpose has been, through the sale for value of the stock and bonds to the investors, to acquire the alliance and support of these investors—the outside stock and bond purchasers who, by their purchase, become the apologists if not the champions of the scheme. And their third purpose, quite as important as anything else, has been to secure the advantage which the reserved control of all this organization gives them for binding together in a larger “trust” the gas companies of other cities where a like margin between cost and profit may be seized, where a like hybrid “trust” may be or has been created.

Viewing this parasitic corporation as it developed in Chicago, one cannot help being struck with the queer mixture of the military and the commercial qualities which the management of it exhibits. The conception of the scheme is marked with that peculiar strategic shrewdness which belongs to the military commander. The details of its practical working are all wrought out with military circumspection. Added to this, there is a certain commercial cunning in the studied effort which is made to keep prominent the appearance of seeking the public

convenience, and to conceal the features which interfere with the industrial rights of the community. The organizers have possessed themselves of a process for manufacturing an inferior and deleterious gas, which they are enabled to make at considerably less cost than that made by the old process of manufacture. Thus equipped, they sally out from Philadelphia to fasten their parasite upon Chicago. They find several gas companies, some of which have been stimulated into being by the immense margin of profits obtained by the earlier companies. These companies are all, notwithstanding their competition, still realizing very large profits upon the amount of money which is invested in their capital. Under these circumstances, the campaign which the forces of Philadelphia have to conduct, although containing some commercial element, is mainly military. It consists in the seizure of existing corporate structures, and in bringing them into subjection; thereafter, in uniting these, and re-charging them, by the issue of stocks and bonds, to an amount which will render a moderate rate of interest on the bonds and moderate dividends upon the stock. To quiet the hostility of the general public, who are not immediately engaged in the contest, it is promised that the rate of exaction shall be less than it was under the old régime—a promise which is afterwards probably fulfilled by furnishing the gas at a trifle less than it was furnished before. By this piece of strategy the public become

neutral, and regard the conflict as one simply between the immediate contestants—a few corporations,—a conflict in which the consequences are not at all likely to touch the rights or the interests of the people. The plan of action of these attacking organizers, as we have seen, was to take one of these companies, in order to make warfare upon the others; and thus they finally brought them to subjection. The capitulation of the conquered companies involved the surrender of their stock, and homage for the receiving back from the victors such a proportion of interest in “trust” certificates as left the victors a majority of the stock, coupled of course with the control of the “Trust.”

This procedure, as I have said, is a mixture of military and commercial operation—the military predominating. It recalls some of Cæsar’s efforts at colonization, or some of the mediæval conquests followed by a rendering of fealty on the part of the vanquished to the victors,—a thorough application of militant methods to commercial enterprise. The sum of it all is, that a Philadelphia syndicate has gone to Chicago, appropriated an industry, and made a perpetual parasite upon that industry, and retains the power and control by which that parasite is made perpetual. With what permanent outlay of money by the syndicate has this been acquired? Probably, a very little; possibly, none. While we are not enabled by the figures which we have to ascertain just what the syndicate expended in the purchase of the stock

of the first corporation of which they obtained control, or what they expended in warfare, or what in the illicit purchase of influence, we can easily believe that in casting up their accounts they found they had recouped themselves for all their initial investments, and that they have as a balance the controlling power of the "trust" beside. In this case, their financial accomplishment may be thus formulated: They have caused the public to pay for the plant which is the vehicle necessary for taxing the public; then, having taken possession and control of the plant, they manage it and reserve to themselves the lion's share of the revenues. No conqueror bent on plunder could wish for more. Whether they have accomplished this entirely without permanent outlay it is impossible, as I have said, to determine. What they have accomplished in all probability approximates it. Stimulated by their immense success, their course of "colonization" will not cease. They garrisoned their conquered territory in Chicago with a few officers and directors, and then moved their main forces to San Francisco. What the result of this movement has been we are not yet fully informed. We know, however, that they have been moving for some time past from city to city in the East and quietly making their conquests. It is only by the development of the legal opposition in Chicago that any of the details of the strategy have become public.

When New York, Boston, Baltimore, Philadelphia,

Chicago, New Orleans, San Francisco, Albany, Washington, and such other cities as can afford margin enough to tempt the cupidity and craft of the "trust" organizers shall have come under one immense "trust," it is not difficult to see how any attempt at competition called into being by a sense of oppression may be promptly put down from the common revenues of a hybrid "trust." The organizers have learned, by practice in their art, the value of widely diffused possessions for the accomplishment of such a purpose. In all this scheme it must be seen that, as in the case of the "Standard Oil Trust," they have not added to an industry; they have not created an enterprise; they have not imported commercial skill. Their processes are simply those of appropriation; their structure is framed solely to this end, and the whole value of that structure to them is that it accomplishes this end.

These parasitic processes are employed quite as efficiently in organizing and conducting cable and surface railways, sometimes under the complex form of the "trust" as I have described it, sometimes with the use of the single corporation. If A were to obtain a charter to place a gate across Fulton Street at Broadway, with the power to exact a penny from every one passing the gate, the scheme would doubtless create great wealth for A, but it would not add one cent to the public wealth. It would simply be a process for transferring the money of the public into A's



pocket. The difference between such a charter and the one which was conferred for the construction of a railway on Broadway, so far as the holders are concerned, was only a difference of pretence—the furnishing a convenience to the public. Beneath this difference the motive in the two cases is the same—the wish to seize and appropriate a public right, without any disposition to add to the public convenience. Of course, the convenience was necessary; it was necessary as a part of the inducement with which to beguile the public. But the motive of the holder is simply his own gain—to work to make a great gain as nearly as possible out of nothing; and the corporate charter is the means for this end.

The hybrid "trust" is employed for another insidious purpose, a purpose which is unconnected with railways or municipalities. It has come into considerable prominence within the past few months as a means for the appropriation of that premium which the protective tariff indirectly affords to certain special industries. In this field it operates by limiting the production of the special industry. At the same time, it depresses the cost of manufacture by lowering the wages. The difference thus accomplished, the "trust" appropriates. The essential motive for this kind of "trust" ought of itself to be sufficient to illustrate that the continued fostering through protection contains a large element of delusion. Every protectionist assumes that the tariff stimu-

lates the growth of the industry to which it is applied. There is no claim that it ought to exist for any other purpose, and yet the only possible office of the "trust" is to repress that growth and appropriate the result. . It is true, it does this indirectly; but it does it with none the less certainty. If in a given commodity, say steel, the product in this country exceeds the consumption, the sole purpose for the erection of a "trust" is to restrain this production, either by arbitrarily limiting the amount produced by each manufacturing member of the "trust," or else by closing a part of the manufactories at the behest of the "trust," and thereafter compensating the owners of the closed manufactories by letting them participate in the profits of the restrained industry. The protectionists thus cry for protection because they assume that it encourages industry, but their "trust" flatly contradicts the assumption. They seek to prohibit foreign competition by a tariff, and then repress home industry by a "trust." Thus the salt, steel, lead, rubber, and other similar "trusts" methodically and rigorously aim to keep from growing the several industries which the tariff is to "foster," in order that the organizers of a "trust" may profit by the repression of those industries, and then, by the reduction of wages and the increase of price, appropriate the government's bounty.

The last example of the hybrid parasite which I have considered is the "trust." This did not spring

into sudden growth. Whilst it has only come to public attention within the past year or two, it is the clear result of a long line of causes that were set in motion when the first favored shipper of the railway divided the moderate results of his favoritism in secret with the railway manager. From this first simple personal appropriation, to that huge "trust" structure which seized the industry of a whole district of country, the growth has been gradual; and the first step of that growth stands in logical relation to the last. Similarly, from the first railway discrimination to that management which insidiously secured the custody of the Erie Railway and conducted that custody for wholesale plunder, a like sequence appears. Nor, indeed, is this management of the Erie Railway the highest expression of parasitic growth. In the possession of that road, as in a preparatory school, the custodians learned the value to them of the loose ownership of shares in corporations, and of the vague public notions of railway custody. They learned the art of manipulating legislatures, courts, and markets, as the efficient means by which "custody," intrenched in possession, might make the beneficiary the victim. When they were driven at last from the possession of the Erie they only began their real work. Thenceforth, as the West afforded a new and larger field for their energies, there they went, and there they have reached the highest results of their "custody" and audacity. There, having insidiously worked into the

positions of custodian, they no longer confined their efforts simply to control for temporary advantage, but deliberately proceeded to convert the property of the *cestui's que trustent* to their own permanent legal ownership.

Nothing has been more natural than parasitic growth. We cannot, therefore, assume that it has been the result of genius; that the manipulators can in any true sense be called, as some reformers have called them, "the captains of industry." Whilst there are doubtless many able men engaged in railway and corporate management, the great mass of them are only results of a condition; they are men who have learned to work in service as men learn a trade. There are thousands outside these corporations of as signal business ability. The corporation parasite has been held up by its promoters as a necessary and beneficial supporter of industry. The railway managers have particularly assumed to have called industry into being. They point to railway development and to the growth of the country, as if it were their own creation—the result of their favorite methods,—and therefore a full warrant for these methods. Nevertheless, it ought not to require much examination or reasoning to convince one not only that these methods have been unnecessary, but that they have been obstructive of all that is wholesome in the growth. We ought not to have to go far to find that the corporate structure, as developed in the parasite

corporation, has in no true sense been a necessity for the enlargement of transportation or for the promotion of industry.

Real industry originates with the individual who labors in the various fields of activity. While the transporter may stimulate and may further energy, he does not create it; and it is not necessary for this stimulus that artifices should intervene between the industrial worker and the consumer for the secret abstraction of gains. The evils which we have suffered have come mainly, not from the railway or from the railway shareholder, but from the railway manager. His work of abstraction has not been for the support of the railway; it has been an abstraction from the railway, and in all the industry which has grown up in this country there has been no reason for the office of the dishonest abstracter. When we consider his larger power over the civil and political rights of the citizen, and the manner in which it is employed, we must conclude that a great part of the demoralization of modern industry is chargeable to his influence. He has produced in industry something like a noxious contagion. The small individual dealer first found his business injured by the secret alliance of his neighbor with the railway official; and at last this alliance drove the small dealers into bankruptcy. When from isolated instances of this kind there grew to be a system which made success in any undertaking depend upon organized and permanently

constituted secret artifices, rather than upon free competition, skill, and honesty, but one result was to be expected. When dishonesty and secrecy become conditions of success in any community, skill and honesty diminish; nor does the conscience of the community remain unaffected under these circumstances. It invariably deteriorates; and with it the whole standard of morals, public and private, becomes degraded. Individual industry, running into ambushes erected by corporate methods, inevitably tends to moral and political decay, and no matter what material advantages the community may have, they cannot counteract this tendency. Where combination and collusion are essential to success, candor and fair dealing cannot flourish. There class interests are sure to grow and to continue their growth, until at last each man who has any remnant of right left will find himself holding that remnant only in a secondary way, not as a freeman but as a member of some illicit alliance.

If we take the parasite from first to last, we shall find that it has through all its variations one quality which is constant—it always exists as an appropriator and not as a creator, in any just sense, of industry. Whatever its vehicle or its victim; whether it adopts the single corporate structure, or unites a number of corporate structures together in a “trust”; whether it preys upon the railway, or upon that bounty which the government affords, called “protection,” or upon any branch of industry, it is invaria-

bly and by supreme motive an abstracter. Its favorite means of organization is through the corporate structure. It is possible that it might be supported without this, yet, so far as development shows its great efficiency for evil has been due to that structure; and I doubt whether a resort to individual union, either by copartnership or by means of a "trust" based only on individual agreement, would prove successful. I believe with Mr. Lecky, that the corporation is the ideal of the monopolist.

Added to the fact of this appropriation of the property of others, and of far more consequence than this fact separately considered, is the influence which the parasite necessarily exerts upon the body-politic; its far-reaching effect upon the moral, political, and economic rights of every citizen. One does not need the gift of prophecy to predict that this structure cannot continue if liberty is to endure; no trimming can adapt it to freedom. The people of the oil regions have borne the baleful influence of the "Standard Trust," until they have become accustomed to it, if not submissive. The people of Chicago may be prosperous enough to pay the tribute that is required upon the immense fiat-capitalization which has been fastened upon that city; the people of the whole country may bear, without at first seeming severely to feel them, the burdens which come from the indirect exactions of the parasite upon the railways and upon the cities; but for all this the crisis must inevitably come—the issue

must be made between its continued existence and the continuance of freedom.

Of the "trust" phase of the parasite, we may confidently hope that, if courts are ever established with an amplitude of power to examine the interior of the structure, they will find that the "trust" is no longer a trust; that there can be no such thing as a "trust" which involves only fidelity in the division of property secretly diverted from its owners. They will find that the real trust requires not only faith in custody, but honesty of management throughout, always for the beneficiary, whether his interest be direct or remote, or whether he be present or absent; and that there can be no "trust" for abstracting the goods of others or usurping powers which belong to the public; that to name such a thing a trust is as great a libel on the sacred character of fidelity, as to call legitimate that conspiracy which binds robbers together for the division of their booty. When this is realized, in whatever form this "trust" may appear, it will be recognized as the great abstracter of "the earned and unearned increment" of industry, the violator of custody, the insidious taker of the livery of the real trust relation, in order effectually to distribute the fruits of violated trust.

When we view by this standard the enormous individual accumulations of the past twenty years, and their influence on political right and freedom, we shall better realize the necessity of revising our definitions of the trust relation. The pub-



lic have shown some signs of beginning to realize it, not as yet through a careful study of the processes, but largely by a view of the enormous magnitude of the evil results.

I have thus, at the risk of wearying my readers and with some repetition not altogether unintended, sought to give illustrations of the manner in which the corporation has been illicitly employed in modern industry. A part of what I have said with reference to railway management and parasitic corporations has at different times heretofore been given to the public with more or less particularity. I am aware that the examples I have given may not be absolutely accurate in every particular of illustration. Still I think they will be found as exact in all their details as it is possible to make them in the existing secrecy of management, and that they are set forth with sufficient definiteness to warrant me in attributing to the railway and parasitic managements the evils which I have pointed out.

The hope of reform which has accompanied most of the attacks upon these evils, has been based upon the belief either that the corporate management itself may be impressed with the gravity of its conduct, and thus be induced to inaugurate reform from within, or that the government should adopt the policy of state ownership of the railways and of what is called the *quasi*-public corporation generally. So far from realizing the first, I conceive it to be an impossibility. Whilst individuals are sometimes

impressed with the error of their ways and induced to change their courses, no such effect has ever been produced upon a corporation; at least I do not believe there is an instance of any corporation becoming penitent or voluntarily relaxing its power. A disclosure of the general evils, or an attack upon the specific abuses of corporate management is apt to have no other effect than to make the managers more circumspect, formal, and secret in the continuance and enlargement of their methods. But this I shall discuss more particularly hereafter. So far as State ownership is concerned, it seems to me utterly inconsistent with the idea of a republican form of government; because it implies paternal and protective functions which, if persisted in, would be fatal to the self-dependence of the individual citizen.

My purpose in setting forth these examples of parasitic management is twofold: first, to show that, notwithstanding the exterior and functional differences of these various parasites, they are essentially and intimately related to each other as growths from a common beginning—the corporate structure; and second, to measure the qualities of this structure by the definition which I have given of industrial liberty.

The *quasi*-public corporation is an industrial institution which necessarily possesses functions and powers for the control of property not owned by those who exercise that control. If the broad definition of trust which I have given in a former chapter

is correct, then the manager of such corporation owes to the owners of that property a duty as trustee. Besides this, if my broad definition of trust is correct, then this manager, possessing and exercising functions and powers which also necessarily affect the political right of the citizen, owes to the citizen and to the public a duty as trustee in the exercise of a larger trust touching the individual and public political right. In the appropriation, by this trustee, of the property of the shareholders of such a corporation, immense as the evil of that malfeasance has grown to be, it is, after all, in its direct import but the violation of a lesser trust. The indirect consequences which are involved in this violation, added to the direct interference with political right, which is involved in the violation of the larger trust, are infinitely more dangerous to the citizen and to the State, since these obstruct political well-being, and, in a republic, the freedom of the citizen.

It is, then, with the corporate idea itself, in its relation to political right, that we have primarily to deal. Here is an artificial structure, erected by the State, within the State, and empowered to do certain things in the exercise of its normal *quasi*-public functions which profoundly affect the individual as an industrial unit and the sum of individuals—the public. If equal political right is to be maintained; if a real republic is to be preserved, and at the same time the corporate structure is to be permitted to exist, then the exercise of its powers wherever they

..affect the political right must not only be exactly defined, but must be under the constant supervision and inspection of the State. If a corporation may be allowed, either directly or indirectly, in a single instance to disturb or interfere with the industrial citizen ; to take directly or indirectly from one and give to another, whether the exercise of such power be under the pretence, or with the purpose, of equalizing industrial interests or of encouraging trade, the power so exercised cannot be construed to be a private power. It is a power which necessarily includes governmental functions, and, if it be exercised in a free State, it cannot be exercised otherwise than as a trust ; and this is the trust that needs to be defined. It is not by vaguely calling it "a high public trust" that it can thus be defined, but by creating for it precise bounds, and exacting specific performance. For what kind of freedom exists in a State where an artificial power is granted by the State to a set of men that enables them to repress the industry of one class of citizens and to promote the industry of another, by extending to the favored class, privileges based upon a subsequent secret division of the profits of the industry, and this where no definite accounting is required from them in the exercise of this power? What kind of freedom is there where we find the commands of a railway combination maintaining, without specific check, a consolidated monopoly of one great industry, determining when it shall stand idle, fixing

arbitrary limits to production and prices of staples? I have called this a governmental power; in a republic it is far more—it is *ultra*-governmental. And yet this is the power which the railway companies of the country, unrestrained by specific obligations as trustees, may exercise. It is the power which these railways have thus been exercising, with a constantly increasing violence, from their beginning to the present. If such power does not involve a usurpation of the sovereignty of the State and of the individual industrial rights, there can be no such thing as usurpation. If it does not involve a clear assumption of more than governmental authority, it is difficult to conceive what could be a trespass upon any authority.

Let me repeat that the trust relation cannot be established by vague generalities or declarations. It is necessary that there should be clearly indicated a specific course of performance, based upon a thorough realization that any holder of the property or rights of another is a real trustee, and that he is to be required to give continued account of his stewardship. No custodian will ever learn to stand in awe of the simple name of trustee, nor can exact performance of his duty be expected of him, until the authority which clothes him with that duty comes to keep surveillance over its whole performance.

That which American civilization is confronted with, then, is an artificial structure, beginning its aggressions with the great growth of modern indus-

try by the exercise at first of small acts of favoritism, which have gradually grown by formal organization into a persistent and regular system, until it has lowered the standards of commercial and personal integrity, debased the sense of political freedom, and plundered the public for the enrichment of the few. Its charter has hitherto been treated as a contract and as a private right and power, and the sanction of concealment has been thrown over it. It has not become modified by the grace of generosity, but remains a corporate tyrant. Its schemes are executed with an impersonal inhumanity for which no one of the actors as an individual would assume the responsibility. This power which we have persisted in calling private, notwithstanding its essentially public functions, has gotten into our legislatures, into our city councils, has employed our bar, has seated judges upon our benches, and has selected its special agents from the assumed custodians and delegates of the public right, who were chosen for the protection of that right. Its whole theory lies in opposition to the principle of political liberty, because, unrestrained, it will utterly break down the constituents of that liberty.

If after we consider the undemocratic qualities, the aggressive processes and tendencies of the corporation, we still determine its existence to be an essential for the support of modern industry, because we have nothing to take its place, we need to address ourselves to the problem of bringing it as far as possible within the subjection of equal political right

and republican sanction, and then to exact from it rigorously all that is necessary to keep it within the bound of equal right. If it can only be properly administered by forbidding its alliance with whatever clashes with the performance of trust, and if from its function it is necessarily public, then our only course is so to treat it and to bring it within legislative and judicial control as a public trust.

The first essential step, therefore, is by legislation based upon a careful examination of the facts—legislation which shall take these facts from their present nebulous position and place them within the region of clear definition—legislation framed in the spirit which brought forth in England the great Statute of Uses of Henry VIII., and the Statute of Frauds of Charles II.<sup>1</sup>—which shall exactly define and limit the powers and duties of the corporate manager as a trustee, both for private profit and for public right, and which shall provide tribunals clothed with ample jurisdiction to secure the faithful performance of the duties so defined. I think we may be aided in this course by bearing in mind how essentially artificial the corporation is; that its beginning is not in the Anglo-Saxon or the English law; that it is an exotic; that it was imported by the ecclesiastics into England, administered for absorp-

<sup>1</sup> Lord Campbell ("Lives of the Chancellors," vol. III., p. 423) terms the Statute of Frauds of Charles II. "the most important and beneficial piece of judicial legislation of which we can boast." Blackstone ("Commentaries" vol. IV., p. 439) calls it "a great and necessary security to private property."

tion and aggression, and that, unrestrained, it is not and never was consonant with liberty. It was only when it was subjugated by the government of England, and thoroughly secularized, that it became a promoter of industrial civilization. In its modern and enlarged use, new evils have grown with it. It has been made the vehicle of frauds and diversions unknown to the simpler habits of the Common Law, and which are unprovided for by that law. We need therefore, as I have before said, some Lord Nottingham to institute for this trust-relation, in its larger and more public field, those guards which he established for it in its narrower and private field. In other words, we need the application of the same principles which he defined, to the new and enlarged relations which modern industry has created. Our progress toward real reform can never really begin until we can apply the remarks which Chief-Justice Mansfield made of Nottingham<sup>1</sup> to some such leader in this larger field.

Whilst no single act of legislation can accomplish the result; whilst it may be necessary to deal with multitudinous details, nevertheless there must be the pervading principle that the railway management and the management of all corporations which come in contact with industrial and political right shall be placed clearly in a relation of trust, in which all motives inconsistent with faithful public service and public convenience are eliminated,—in a word, where

<sup>1</sup> See *ante*, p. 89.



the custodian shall be held as strictly accountable as the Secretary of the Treasury is now held,—then and not sooner there will be a beginning of the return toward that political condition in which the individual citizen is protected in his equal political right. There are some of our industrial corporations somewhat, although not altogether, analogous to the railway corporation, which furnish instances of the clear definition and careful governmental control of the administration of trust by the officers of these corporations.<sup>1</sup> These instances were born of the realized

<sup>1</sup> The Chemical National Bank of New York has, as a matter of fact, not nearly so public a relation as the railways have,—as many other corporations have. It has a capital of three hundred thousand dollars. Its deposits amount to fifteen or twenty millions. But the relations of its officers are recognized as well-defined relations of trust; not only to the shareholders, but to the public as well; and this public relation is promoted by government inspection, not simply to secure any direct interest the government can have, but to secure fidelity in the performance of the duty involved in the larger trust. What would be thought of the president of this bank if he were able to say to his associates: "The shareholders will expect six per cent. dividend on their shares. The deposits which we have enable us to make a vast amount beyond this. Let us, therefore, create parasite organizations by which we shall conceal the profits and divert them from the shareholders to ourselves?" What would be the influence of such conduct upon the general credit of the country? What would be thought of a representative in Congress who would ally himself with such a parasitic corporation to secure legislative form for it, for abstracting the fruits of the bank from the shareholding ownerships, and for degrading the sanctity of general credit? Yet, there is no difference between the motive thus suggested and the motive which has prompted similar combinations for abstracting property from the railways and interfering with the rights of the public. And what is there to prevent such abstraction, except the clear recognition of the trust-relation by governmental supervision? It must be seen that the difference between the two comes largely, if not wholly, not from the difference of the subject-matter, but from the different realization which the

necessities of the case, and they in some measure afford illustrations of what may be accomplished in the larger field. Between the present and this ultimate accomplishment there are a number of obstacles to be overcome, the more prominent of which I will proceed to indicate.

public has of the two relations. It is not enough that a deposit of bonds is required to secure the note-holder and depositor ; beyond this the government exercises the power of inspection ; and this is to secure the performance of the duties of the officers, not simply as private custodians, but as custodians who have the duties of a larger trust to perform.

## CHAPTER VI

### OBSTACLES IN THE WAY OF REFORM

AMONG the causes operating as deterrents to industrial reform, there are four which are prominent and which may be stated as follows: first, that which exists in the insufficiency of the jurisdiction and powers of the established judicial tribunals; second, the opposition of the corporation that is immediately to be reformed; third, the organized character of the mischiefs in question; and fourth, the state of public opinion with reference to these mischiefs,—the failure on the part of the public to realize them, and therefore to devise the necessary remedies. These I shall proceed to examine in this and the following chapter.

The creation of the Inter-State Commerce Commission, viewed from a legal standpoint, is in many respects an unique piece of legislation. It may also be said to indicate a dawning perception that existing constitutional guards are not altogether sufficient to meet all of the necessities of reform. While the establishment of this Commission thus marks an initial era and indicates a growing interest in the question of reform, it cannot be regarded as any thing more than

tentative. Strictly considered, it owes its being to a strained construction of that clause of the Constitution which provides for the regulation of commerce between States, since this clause was obviously intended only to extend the federal authority to the control of imports and duties, and, it may be, to such further control as is necessary to preserve the freedom of the water-courses. It certainly seems like a strained construction to assume that the constitutional power conferred upon Congress, of *regulating* inter-State commerce relations, will warrant the *controlling* of commerce between the States; and not only this, but that Congress may delegate this power to a permanent commission, and thus confer upon that commission the authority for controlling the rates and charges of common carriers, and all the details by which their business is conducted. It can hardly be conceived that it was the intention of the framers of the Constitution to enable Congress to confer such unbounded supervision upon a permanent commission. This does not imply that such supervision is not in present conditions necessary, but it does imply that these conditions had no existence at the time of the formation of the Constitution, and it is not possible that they could have been thought of. There was nothing at that time which indicated that small bodies of corporate officials would arise in the progress of railway development, having direct interests, acting under centralized and often secret authority, and to a large

extent necessarily controlling commerce. Nor was it foreseen that in such a condition such organizations of officials, as pointed out by Mr. Spencer, would possess an immense advantage over that incoherent public which is brought to act unitedly only under strong provocations; nor that in their progressive growth they would become less and less resistible by this general public.

But granting the power of Congress over the matter, and the right to delegate this authority to a commission, the question arises, what is the quality of this Commission by the terms of the enactment creating it? It cannot be called either a Common Law or a Constitutional Court, for, although it is given power to inquire, "to investigate," and to make report in writing, "including findings of fact, together with its recommendations," all of which power is judicial, it yet lacks jurisdiction to determine controversies between litigants, and to enforce the recommendations which it is authorized to make. Not being a court, it cannot have the powers of a court, except in so far as they are expressly delegated to it by the act of its creation; and therefore its jurisdiction is deficient in comprehensiveness. It lacks not only the power of enforcing its findings, but also the power of thorough investigation, since it cannot compel the production of all that is necessary for such an investigation. And as the questions most likely to come before such a tribunal are of a secret nature, in which identical interests are adroitly concealed in

separate and seemingly independent corporate structures, where such concealment is made for the very purpose of evading investigation, this inadequacy is especially unfortunate. In the case of another commission, lately appointed by Congress, which was vested with powers as great as those conferred upon the Inter-State Commerce Commission, the effort made through an application to the United States Circuit Court to bring forth facts from an unwilling witness was unsuccessful. The Court held not only that the Commission had not the power, but that it was not in the power of the Court itself, to perform the service for the Commission.<sup>1</sup>

<sup>1</sup> In the matter of the application of the Pacific Railway Commission to the Circuit Court of the United States for the Northern District of California, decision rendered August 29, 1887. (Reported in 32 Federal Reporter, p. 241.)

This was an application by a commission created by Congress for the investigation of books, accounts, and methods of the railroad which received aid from the United States, for an order requiring a witness to answer certain interrogatories propounded to him. The act empowered the Commission "to require the attendance and testimony of witnesses, and the production of all books, papers, agreements, contracts, and documents, relating to the matter under investigation, and to administer oaths; and to that end it may invoke the aid of any court of the United States, in requiring the attendance of witnesses, and the production of books, papers, and documents." It further declares that "any Circuit or District Court of the United States, within the jurisdiction of which such inquiry is carried on, may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before said commissioners, and produce books and papers if so ordered, and give evidence touching the matter in question; and any failure to obey such order of the Court may be punished by such Court as contempt thereof." And also that "the claim that any such testimony or evidence may tend to criminate the person giving such evidence, shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person, on the trial of any criminal proceeding."

If it be the function of courts to determine exact justice between man and man, the essential prerequisite for this is the power to acquire every fact which is necessary for that determination. If, in a larger sense, it be the function of any power in a free state to preserve as far as possible unimpaired the individual freedom of the citizen, such a power must be capable of reaching any insidious secrets by which that freedom is threatened or attacked. The very preliminary for the reform of any existing evil, or for the restraint of any aggressive attempts by the holders of any franchise, is the clear power, somewhere lodged and always ready for exercise, of searching

The witness, Mr. Leland Stanford, president of the Central Pacific Railroad Company, refused to answer the question whether any part of the sum mentioned in certain vouchers had been paid for the purpose of influencing legislation, and the commissioners applied to the Court for an order under the act of Congress.

Mr. Justice Field, in delivering the opinion of the Court, denied the motion. Among the reasons set forth for the denial is that : " The Pacific Railway Commission, created under the act of Congress of March 3, 1887, is not a judicial body ; it possesses no judicial powers ; it can determine no rights of the government, or of the companies whose affairs it investigates. Those rights will remain the subject of judicial inquiry and determination, as fully as though the commission had never been created."

Under the authority of the decision neither Congress nor any investigating commission appointed by it has power to assume judicial functions, or to punish witnesses for contempt when they refuse to answer interrogatories propounded, calling for books or papers.

The Court further says : " The law provides for the compulsory production, in the progress of judicial proceedings, or by direct suit for that purpose, of such documents as affect the interest of others ; and also, in certain cases, for the seizure of criminating papers, necessary for the prosecution of offenders against public justice ; and only in one of these ways can they be obtained, and their contents made known, against the will of the owner." (Citing *Boyd vs. United States*, 116 U. S., 616 ; and *Kilbourn vs. Thompson*, 103 U. S., 168.)

out and detecting all that is essential to determine the relations, not only between particular suitors, but also the relation between those who hold such franchise and the citizens of the republic.

One example of the limits of the functions of the Inter-State Commerce Commission may be given by reference to a number of cases which lately came before that Commission, in all of which the "Standard Oil Trust," although not a party of record, was the real party mainly involved. These cases are entitled "Rice *v.* Louisville and Nashville R. R. Co. *et al.*" The plaintiff was the same in all the cases; and as the questions at issue were to a considerable extent identical, they were by agreement tried together. The particular shipping parties to whom the discriminations were shown to have been directly given were the Standard Oil Company of Kentucky and the Walters-Pierce Company of St. Louis, two corporations which seemed to all outward appearance to be entirely independent existences. These contracted apparently for themselves with the managers of the railways, and the investigation before the Commission was confined, therefore, to considering the contracts between the railways and these particular companies. But, as was incidentally developed, the Standard Oil Company of Kentucky and the Walters-Pierce Oil Company of St. Louis were not independent companies. They were, in fact, simply conduits of the "Standard Oil Trust"; or rather they were the means through which contracts might be



made which could on occasions be exhibited without danger. Their contracts made directly with the railways did not by any means show all that there was in the cases. So far, then, as the proceedings before the Commission went, they were limited to the development of discriminations which were made to these two ancillary corporations, under contracts between them and the railways, by the officers of the different railways. The discriminations were shown to consist partly in furnishing to these minor corporations the privilege of shipping oil in tank-cars belonging to them as against the independent shipper, whose shipments were made in barrels. There were discriminations of several kinds. One consisted in making a greater charge for a hundred pounds of oil shipped by barrel than on the same quantity shipped by tank-cars. Another method was indirect: it consisted in a purposed neglect by the officers of the railways to indicate or notice the capacity of the different cars belonging to the favored corporations, some of which were twice as great as others. Through this means the favored tank-car shippers were enabled at times to ship as much as double the quantity charged for.<sup>1</sup> Another advantage consisted

<sup>1</sup> Since the passage of the Inter-State Commerce Act it has become quite common for shippers, in collusion with the railway managers, to misrepresent the character and weight of the goods forwarded over the road. The practice is popularly called "underbilling." Mr. Fink, in a letter to Senator Cullum, Chairman of the Senate Inter-State Commerce Committee, treats this subject with his accustomed candor. He says:

"This practice has been in operation for a long time; but since the enactment of the Inter-State Commerce Law it has greatly increased, and has

in abatements to the favored corporations, on account of the stationary tanks which were erected by them at the termini of the roads, for receiving and storing in a great measure taken the place of the payment of rebates. It has the same effect, only differing in method, and results in unjust discrimination, which is forbidden by the Inter-State Commerce Law. For this reason the attention of the Inter-State Commerce Commission has been called to this matter ; and the question how to prevent, by proper legislation, this violation of the spirit and intent of the Inter-State Commerce Law, is worthy of the consideration of your Committee.

“ There are two distinct features of this practice to be noted : first, when the motive of the shipper is simply to cheat the railroad companies and to prevent them from collecting for their services the charges according to the open tariffs filed with the Inter-State Commerce Commission ; second, when freight is underbilled, or the character of goods misrepresented, by an understanding, direct or implied, with the carriers, to secure the business of certain shippers in competition with other carriers, thus favoring one shipper as against another.

“ In either case the effect upon the honest shipper who represents his shipments correctly, and who is not favored by such understanding, is the same. It is unjust discrimination forbidden by law.

“ It may be said that so far as the railroads themselves are concerned, they are able to protect themselves against this misrepresentation by examining and weighing all goods. This is true to a certain extent. There are a great number of railroad companies who have, individually and in concert with each other, endeavored to do this, and have established for that purpose inspection and weighing bureaus at some important points ; but it has been found impracticable to weigh and inspect all goods offered for shipment. At New York, Chicago, Indianapolis, St. Louis, and other points such inspection bureaus have existed for some time past, and they have to some degree accomplished their purpose ; but the amount of freight so inspected is only a small portion of the whole inter-state traffic of the country.

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“ It would appear at first sight very simple for the railroads to control this matter, if they so desired ; but there are so many competing roads, and among them some roads which do not want to control it. How can the roads which are willing and anxious to do it force those which are not ? There is no law to compel them. The inter-state law forbids the use of any device by which one shipper may secure more favorable terms than another for like services ; but it does not command the railroads to inspect

their shipments. And still another advantage to these favorites consisted in an allowance for mileage, made by special arrangement for the use of the tank- and correctly weigh every parcel of goods to be forwarded by them; nor would it be practicable to execute such a law if it were enacted, without greatly obstructing the prompt movement of the traffic of the country.

“It is in the very nature of the case that the carrier must to a considerable extent rely upon the representations made by the shippers; and while there are many honest merchants who will not attempt to misrepresent, there are others who will avail themselves of every opportunity to do so. The honest merchant suffers by the practice of the dishonest merchant, with whom he is unable to compete on equal terms.

“It makes no difference whether these misrepresentations in weights and the character of freight are made for the simple purpose of cheating the railroad companies, or whether they are countenanced and not resisted by the railroad companies for the purpose of securing the traffic of certain large shippers, in competition with other carriers; the result is exactly the same—unjust discrimination. This practice is a much more objectionable one than the former practice of paying rebates, because it is much more difficult of detection.”

Mr. Fink suggests the following as a remedy for this evil.

“In my opinion, as well as in that of many railroad managers and a great many merchants with whom I have conversed on the subject, a law should be passed by Congress making the intentional misrepresentation of the weight and character of the shipments on the part of the shipper illegal and punishable by fine. The Inter-State Commerce Law already prohibits railway companies from resorting to these devices; but it might also be desirable to make the law more specific on this point.

“Such a law would have a great moral effect with law-abiding citizens. At present to misrepresent the weight or the character of shipments is not considered by a great many people as in any way reprehensible or immoral; but the legal condemnation of this practice would deter a great many from continuing it. It would have the same effect upon the railroad companies who now for selfish purposes countenance or encourage the practice. It would further have the effect of strengthening the railroad companies in their voluntary efforts to correct these evils.” (See “Correspondence on the subject of legislation to prohibit misrepresentation on the part of shipper of character and weight of goods,” between Mr. Albert Fink and Senator S. M. Cullum, Chairman of the Senate Inter-State Commerce Committee, March 7, 1888.)

This “underbilling,” as will thus be seen, is but another form of discrimi-

cars by the railways. Besides this it was developed, rather incidentally, in the course of the investigation, that the railway companies were in the habit of using the tank-cars for the shipment of return freight of cotton-seed oil. The rate charged on this return freight was so low as to appear mysterious to the Commission, since the commissioners say concerning it: "This charge, for some reason not satisfactorily explained to the Commission, is made astonishingly low when compared with the charge made on petroleum, although the cotton-seed oil is the much more valuable article. It is very manifest from the evidence that the cotton-seed oil traffic in itself is not one of much profit to these defendants"—the railways.

Altogether, these cases were very much more significant in indicating certain concealed relations between the favored shipper and the railway managers than in any proofs which they furnished of discrimination. Their whole tenor exhibited an unmistakable disposition, upon the part of the officers of the railways, to lean to the interests of the "Standard," a device to evade the legislative enactment that is intended to correct the abuse. It seems to me that nothing can be more obvious than that this evasion exhibits a condition of management for which no remedy can be effective that does not include systematic inspection; or, in other words, that does not deal with the railway manager as trustee for the performance of that lesser and larger trust which I have hitherto defined.

There is pending before the United States Senate an amendment to the Inter-State Commerce Bill, which aims to prevent this form of discrimination. It prescribes certain penalties for the various kinds of "underbilling," but it does not provide, as it seems to me, for such comprehensive inspection as is necessary to correct the evil.

ard Oil Trust" as against the independent or competitive shippers. It was clear that, in all of their intercourse, the officers of the railways intended to make it easy for this "Trust" to do business through its ancillary corporations over the roads, and difficult, if not impossible, for every other shipper.<sup>1</sup> From all the indications, it appeared that the real wrongdoers were not the parties who were made the defendants to the case, and that the contracts therefore which were essential to a determination of the whole question of discrimination, being between parties who were not before the court, were not produced. If,

<sup>1</sup> The following is a significant instance of this given in the opinion of the Commission :

"Nothing in these cases more distinctly challenges attention than the fact that several of the defendants, while giving tank rates regardless of the quantity carried, informed complainant, when interrogated by him on the subject, that if the quantity exceeded a certain specified weight, a charge would be made for the excess. The published rate-sheets ought to have given clear and reliable information on the subject ; and it was only because they were silent or ambiguous that the inquiries became necessary. The remarkable thing about the matter is that so many of these defendants should make the same mistake ; a mistake, too, that it was antecedently so improbable any of them would make. The Louisville and Nashville, the Cincinnati, New Orleans and Texas Pacific, the Newport News and Mississippi Valley, and the Illinois Central companies are all found giving out the same erroneous information, and no one of them can tell how or why it happened to be done ; much less how so many could contemporaneously, in dealing with the same subject, fall into so strange an error. It is to be noted, too, that it is not a subordinate agent or servant who makes the mistake in any instance, but it is the man at the head of the traffic department, and whose knowledge on the subject any inquirer would have a right to assume must be accurate. In no case is the error excused, and if it be conceded that there was no purpose to mislead, the case is not relieved of unpleasant features, for gross negligence, when it is damaging, may be equally culpable with wrongs of intent."—"Inter-State Commerce Reports," Vol. I., p. 753.

as all the indirection indicates, the real inner contract for discrimination was not that which was made between these ancillary corporations and the railways proper, but one which existed between the "Standard Oil Trust" and the officers and managers of the railways, and if therefore it is between the "Trust" and these managers that the accounts for discrimination are at last to be adjusted, they may be found to provide for salaries and bonuses paid by the "Trust" to the officers, which purchased the infidelity of the railway managers to the shareholders of the corporation. If this is the case, the railway companies proper instead of being aggressors are victims.

If we accept these indications, we have a rational explanation of the studied ignorance of the railway officials as to the capacity of the cars, as well as an explanation of the insidious favors that these managers were constantly affording to the shipping corporations which belong to the "Trust," and of the insidious obstructions that the same managers were constantly throwing in the way of every independent and competitive shipper. Moreover, they point with significance to that circumstance which seemed so puzzling to the Commission; viz., that the railway companies without apparent motive persisted in carrying return freights of cotton-seed oil at rates so low as to be absolutely profitless. If there should exist between the "Standard Oil Trust," the "Cotton-seed Oil Trust" (which is the shipper

of the cotton-seed oil freights), and the managers of the railways, a contract which provides that the "Cotton-seed Oil Trust" shall account to the "Standard Oil Trust" at a very high rate for the use of the cars for the shipment of the cotton-seed oil to the North, and that meanwhile the "Cotton-seed Oil Trust" shall pay to the railway companies a very small amount of freight for shipment, there is a manifest advantage in the arrangement to the "Standard Oil Trust" as a shipper of petroleum. In other words, here is a place for concealment of discrimination, in contracts which were not and could not well be brought before the Commission—a discrimination in favor of the "Standard Oil Trust" and against any other shipper of oil on the roads. But the matter of the amount of freight paid by the "Standard Oil Trust" to the roads, so far as the interests of the "Trust" are concerned, is in itself only of secondary consequence. It is a fact, but not the pregnant fact. It is only one of the means to an indirect and very much larger end. That which is of the greatest importance to the "Standard Oil Trust" is the possession of the power which comes from being the exclusive shipper of petroleum over a road, and thereby the exclusive furnisher of this petroleum to large areas of country. This power enables the "Trust" to distribute its oil to consumers at a price not regulated by market value,—a price which has no relation to cost of carriage or reasonable profit, but such a price as it can exact from consu-

mers in the absence of all competition. The revenues derived from this source, when skilfully employed, are immense as compared to any sums which might come from simple freight discriminations. They afford ample funds for enabling the "Trust" to persuade the managers of the railways to confer exclusive right of way over the roads to the "Trust," independent of any question of freight rates. In reference to the particular case of Rice against these railways, just cited, it is not improbable that the "Standard Oil Trust," as a result of the finding of the Commission, will purchase Mr. Rice's refining interests. The "Trust" can thereupon prepare itself, as exclusive shipper, to meet the next independent or competitive shipper, who will be altogether likely to be less persistent than Mr. Rice, by some new secret method of throttling. Manifestly the evil will not be abated by this finding of the Commission, for the reason that the real cause of that evil has not been reached. To suppose that the managers of this "Trust" would give up their processes as a consequence of the finding, is to assume that they would abandon without necessity all the motives which they have for being,—all the reason for their success.

There can hardly be any greater mistake than to consider this organized power a private right, but this is the common estimate of it. If a corporation which comes in contact with the public as the railways do, may be allied with a "trust" organized for



keeping secrets, and if by such repository the railway managers may shield their contracts from judicial investigation, then the immunity of the *quasi*-public corporation from exposure is fully assured, and the right of the private citizen coming in contact with it cannot be secured. We have seen how a league of corporations, bound into a "trust," has reduced an industry into its possession, and, by secret alliances with the managers of the railways, perpetuates this possession.

Such result is largely rendered possible by permitting a corporate masking—an assumption of that sacred right to privacy which belongs properly only to the individual citizen. As Mr. Justice Field says: "Of all rights of the private citizen, few are of greater importance. . . . than the exemption of his private affairs and books and papers from the inspection and scrutiny of others. Without the enjoyment of this right the other rights lose half their value."<sup>1</sup> But it must be plain that this right can only be well assured and guarded when the corporation counterfeit is not permitted to interfere with it.

I repeat, therefore, in this connection, what in substance I have said before: that all of the facts are necessary for a proper determination; that the court must be enabled to discover the indirect and concealed as well as the direct and public contracts. It must be armed with the power of following all of the parties to the dereliction *in personis* to their

<sup>1</sup> "Federal Reporter," 32, p. 241.

last hiding-places, and unearthing those unwholesome secrets which not only threaten, but continually interfere with the equal political right of the citizen. And more than this, there must exist a power somewhere which can not only examine specific cases and treat specific injuries as they are brought to notice, but one which will exercise a constant supervision over the actions of the trustee, and exact from him an accounting of his stewardship; for no government can be free which permits the invasion of individual rights, no matter how it may hold the invader responsible for specific acts after the invasion is committed. The citizen in a free state must be able to feel that he can embark in industrial enterprises without meeting all about him secret conditions which interrupt that right. It is the duty of the state to remove obstacles from the individual, so that he may begin as well as prosecute his industries freely. There must be a power, therefore, which of its own motion will remove insidious obstructions, and not delay its action until specific mischiefs are accomplished. The Inter-State Commerce Commission does not exercise this power, and as at present constituted it cannot. In thus noting the limits of this Commission as constituted, I do not mean in the least to undervalue its importance. I think there is plainly to be noticed an instinctive sense of relief all over the country, by reason of the high character of the members of this Commission and of the efficient work which it has accomplished.

This accomplishment marks the necessity for enlarging its scope and placing its powers upon a broad, fundamental, and unquestioned basis. The very fact that Congress was impressed by the magnitude of the evils to stretch a point of construction in order to create the Commission, only exhibits more clearly how the evils of corporate management have outgrown due public restraint; how, hitherto, the country has not been sufficiently apt, as Bacon puts it, "in devising remedies as fast as time breedeth mischief." When we look at the powers conferred by this unique piece of legislation, exceeding as those powers probably do the existing constitutional bounds, it must be conceded that they are not yet sufficient to fulfil all of the requirements of the needed reform; that although they are beneficial in their effect, they can only be regarded as tentative.

Nor can we confidently look to the corporate interest for the inauguration of a comprehensive reform. I think it must be admitted that those directly allied to this interest were for a long time very reluctant to recognize that there was such a thing as a railway problem in which the individual had any political right. Any suggestion of governmental interference was assumed to be in some way an invasion of a vested right. These allies continued in this attitude until internecine wars of rates induced them to look about for some means of relief from themselves; but they still regard the

question as their exclusive affair, and only seek that political power be conferred upon them to enable them to adjust their differences. The abnormal growth of the power of the railway interest in politics has been stimulated through the acquiescence in this assumption by the public. It may be said generally of the railway manager that his success and his accumulations are largely due to violations of sound economic principles, or, at any rate, that these successes and gains result from a system which has flourished in violation of those principles. The methods of management have been popularly judged by their money success, and thus judged they are not only praised, but suggest imitation. Public approval of this kind is always apt to awaken self-satisfaction among the approved; and thus neither any reason from within, nor any persuasive influence founded upon analysis, will be likely to change the current of the managers' views. In other words, they are in a condition which hardly conduces to meditative self-examination.

I do not mean to say that this state of opinion and feeling is universal among railway men. There are differences of opinion; nor do I think, indeed, that the grosser assumptions of the railway interest are so general as they have been. One of the best reasons for hope in the transitional character of railway management is the fact that such men as Mr. Albert Fink and Mr. Charles Francis Adams have, within the past few years, come into great promi-

nence in the field. These are men of recognized integrity and consummate ability. There is commonly, and very justly as I believe, attributed to them a disposition for the highest candor in their attitude toward the questions involved. Nevertheless I may be permitted to say that I think it is clear that all of the conditions of a comprehensive reform cannot be justly expected to be suggested or cordially supported, even by them. They are reluctant to admit that there is any thing in the industrial corporate structure itself which contains any tendencies essentially at variance with republican institutions. They look upon it as a vehicle of industry complete in itself, capable of self-government and self-restraint, and through such self-government to be made harmonious with our institutions,—a something which, whilst it may have some functional defects, is thus not only capable of, but entitled to this self-government. It is their environment which prevents their seeing the necessity of reform through limitations of their own power; for it is an invariable quality of power, and especially of corporate power, never to yield of itself. Those in possession of it who mean to be just and fair are not exceptions to the rule. So far from yielding on this account, they rather tend to hold it the more firmly and to justify their holding with what to them is a profound conviction, that they will employ it more beneficently than any others. This tenacity is thus supported by a sense of duty, in which they assume

that, if they were to relinquish the power, it would be apt to fall into the possession of those who would not employ it so fairly. This, I say, is the inherent quality of all power, but it is especially characteristic of corporate power.

The wise statesman, on the other hand, who views the equal individual political right of the citizen as the first condition of freedom, will see in this corporate structure itself a constant motive of private interest, and thereby a tendency against freedom. He will infer that this tendency can only be counteracted by preserving a strict surveillance over the artificial structure. He therefore believes, as a postulate, that this structure must be recognized as an artifice which tends to antagonize freedom. This difference of opinion between the two rests upon an essential difference of opinion as to the kind of title which the managers of the corporation have to the property, and in their franchise. What are these differences of estimate as to the nature of this ownership? With the shareholder of the corporation whose investment is in property for profit, the dominant motive is the using of the power which he has received from the State for the furtherance of his investment. To him the franchise is apt to seem an incidental means for the promotion of his investment. The chief motive of the State, on the other hand, is the securing of the convenience of its citizens under an equal rule of service, and to this the private interest of the shareholder is entirely

secondary and subordinate. The manager of an industrial franchise is more apt to consider the franchise as something other than a creature of the State, and the management of the property as if it were a management such as usually belongs to private ownership. This is the inherent tendency of corporate management in its attitude toward the State. Neither Mr. Fink nor Mr. Adams is by any means free from it. Mr. Fink says, in his argument before the Committee on Commerce of the House of Representatives, in January, 1880 :

“In my judgment, the only measure now wanted in order to give permanency to the operations of these associations [the coöperative, or what is sometimes called the pooling system of the railroad companies] is to recognize the same as necessary and beneficial, to give legal force to the voluntary agreements that may be made between its members, with the view of carrying out the objects of the association, namely, the establishment and maintenance of reasonable and non-discriminating transportation tariffs; in fact, the object of your legislation. If Congress would pass a law to this effect, I would consider the whole railroad problem in this country settled, and settled upon truly American principles. It would allow the proprietors of the railroads to manage their own affairs, which they are much better able to do than it could be done under a centralized government.”

It is the assumption in this that the managers of the railways are the proprietors of them, and that the affairs of the railways are their own affairs, which characterizes the attitude of all railway men toward

the problem. The just answer to it would seem to be, that the shareholders of the railways are not and cannot be owners of them, in the strict use of the term ownership. They cannot own a franchise empowering them to take private property, or to construct, maintain, and operate a public highway. They may exercise it as public agents, but its ownership remains with the State as an essential part of the power of the State; and it is this ownership that the State cannot part company with. So far as the public are concerned, this is a far more important part than that which the shareholders have. It is indeed something which it is not in the power of the legislature to vest in those shareholders as owners, because it contains essential rights belonging to the citizen by virtue of the fundamental law. These rights to the citizen consist in the right to demand from the holders of this public franchise a uniform service; and there can never be any dealing with the corporate power in any way that involves a surrender or a compromise of the unrestrained control of that franchise to those who manage it. The direct motive for the management of an industrial *quasi*-public franchise by those to whom such franchise is given, is essentially commercial and private. The corporation to which the franchise is committed has a motive for gain; and the motive for which the franchise was given—public equal convenience—does not of itself, and cannot, run current with the motive for gain. The two are not homogeneous. They will



not of themselves run in parallel lines, and they can only be kept there by constant supervision of the power which created the franchise; so that it is absolutely necessary for the existence of freedom that the motive for private gain shall be subjected to the motive of public right by the constant surveillance of the guardians of that right.

Ever since the commercial corporation has come into prominence in this country we have been endeavoring to find some plan whereby those in possession of a franchise, moved as they are by desire for private gain, shall be permitted to exercise more or less of a political power in the use of that franchise. We have proceeded upon the theory that from this union, in some way, there might result such self-imposed restraint, by the railway manager, as would make his use of the public power which the franchise conferred equitable and just. The attempt has been a failure. It never has been and never can be successful, for it involves an inherent contradiction. To estimate the inevitable result we have but to consider the relative force and tendency of the conflicting motives involved. The motive of the railway manager for gain is direct, constant, persistent; it is increased by competition and stimulated by the hope of wealth. The motive for his performance of the public duty, on the other hand, if the requirement of the performance is loosely guarded by the state, depends almost entirely upon the spontaneous suppression, by the railway manager,

of his persistent motive for gain. Security for the public right thus depends upon the sense of patriotism of the railway manager,—a sense which when it exists, is constantly strained by those severe tests of competition which occur between the rival franchises and a sense which, if persisted in, is likely to bring commercial failure and disgrace. The virtue of self-restraint will not flourish in any system of industry where avarice is made the goal. Nor can commercial justice be expected to prevail in any condition where the only final reward of that justice is bankruptcy.

The name of Mr. Adams has been even more prominently associated with the railway problem than that of Mr. Fink. He has written upon it to a considerable extent, and described with great power, and in detail, many of its evils. His utterances have been received with great consideration, partly because of his antecedents, and because his name is regarded as a synonym for honest purposes. Mr. Adams' faith in the autonomy of the corporation is no less marked than that of Mr. Fink. Indeed, it is so great that he not only raises no question as to the inherent vices of the corporate structure, but he assumes the whole cause of all the evils of railway management to be outside of that structure. Before the Inter-State Commerce Committee he made an argument mainly against all restrictive and repressive legislation, and in favor of enabling legislation for the corporation. While it is true that by means

of such enabling legislation he assumed that the corporation would regulate itself in the direction of reform, his argument did not show that he perceived anything in the corporation itself which would tend to conflict with the progress of reform. With unbounded faith he set forth what he assumes to be the cause of all existing railway evils, saying at the outset: "What then is this mysterious underlying cause of which the railroad abuses I have referred to as so notorious are the outward manifestations?—with all possible confidence I assert that it is excessive and unregulated railroad competition. This, and nothing else."<sup>1</sup> One can scarcely conceive of a more signal instance of mistaking the result for the cause. Mr. Adams took this as the postulate for his argument before a Congressional committee in 1880. In 1885, as a witness before the Senate Select Committee on Inter-State Commerce, he tells the Committee that there is nothing which has occurred in the meantime to induce him to change his views; that, on the contrary, he has become more and more convinced of their soundness. The confidence which is thus based upon what is assumed to be the real cause of the evil, of necessity, if that assumption be false, limits the value of any suggestions for reform which proceed from such a premise. Where one assumes the evident effect of an evil to be its cause, his remedial suggestions cannot pos-

<sup>1</sup>Argument of Charles Francis Adams, Jr., before the Inter-State Commerce Committee of the House of Representatives, February 27, 1880.

sibly be complete. If the City Council of the city of New York were to turn loose upon Broadway a number of wild beasts, there would undoubtedly follow active competition among those beasts for devouring men, women, and children. But this competition could in no sense be called the primal cause of the evil. The primal cause would be the letting loose of the beasts upon the community. In the same manner, the underlying cause of the railway evil is the license with which the State has endowed railway corporations bent upon unrestrained aggression. It is a natural result that in the eagerness of these to employ their opportunities they have fallen into unrestrained competition. In Mr. Adams' confident opinion, therefore, it is not that political solecism—the artificial structure,—but resultants of this solecism, which constitutes the cause of the evil. The fact that the State has carelessly given to these corporations the license by which they have made themselves warriors for conquest is a fact which lies beyond the line of Mr. Adams' inquiry. In the eagerness of the railway powers for supremacy, they saw at last their tendency to self-destruction. The aid which they thereupon sought would not admit of control from without. They sought additional power from their creator, the State, to organize themselves for a more efficient continuance of their courses; and the remedy which Mr. Adams suggests is nothing other than the furtherance of this method. Practically it is no less than the imparting to an organ-

ized evil a more thorough organization. The illogical hope which Mr. Adams entertains, that such a course would work a modification of the evil, does not affect its tendencies; for his remedial theory proceeds upon the assumption not only of continuing the cause, but of conferring upon it the power of self-continuance.

In accordance with this theory, he rests with great faith upon what he calls the "survival of the fittest."<sup>1</sup> It is doubtful whether any phrase invented to express a clear scientific fact has ever been more generally wrested than this, from its legitimate meaning in support of false reasoning. It has been seized upon by those who have worn out the misapplied uses of the *laissez faire*, in order to sustain the fallacy that "whatever is, is right." Mr. Adams' employment of this phrase is a fitting illustration of its wrong use. Under this reasoning, the evils arising from careless legislation, by which the artificial structures created by such legislation are loosely restrained, come to be regarded as something which ought to be unmolested. Those who treat evolution in this way seem to regard artificial forces as something which may control human intelligence. They treat society as something which may submit itself to any legislative creation, and, because it is a legislative creation, insist that it must prevail. They ignore the larger fact that those forces which mark

<sup>1</sup> Report of U. S. Senate Select Committee on Inter-State Commerce, 1886, p. 1204. Testimony of C. F. Adams, Jr.

progressive civilization consist in the power and disposition of man to modify artifices and bring them under the rule of natural law; and that the most reasonable hope for this civilization rests upon the belief that man may at length solve the problem of liberty by arresting and preventing those political disasters which come from artificial interference. It is thus, by the examination of organic methods, that mankind becomes enabled to discriminate between those things which are dominant in nature's law and those which may be modified. The greatest exercise of human intelligence, therefore, is to apply principles to institutions. This is what I understand to be the true import of evolution, the meaning of the "survival of the fittest" as applied to political science. In this view it seems to me, nothing can be more delusive and misleading than to undertake to apply this "survival of the fittest" to the incidental and artificial development about us.

However difficult the details of adapting corporate methods to natural law may seem to be, at whatever seeming sacrifice of convenience, republican freedom requires that it must be done. The seeming difficulties are seized upon as pretexts for prevailing methods. When we are met, for instance, with the proposition, from the railway manager, that the demands of commerce require that the railways shall do their carrying, on competitive terms to common points; "that it was never intended by nature that some obscure point in the Rocky Mountains

should be built up at the expense of large seaboard cities," we need to analyze the proposition; and so analyzing it, we find that artificial are substituted for natural conditions, and the proposition might be more correctly stated, that it cannot be made consistent with natural law or political economy that a common carrier should convey a barrel of flour from San Francisco to New York for less than the cost of carriage, and then recoup that loss from some unprotected, unguarded local point along the line of the railway; that nature never intended that huge corporate powers should be allowed to distribute advantages and disadvantages in accordance with the sense of greed of their managers in order to promote secret and personal interests; that no pretence of convenience to commerce can justify this. Moreover, that geographical distances and water-routes have been made by natural causes; that railways are creatures of man's creation; that the corporations by which these are conducted are like creations, and that in the progress of natural law these structures, in order to work normally, must be made to adapt themselves to natural laws, and therefore to sound political conditions, and that this in a republic means the adaptation of them to equal political liberty. If the processes of this adaptation are at times difficult and intricate, they are not on that account the less necessary, and they cannot be avoided by any shift or evasion where political right is to be preserved.

That survival which should be sought for is therefore of the ultimate fittest—that which is physically, morally, and politically the fittest. Intelligence has a large work in this field, in seeking to discern primal causes and ultimate effects, and in seeking to adapt political and industrial conditions to political and industrial principles. When we find about us corporations which misdirect human energy and interfere with human rights, we have to consider not only whether these promote temporary industry, but whether their management is in accordance with natural laws, with industrial economy, and with human liberty; whether, in a word, they fall in accord with the essential principles of civilization.

Mr. Adams is of the opinion that the power for organization in the American people is very great—greater even than was that of the Romans. This is in all probability true. Still it is possible that such a power may be exercised without due guards. I think it is a present fact that it has transcended these guards, and, to a considerable extent, the authority of the government. It is this excessive power of organization that Mr. Adams would call into larger growth by what he calls the “encouragement of the federation of the railroad management,”—a proposition which springs either from too great a solicitude for a continuance of the railroad power, through a more formal and permanent recognition, or else from a somewhat ingenuous confidence in the self-abnegation of a power whose most obvious



motives are for private gain. But all human experience shows that no artificial organization, whose motive is private gain, can safely be endowed with political influence or regulation of industry, except under continuous and specific governmental restraints. No matter what beneficent intention Mr. Adams may have for such design it will be beyond any human reach to change the inherent qualities of a corporate federation. Such a federation in this country would constitute a federation of commercial monarchies within a federation of political republics. There would thus be two federations with motives diametrically opposite—one containing a centripetal, the other a centrifugal force. The two do not act in the same direction. One or the other of these must predominate. Such a gift of federation, in a republican country, could be no other than a Trojan gift.

In regard to Mr. Adams' personal relations to the railway management and his duties to it, I do not presume to say that it becomes necessary for him to divest himself of interest in order to discuss the railway problem. But it is obvious that during the continuance of such relation he cannot maintain such a judicial attitude toward the question of reform as will enable him to deal rightly with its larger phases, and the intrinsic value of his suggestions, therefore, as a reformer, is necessarily limited by his interest. This does not, of course, involve any question of his ability or his integrity; it

solely indicates the point of view from which he sees the corporation, a point of view from within outward; a point from which it is impossible to see the whole of it. No man, whatever his ability or honesty, who permits the line of his personal interest to cross the path of his investigations, can take a thoroughly passionless view of all that is involved in those investigations. Were Mr. Adams to divest himself of all direct interest, I do not believe there is any one who would be better equipped for the task of reform.

When he took the presidency of the Union Pacific Railway there were many who believed that road to be beyond redemption by honest methods. It had previously received, from time to time, from Congress enormous concessions of subsidies and credits. By the unchallenged use of the corporation, the managers and manipulators watered the stock, placed parasites upon the road, ignored all public and private rights, and, having diverted all of the revenues that they could out of the corporation and into their individual ownership, they turned it over to the stockholders, whom Mr. Adams represented. Its affairs took their necessary course until the gravity of the evil arrested the public attention. When the details of that evil had penetrated the public mind the gravity of the general railway problem became apparent. Then it came to be assumed that this railway was beyond the hope of immediate reform, and that the evils of its management could only be

corrected through reform of the whole railway system. Whether or not this view of the case is entirely correct, there certainly is enough in it to warrant the assertion that the president of the road, having taken it with the obligations which that charge involved, cannot be expected to contemplate or suggest a reform which involves the complete subordination of his authority. Taking Mr. Fink and Mr. Adams, then, as the best representatives of the railway interest, I think it may fairly be said that whatever the public may hope from the railroads in furnishing data or assistance toward general reform, it cannot reasonably be supposed that there will be in that quarter an anxiety to establish those more fundamental principles which essentially limit the power of the corporation.

Nor can we look to the statesmen who have either direct or indirect alliances with the railway interest, for any aid or suggestions toward a reform founded upon thorough analysis. Their corporate interests stand in perpetual conflict with their duties as representatives of the people. These interests are always likely to be nearer and more personal to them. The growing need, therefore, for legislation to guard the political and individual right against the corporate power is more likely to suggest to them evasion than examination. Some of these representatives have been placed in their seats through the direct influence of the corporate power for the purpose of furthering it, by legislation. Hav-

ing been successfully engaged in supplanting economic and natural laws by processes which seem to them of a more practical kind, it is not to be supposed that such representatives will examine the force of those economic laws with which they stand in conflict. Besides this, they possess to a considerable extent the public approval of their success, and their tendency, therefore, is to accept this approval as a vindication of their methods; and thus these methods to them easily fall in the category of political virtues. The railway statesman assumes to be, and to some extent is, regarded as the representative practical man. He looks upon the economist as a theorist, and classes the study of all political principle as theory. His natural course of reasoning suggests to him the conclusion that whilst we were living in more active recognition of what we call economic principles, we had no such development of material and physical resources as we now have, nor anything comparable to it; that our progress has been brought about through what economists call a contradiction of economic laws, and therefore it must be that those laws which were formerly depended upon are no longer in force. When a man has achieved political success, and becomes a United States senator solely because he has achieved prior success in railway management, we need not look to that man for such legislative or judicial wisdom as comes from the examination of political and economic principles. The prevalence of such principles

in his State would have made his success impossible. Nor can we conceive that a man who has learned his lesson from the corporation will feel in any constitutional sense that he is the servant of the people. His energies have been spent and his success acquired in undermining the sanctions of political right, and in employing for his personal gain rights which belong legitimately to the citizen. His influence, therefore, in legislation will be found to be of that kind which promotes class-interest to the detriment of individual right, which converts the delegated servant, chosen by the people, into an ally of a corporation for usurping public power in order to employ this power against the common right, in absorbing the proceeds of subsidies, and the guaranties of government credit. When, therefore, a senator urges that the railway question be left with those in corporate control, in order that they may work out their problems unmolested by the government, it is not possible that he can realize his relation as a representative of the people of his State to support a free government; and when another senator resists investigation into corporate methods in which he is directly interested, it is not possible that he can realize either the true interests of his constituents or the constitutional obligations under which he holds his seat.

Nor again can we expect any assistance in reform from the corporation attorneys. By these I particularly mean that large number of attorneys who are

employed at large salaries to give their exclusive services to this interest. They naturally seek for authority in form. All their suggestions lie in this direction. Their services are devoted to the promotion of existing corporate methods. Their efficiency is measured by the corporate managers largely by their power to resist reform. The corporate interest, satisfied with its established policy, desires only to fortify that policy, to keep it within the forms of law. The whole office of the corporation attorney is thus exerted to give strength and system to an artificial structure, with no thought of bringing industrial processes within the principles of equal political and industrial right. In furtherance of this we find him ready with his constructions solely to this end; ready to insist that a corporation is either public or private as suits the interest of the corporation; to assume it to be public as being the possessor of the right of eminent domain, and private when it is assumed that its charter is an inviolable contract with the State. The corporation attorney is constant in insisting upon strict adherence to the Common Law wherever the Common Law is inadequate for the relief of an abuse; for he is always a strict constructionist. He will question the constitutionality of any commission or court which is erected for instituting special inquiries into corporate methods or latent frauds, unless such commission or court may be in some way made to serve his ends. A considerable part of the best legal talent

of the country is arrayed on the corporate staff and engaged in this endeavor. And as nothing is more natural to them than to suggest difficulties in the way of changes of form, the earnest reformer is placed at great disadvantage by seeming to be an innovator upon what are called the sanctions of form. It is this that largely fortifies abuses against liberty and makes them so difficult of removal. It was thus that slavery, upheld by the Constitution, and by the decisions of the Supreme Court, gave to its defenders the advantage of being law-abiding citizens, and to those who attacked it the great disadvantage of being innovators who were seeking to overthrow that which the Constitution and judicial decision had recognized and protected.

## CHAPTER VII

### OBSTACLES IN THE WAY OF REFORM—CONCLUDED

ANOTHER of the obstacles to reform consists in the organized character of the evils to be reached. Through the support, direct and indirect, of what is called the vested interest, these evils have acquired great cohesion ; for nothing is more persistently conservative of existing structures than this interest. The honest investors of actual capital in the bonds and stock of corporations, where the investment is not accompanied by management or control, especially show such persistency. It has grown to be the case within the past forty years that a considerable part of the investments made in corporate enterprises are thus disassociated from control, and as these investors take no part in the direct management of the corporation, they therefore generally have but a dim perception that they are the supporters and encouragers of evil methods. They do not often hold themselves responsible, either directly or remotely, for the wrongs of management, because they do not come into direct contact with that management, except here and there in the indefinite and perfunctory way of voting ready-made tickets in the



elections for officers. Of this class it may be said that whilst they constitute one of the most efficient supports of civilization, they are at the same time among the strongest supporters of the organized wrongs. The men who get, gather, hold, and bequeath property are naturally the conservators of the fruits of industry; but from the very biases which they acquire in the getting and holding of these fruits, they lose the disposition to investigate the structure of the institutions, and thus by habit and character are rather preservers of what is, than promoters of what ought to be. In this attitude towards property, they are naturally jealous of the forms which guard their holdings, and the sum of their inspection is the audit of accounts. This is to deal only with the dollars and cents of their investments, and to leave all untouched the principles of political right which lie behind these audits.

There is often, indeed, a certain cowardice about the possessors of these interests which makes them dread examination. While, in reasoning among themselves in private conversation, they may be ready enough to condemn the apparent wrongs of corporate management in a general way; yet when remedies are suggested which tend to disturb the tranquillity of the existing conditions, or when such incidental outbreaks as riots, labor difficulties, or strikes arise, they perceive in these no other cause than the viciousness of human nature exhibited in the wanton disposition to disturb their

rights. They infer from such disturbances nothing to indicate to them any individual responsibility on their part. With many of them, it must be confessed, too, that this dread of disturbance tends to blind them to the illicit means by which the acquisitions were made, or, when these means become too obvious to be ignored, often induces them to condone them. They more easily effect this compromise with their consciences by thinking to avoid responsibility for the wrong because they are not directly connected with it, and so, claiming to represent the moral standard of the community, come to make the moral interest the supporter of the wrong. Under these circumstances, it is obvious that it requires the severest logic of facts to bring the holders of these interests to a consciousness of the evils which they are supporting.

Numerous revolutions in history have resulted from the tenacity of this interest in the support of organized evils. One historic example is afforded by its blind tenacity just preceding the Revolution in France. When the owners of property become impressed with the notion that the investment is paramount, and can see in reform nothing but a vicious attack upon right, they stand immovable. But behind all investment of the fruits of industry there lies the ultimate political right. This, repressed to the intolerable point, inevitably produces revolution. The vested interest, therefore, cannot be counted upon for organic reform. Its pos-

sessors cannot be expected of themselves to undertake to study its conditions. From the inherent character of that interest its owners are possessed by a sort of moral daltonism which renders them oblivious to those conditions which precede and which make political revolutions inevitable.

Besides this, a more indefinite responsibility for existing evils is to be found in the factor which we call public opinion. In the broad sense there are only two general modes of creating political conditions. One of these is by studying primal principles and rigorously establishing precedent conditions in accordance with such principles; and thus making a political foundation which, if wholesome, tends to prevent the growth of political evils. The other is by letting things drift until evils grow perceptible and oppressive, and then dealing with them in detail. The former method rests political right upon a fundamental constitution; the latter has no such foundation and deals only with consequences. It is what Carlyle calls "building your house from the top downward." Unfortunately for mankind, the latter is the mode which prevails, and whatever progress has been made in civilization has hitherto mainly depended upon this kind of patching. This is not altogether flattering to human intelligence, but it is the mode which prevails.

In searching for the contributing causes of political evils, we may often find some of them to be in a measure the resultants of public opinion. In a dis-

tribution of responsibilities, therefore, the more prominent actors in the evils are not solely to be held accountable, for in one sense they are to a considerable degree but the products of this opinion, and we must conclude that one of the deterrents to reform is the fact that the public, through their imperfect perception of the evils to be reformed, have contributed a share towards stimulating those evils. The motives of the chief industrial actors are not to be gauged entirely by their actions, but partly by their surroundings—by the standard which is made for them by the public. Thus considering all of the constituents of corporate aggression, especially those which have been incident to railway construction and management, it is proper to designate the part which the public have taken in these.

The public have stimulated building in its earlier stages, and have given many marks of approval to its earlier accomplishment. We all know how public clamor has urged forward rapid railway construction irrespective of the character of the management or the means employed. The popular vote has been rather eager to give the credit, first, of the townships, then of the cities, then of the States, and at last of the nation. The public have demanded not only that the railways be built, no matter how, but have largely ignored all attempts at criticism. They have even gone so far as to treat the occasional individual persistent censor as an obstacle to industrial progress. A large proportion of railway construction

has been accomplished from this loose sense of control and examination. These were the characteristics of the first stage of railway management. The stimulation of railway building on these conditions was nothing other than the pursuit of magnitude at the expense of quality. Whilst we congratulated ourselves that our rapid growth was unprecedented, we did not count the conditions of that growth—the evils which were its accompaniments.

At length the public awoke to a perception, not of the problem itself, but of the magnitude of the consequences which had grown under this encouragement and fostering. Thereupon the disposition to grant subsidies and to extend unquestioned approval rather suddenly ceased, and in its place there came as suddenly a disposition upon the part of this same public to repudiate the loans that were made, and to turn upon the "captains of industry" with the fiercest denunciation, and, in some instances, to seek to gibbet them indiscriminately as malefactors. This injudicious hostility organized itself into retaliatory legislation not only against the railway managers personally, but also against the railways, and largely out of this condition grew other corporations, in conscious and unconscious imitation of the railway processes, operating as direct retorts against that management. Courts were resorted to in efforts to test the question of the criminal conduct of managers in some cases, with the result that the defendants were usually found to be within the forms of

law ; that their acts were conducted under the very laws which were born of the anxiety of the people to further the condemned processes ; besides which the violent legislation against the railways was in many instances also found abortive. The Granger legislation proved to be an effort to accomplish impossibilities. The failure of such judicial and legislative attempts weakened the cause of their promoters, and were seized upon by the railway managers themselves as illustrations of what was assumed to be the impossibility of regulating the problem by any legislation whatever. Thus public opinion ran from one extreme to another, and these extremes were equally illogical. Even more than this, the railway managers were charged not only with doing the very things which they had been urged by the public to do, but were condemned by the public for not doing these things more rapidly. This situation is one of the solecisms of the times.

During the first stages of the railway question to which I have referred the leaders in railway management received a degree of admiration and a freedom from criticism and examination, which naturally tended to enlarge their confidence in themselves. They thus easily came to regard themselves as the creators of the industry which they were leading ; as some of the Roman emperors, stimulated by like admiration at the beginning of their reigns, came to proclaim themselves gods. But such apotheoses of human power could not in the nature of things last. So far as the

public were concerned, the very excess of this adulation produced a reaction of excessive abuse. Therefore in estimating the responsibilities which belong to the whole situation, we shall be able to modify our strictures of the individuals and to realize that the evil consists in a condition, and that the solution of the evil must proceed from a quiet examination of that condition. Such an examination requires the exercise of a passionless interest. Whilst the philippic may be a means of arousing passion, it is useless in investigation. Mere abuse has no office here. I do not mean to imply that there are not individual instances of the gravest and most direct personal responsibility. These are exceptions. Generally the individuals who constitute the corporate interest are not special creations of humanity. They are, as a class, no better or worse than a like number of men chosen from any other avocation. They exhibit the powers, feelings, and weaknesses of human beings in certain conditions.

Nor do I believe that as a class the corporate managers have been students of the history of the middle ages. They have been likened to mediæval barons, but they have not learned their practices, as has been sometimes supposed, from mediæval records. It is true they have received a structure in the corporation which is handed down from the middle ages, and that around this structure there naturally grew those conditions in which it was most likely to flourish; but it was the structure itself which sug-

gested the practices. I think, moreover, that the creations of sudden wealth by the railway managers have often been due not to their special abilities or individual aptitudes, but to the fortuitous circumstances by which they became managers of corporate structures, and in some instances the growth of this wealth has probably surprised the acquirers quite as much as it has the public.

It will always be well to keep in mind that it is by reason of the character of this structure that the individual conduct is distorted; for the corporate conscience, is always inferior to the conscience of the individual constituent manager. Mr. Spencer points this out as a familiar fact. "A body of men," he says, "will commit as a joint act that which every individual of them would shrink from did he feel personally responsible."<sup>1</sup> Not infrequently do we

<sup>1</sup> Mr. Spencer further notes the circumstance that "Not only is the conduct of a corporate body thus comparatively lax, but also the conduct towards one. There is ever a more or less distinct perception that a broad-backed company scarcely feels what would be ruinous to a private person; and this perception is in constant operation on all railway boards and their employés, as well as on all contractors, landowners, and others concerned; leading them to show a graspingness and want of principle foreign to their general behavior. Again, the indirectness and remoteness of the evils produced greatly weaken the restraints on wrong-doing. Men's actions are proximately produced by mental representations of the results to be anticipated, and the decisions come to largely depend on the vividness with which these results can be imagined. A consequence, good or bad, that is immediate and clearly apprehended, influences conduct far more potently than a consequence that has to be traced through a long chain of causation, and, as eventually reached, is not a particular and readily conceivable one. Hence, in railway affairs, a questionable share-transaction, an exorbitant charge, a proceeding which brings great individual advantage without apparently injuring any one, but which, even if analyzed in its ultimate re-



find examples, therefore, of character in the same individual which seem at first sight to present a curious moral paradox. There are among the corporate managers, men who are chosen for the performance of the duties involved in the private trust relation, and who perform all the duties of this relation with exact fidelity.

I have no doubt that there are men prominent in the control of the "Standard Oil Trust" who may be scrupulously careful in the custody of the property of that "Trust," notwithstanding the fact that they have derived this very property through diversion, by violence to that larger and real trust which inheres between the managers of the railways and the public. We should be altogether mistaken, therefore, were we to argue rigidly from the railway and corporate methods of these men, that, as individuals, they are especially deficient in moral perception.

What is it, then, that makes it possible that the same man may be a violator of one trust duty and signally faithful to another? It is and can be nothing other than the fact that the trust is recognized and defined in the one case, and left vague and indefinite in the other; that the public perception of the two conditions is so different that,

sults, can but very circuitously affect unknown persons living no one knows where, may be brought home to men who, could the results be embodied before them, would be shocked at the cruel injustices they had committed—men who in their private business, where the results can be thus embodied, are sufficiently equitable."—Herbert Spencer, "Essays: Moral, Political, and Æsthetic," New York, 1871, p. 261.

by what Locke first called "the association of ideas," the simple mention of the private trust relation calls to mind the guards and sanctities which belong to it, whilst that relation of trust which accompanies railway management (though in all respects as real) is not thought of or spoken of as if it had any such sanctity. Hence, the man grossly violating the duties of one relation and conscientiously performing those of the other, may be the same man—the same character. In each case he is acting in accordance with the existing forms of law. In one case these forms are clear and definite, they enact and support a principle; in the other they are vague and indefinite and ignore a principle. In the one case public opinion explicitly condemns violation, whilst in the other it has hitherto not only permitted, but to a considerable extent encouraged it. Personally, we often find the corporate managers and "trust" managers to be citizens who express, and doubtless believe they manifest, an interest in the general welfare of the country, while in their family and social relations they are models of propriety. Therefore in considering the problem, we must not confine our criticisms to the individual alone. We must realize that in the sum of the responsibilities some part must be borne by the people themselves; and in estimating the chief deterrents to reform, this public opinion must be set down as one of them.

In considering the condition of public opinion,

particularly upon the railway question, it is interesting to note its transitional movement; and there is reason for hope in the progressive character of this movement towards substantial and permanent reform. I have indicated that there are two stages of the railway problem; more accurately, there are three, each of which has its distinct characteristics. In the first or constructive stage of railway enterprise, as we have seen, the public were possessed with an absorbing desire which suppressed examination—a zeal not tempered with discretion. In the second stage there was a violent resentment, which expressed itself in a spirit of retaliation and indiscreet legislation—resentment which proceeded without judgment. We are now upon the threshold of the third stage, where we may expect a more passionless examination of the question as a problem; and in this examination we may hope that both the too great eagerness for material convenience and the too great personal animosities will be eliminated.

In such an examination we shall realize that a great deal of legislative injustice has been attempted and accomplished against the railway interest; that this interest has been subjected to annoyances created by the public prejudice, resulting in unreasonable and unjust exactions, and also that there have been many difficulties encountered by it of which the public are to a large degree ignorant. But with the realization of these things will also come the inevitable conviction that corporate management has

been aggressive; that this is its essential character; and that it cannot safely be permitted to exercise functions which are substantially governmental, or, as I have shown, *ultra*-governmental, except as custodians of their franchises and under the supervision of the State. Here is the place for the statesman. And the true statesman I conceive to be the man who is acquainted with the best political thought of his time, who has an adequate perception of the prevailing conditions and political needs, and who thus equipped, will seek to formulate into legislation just so much of this thought as can be appropriated by the time. Coming under the definition of Canning that "true statemanship consists in finding the line of safe change," he will not always attempt all that seems best to him, because thereby he might fall out of accord with the time and impair his own influence for good. He will be neither the theoretical reformer, nor the over-enthusiastic codifier, contemptuous of the sanctions of the past; nor the excessive conservatist, blinded by partisanship or by reverence for form. He will be allied to no class-interest. He will be capable of pursuing a system of structural analysis of the industrial and economic conditions of civilization, and of broadening the application of these principles beyond the forms of law, to new and enlarged conditions, thus aiming to preserve civilization by preserving a congruity between progressive events and the principles of justice and political liberty. While aiming at ultimate free-

dom, and with faith in its final accomplishment, he will nevertheless hold that this ultimate may be best reached through gradual and tentative measures rather than by radical and inexpedient ones.

I am aware that by the establishment of the trust relation, exercised within the corporation through a careful definition by statutory legislation, and by the erection of courts to enforce the performance of the duties of this relation, the whole problem will not yet be solved. Besides the obstacles which I have enumerated in the way of reform, there are some of a more indirect character. In our complex system of government with its incident of exclusive State sovereignty, no federal court or commission erected by the general government can exercise such comprehensive jurisdiction as is requisite for reaching the whole corporate system of the country. The power of such a federal tribunal would be exhausted with the examination of those cases which arise in inter-State commerce, and with the application of what would thus be at best but a partial remedy. Such a federal tribunal could not challenge the whole evil or annul a charter granted by a State, nor could it interfere with any infractions, however grave, which might be committed by a railway or a corporation wholly within the boundaries of a State and whose charter was derived from a State. It must, therefore, be apparent that any federal inter-State commission as at present constituted, or even as at present possible under our fundamental law,

would of itself be only tentative and partial, and not sufficient for complete control of the evil; that wholesome as it would be in paving the way for a future course, or as an object-lesson in teaching a clearer realization of the evil, this would be its limit. There remains, then, to make the reform more adequate, the necessity for homogeneous legislation, enacted by the several States of the Union as concurrent with and auxiliary to such legislation enacted by the federal government. This is necessary in order to insure harmonious supervision and control of all *quasi*-public corporations by the State and federal governments; and also more effectually to provide against destructive competition, to establish the trust relation, to restrict the franchises, and thus guard the equal political right of the citizen. This legislation can only proceed from public opinion—educated on this subject. I am aware that even with such homogeneous legislation and the erection of such tribunals with comprehensive powers, the whole question will not yet be solved. There will still remain the possible competition which may come from Canada, from the Transcontinental and other railways, and from Panama; besides the possible future complications which may come from the Mexican railways.

But, notwithstanding these interferences, and all of the obstructions which I have mentioned, the first thing to be insisted upon as a pre-requisite is the establishment of relations between the railway and the government which shall aim to secure the

essential rights of the citizen: a declaration of specific trust. This establishment is the inevitable pre-requisite for dealing with the evil. The question lies across the very threshold of reform, and it must first be answered before we pass, before we can address ourselves to any of the details of the problem; and when we have so answered we will doubtless find that those details, whatever they are, and however difficult they may seem to us now, will be easier of solution than they possibly can be by leaving this question unanswered and occupying ourselves directly with them.

As may easily be inferred from what has already been said, it is probable that to complete the machinery which will be required for the efficient guarding of the trust relation, some constitutional changes will become necessary for the erection of the appropriate federal tribunals. If what I have set forth has the warrant of fact and reason, such a course, radical as it may seem to be, will be justified by the gravity of the occasion. The highest value of a constitution lies in its being in accord with the necessities of existing civilization. If then it be necessary to appeal from any constitution to the reason, humanity, and justice which lie behind all constitutions, from which they derive their vital being, and by which alone they can be preserved from decay, then it is the course of wisdom to make the appeal. In order to accomplish this there will be no necessity to modify any principle. All that will be

needed is that we surround existing principles with a greater conservative force of law and equity ; that without seeking to create any new principle, we shall be careful not to violate any old one. Actuated by the sole motive of preserving the great central principle of equal individual and political right, the essential foundation of the republic, we shall so fortify this principle that all industrial methods shall be brought into accord with it in order to secure honesty between custodian and owner—fairness between one political unit and another—and thus justice to all.

I think we may safely base our faith in the general progress of our civilization upon the qualities of the prevailing race, or rather upon what we know of the lineage of the dominant race in America, which, for want of a better term, we call the Anglo-Saxon. It is from this race that Western civilization has derived its progress, and it is from the instinct of this race that I think we may reasonably hope to preserve our acquisitions and continue that progress. Its representative I will call the Anglo-Saxon unit. There is not so much of what we can call bright intelligence in this unit as in some others. The Greek, in the height of his civilization, as Galton and Matthew Arnold have shown, was superior to the Saxon type, both in intellectual and in physical qualities.<sup>1</sup> Plato was doubtless more purely a philosopher than Bacon ; but with all the intellectual superiority, the difference in the material and moral advancement between the two races of which these philosophers

<sup>1</sup> Galton's " Hereditary Genius," London, 1869, p. 342.



were types, is incomparably in favor of the Anglo-Saxon. The Greek reasoned, as Bacon says, in a circle. The Greek mind was deductive; the English and American minds are inductive. The difference between the philosophy which Greece produced and that which England produced is, as Bacon has said, that the former bore no fruit whilst the latter does. A somewhat similar difference may be noticed between the French nation and the English. The French drew an abstract idea of liberty from their men of letters.<sup>1</sup> The doctrinaires furnished the nation, and the nation accepted, a definition of liberty which was absolute, abstract, and without qualification. From the extensive premise adopted by the French, liberty is social equality, political equality, and fraternity, divested of the practical correlatives of duty and self-restraint. Thus taught, the nation proceeded by rigorous logical processes to socialism and communism. This, I say, arose from the deductive character of the French mind. The difference, therefore, between the Anglo-Saxon and the French, the difference in the causes which led to revolution in England and in France, and the difference in the influence of revolution upon the different peoples, mark the difference of race.<sup>2</sup> As

<sup>1</sup> "The misfortunes of France since the Revolution have been due to no one circumstance so markedly as to the predominance which the man of letters has acquired in that country; and this fatal predominance was first founded, though assuredly not of set design, by Voltaire." (See "Voltaire," by John Morley, New York, 1878, p. 44.)

<sup>2</sup> Mr. Lecky also draws a fine contrast between the characteristics of the French and Anglo-Saxon nations. See "History of European Morals," New York, 1871, p. 160.)

Morley pertinently asks: "Who shall measure the consequence of this difference in the history of two great nations; that in France absolutism in Church and State fell before the sinewy genius of stark reason, while in England it fell before a respect for social convenience, protesting against monopolies, benevolences, ship-money? That in France speculation had penetrated over the whole field of social inquiry, before a single step had been taken towards application, while in England social principles were applied, before they received any kind of speculative vindication? That in France the first effective enemy of the principles of despotism was Voltaire, poet, philosopher, historian, critic; in England, a band of homely squires?"<sup>1</sup> Our progress of civilization in America, with all its lapses, is derived from a practical idea of liberty, from habits of thought which come from daily intercourse, and which are inductive; and it is upon this that our hope for our particular civilization rests. It is through such habit of mind that we can take advantage of whatever failures of theory there may be to reform our mistakes. It is thus that we illustrate to ourselves the essential co-relation between duty and right. The great characteristic of our race is its instinct for freedom. This instinct may not in the highest sense be called intellectual, but it is pertinacious and continuous, and thus it is illustrated as a potent factor throughout history.

<sup>1</sup> "Voltaire," by John Morley, New York, 1878, p. 21.

Indeed, it may be said that self-preservation of inherited quality is a signal characteristic of all races, that each generation receives its qualities from its predecessor, and transmits them but slightly altered to the generations which follow. Whilst it is true that no adequate account can be given of current social and political phenomena until due allowance has been made for the modifying results which come from current social dynamic causes, yet, with all this, the main features of races preserve themselves from generation to generation with remarkable continuity.<sup>1</sup> And this may be said with more force of the Anglo-Saxon race than of any other, for it holds a particular pre-eminence among all the races of the world as a preserver of its own hereditary qualities. The main features of civilization, therefore, which belong to England and America are more eminently due to the circumstance of this persistence than to any other single cause.

Our unit has come through Hengest and Horsa, who planted him in England.<sup>2</sup> There fixed, although he was overcome by the superior force and intellect of the Norman in his conquest, he persistently asserted himself until he appropriated his master, the Norman, and his conquest.<sup>3</sup> In America he overcame the Span-

<sup>1</sup>"Ancient Law," by Sir Henry Sumner Maine, New York, 1875, p. 112.

<sup>2</sup>"When the keels of Hengest drew near the Kentish shore, they bore with them the germs of the American commonwealth, as well as the germs of the English kingdom." ("The English People in its Three Homes," by Edward A. Freeman, Philadelphia, 1882, p. 37.)

<sup>3</sup>This notwithstanding the Norman was himself part Teuton.

ish and the French, and possessed the country. Mr. Fiske has indicated the importance of the battle of Quebec and the victory of Wolfe as the turning-point that determined which of the two nations, the English or the French, should finally predominate in America;<sup>1</sup> but it seems to me that the answer to this question lies not so much in the issue of one battle, as in the fact of the pertinacity of the English. If defeated at the Heights of Abraham, there would probably only have been a postponement of the ascendancy of the English race, with little doubt that this ascendancy would afterwards have been acquired by the pertinacity of the Anglo-Saxon. The Anglo-Saxon unit is slow to move. As I have said, he lacks the quickness of his Celtic neighbor; but, slow as he is, this certain doggedness of purpose and directness which characterize him, give to him a firmer hold upon freedom than that possessed by any other type of human being. Transplanted in America, he has shown the strength of fibre and the power to assimilate all of the other less strong units which have come into contact with him.

Here he fixed his bounds by his sense of convenience, it must be owned, rather than by his intelligence or discrimination. He gave his acquiescence to a slavery not of his own race, but of another; and although for his own race the bounds were fixed without certainty as to the whole of human freedom,

<sup>1</sup> "American Political Ideas," by John Fiske, New York, 1885, pp. 56 and 125.

they were more comprehensive than any which preceded them. Having advanced to this stage, he halted. Thereafter he progressed with rather a dull perception and a leaden step, when this same slavery claimed continued existence as a right, and came aggressively across his path. As he permitted it to be recognized by the Constitution, as it was upheld by judicial decision, he did not disturb it, since it did not seem to be directly personal to him. But when its immediate champions threw down the gauge of battle and defied his own birthright, he arose like a giant, annihilated the wrong, reconstructed his civilization, and reasserted his freedom. Having taken this step, he again rested. He is now more easily aroused by reference to the past annihilated wrong, although it is a dead issue, than by many existing evils which lie immediately about him.

The same principle of action controls his conduct in industrial matters. Beguiled by a sense of convenience, he seems only faintly to feel the intrusion of the corporate trespasser upon his domain. He is told and he hears with dull ears of the treachery of his delegates chosen to guard his right. He only dimly sees the enemies masked behind the forms of law, and he is not alert to divine their purposes or to pursue his remedy. Now and then, it is true, he is aroused by some special act of violence, but he soon falls again into his accustomed indifference. Meanwhile wrongs about him, stimulated by his inattention, continue to grow, until at last by their

volume they are beginning to force themselves upon him. When he is at length brought face to face with the question of his freedom and can no longer delay the answer, then, however overborne by trick, chicane, and fraud, I have no doubt that he will again determine that "the nation shall, under God, have a new birth of freedom, and that a government of the people, by the people, and for the people shall not perish from the earth." At each successive great contest his realization gains some new force. The measurement of liberty is a little more carefully taken than ever before; the lesson is a little more closely learned, that vigilance is the price of liberty. Thus something is gained that is not thereafter lost; and so his civilization takes a new step which it partly at least keeps: When African slavery was stricken down, it was stricken down forever. That this sovereign unit when brought face to face with the new antagonism will rout it, I think there can be no doubt. The only present question is whether his intelligence may not be stimulated to realize the problem of his right—to overcome the antagonisms to that right—before a resort to blood and demolition becomes necessary.

Mr. Freeman traces the lineage of the unit to Arminius, that historic hero of the Teutonic race.<sup>1</sup>

<sup>1</sup> "I have little doubt that, if the distinction is to be drawn at all, Arminius and his fellows would be found to belong to the Low-Dutch rather than to the High-Dutch division of the Teutonic race. But it may be safer to look on that distinction as one of later date, and to say that, up to the fifth century, the Teuton whose descendants were to abide in Germany and the

Our heritage from the Teutonic race was the Town-meeting, as a guard for the preservation of political liberty. I think I may add that the gift which we have accepted from Rome is the Corporation.<sup>1</sup> This heritage and this gift stand in the same antagonism now as when Arminius smote Varus, shattered and drove back the Roman legions from the country of the Rhine. They are the old foes which confront each other with new faces. They present to us again the question whether we shall accept the Roman gift or our Saxon heritage as predominant—the Corporation or the Town-meeting. In the coming conflict, whether the result shall be by intelligence or by the last resort to revolution, the ultimate of civilization will not be lost. The sum of all the tendencies will assert itself. If, interrupted by such inter-

Teuton whose descendants were to make the voyage to Britain had one common history, exactly as, up to the seventeenth century, the Englishman whose descendants were to abide in Britain and the Englishman whose descendants were to make the voyage to America had one common history. . . . When Augustus vainly called on Varus to give back the legions which had fallen beneath the Cheruscan sword, he was mourning for an event but for which we could never have stood here as we now stand. But for that memorable day in the childhood of our people, neither the League of the Hansa nor the Union of Utrecht, neither the Great Charter of England nor the Federal Constitution of America, could ever have had a place on the page of history.” (“The English People in its Three Homes,” by Edward A. Freeman, Philadelphia, 1882, pp. 33 and 37.)

<sup>1</sup>Blackstone says: “The honor of originally inventing these political constitutions [the corporations] entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa; who, finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession.” (See “Blackstone’s Commentaries,” Book I., p. 469.)

ferences as cupidity, bad legislation, ignorance of economic laws, revolution results, I believe these tendencies will only be delayed, not finally overcome. If furthered by the study of political needs and the adjustment of them to the natural law, the result will be wholesome industrial and political progress. Thus in the larger sense it becomes a question of time; and, in the event of the interruption from our disobedience of natural laws, the revolution becomes an object-lesson to enable us to realize that ultimate irresistible force which we, through our cupidity, selfishness, and passion, were unable otherwise to detect. After revolution, with its attendant divestiture of all interests and demolition of all privileges based on wrongs, mankind is thrown back upon the simpler factors of political problems, and thus begins to reconstruct; and as the builder whose foundations are demolished comes to pay closer attention to the new foundations necessary for rebuilding, so a nation, gathering together the results of revolution, is apt to look to the foundations of the new structure, to eliminate from those foundations the weaknesses which produced the downfall. With such an object-lesson before us, we shall come to learn that in a republican state the preservation of the interests of the unprotected is identical with the preservation of the interests of all; that political right has thus essentially an equality which cannot be wrested by the strong from the weak without ultimate disaster. When this lesson comes



to be thoroughly learned, we shall realize, as a consequence, that there can be no such thing as political class interests. If, as I have said, the growth toward liberty, due to the Anglo-Saxon instinct, which was exercised through the Town-meeting, warrants this belief of ultimate victory over that gift which we have chosen to accept from Rome in the Corporation, for us the question of immediate importance is whether we cannot recognize the evils now, whether we cannot define and realize their relation to political liberty to-day. If we can, we shall be wise; because we shall thus avoid the violence of revolution. This can only be accomplished through the vital realization, by the citizen, that his freedom is essentially co-related to the freedom of others; that this freedom is, as I have pointed out, an equation,—that it is necessary for each one of us to insist upon the political equality of every one as an inseverable condition of the right of each and of all.

## CHAPTER VIII

### PROTECTION

I HAVE already incidentally referred to protection in its relation to the hybrid "trust." I will now undertake to deal with it somewhat more fully, in order to illustrate its qualities by the definition which I have given of industrial liberty. In doing this I will not attempt to consider, in a particular way, those statistics which are usually employed in tariff discussions; nor will I attempt to deal specifically with any of the pending or proposed efforts at legislation, or to consider those plans for immediate reform which suggest only modified changes in the existing status. My purpose is solely to discuss the question as a principle of republican government and as it relates to ultimate political and industrial consequences. This manner of treatment is, of course, radical.

I do not mean by this last statement, however, to indicate a belief that any great sudden change in the condition of our tariff duties would be either wise or desirable. I think that what is altogether more important than any immediate change by legislation, is a clear understanding of the fundamental

basis of the questions involved in tariff reform. Such understanding ought to be a prerequisite to the first step, not only in order that a sound basis for the change may be established, but that thereafter we may have a continuous and uninterrupted progressive movement in a wholesome direction. In studying the subject, therefore, analytically, we may arrive at conclusions which will not only enable us to determine with more clearness the direction in which our legislation should move, but we may also thereby be enabled from time to time to test the character of our progress, and to reassure ourselves of the correctness of our course. For such an examination we need rather to expel from our minds the statistics and complicated details of the tariff, and to grasp firmly that fundamental law of industrial liberty which underlies the whole subject.

It seems at first view an entirely simple and fair proposition, that when a little assistance is asked in behalf of a new industry struggling for existence in a new country, such assistance to come from all of the citizens of the republic, it ought readily to be given, if thereby we may aid that industry to establish itself and produce a new activity through the development of material resources. When we analyze this proposition, however, we discover that the classes which receive such assistance are made up of individuals or of private corporations; that their enterprises consist of industries in the management of which the personal profit of the owner is the

definite and prevailing motive ; that the contribution, on the other hand, which furthers these industries, is a public contribution, the assumed object of which, somewhat indefinite, is the public welfare. The motive which actuates the individuals and private corporations engaged in the fostered industry is not necessarily, nor is it likely to be, patriotic, whatever the pretence may be to the contrary. It is essentially and predominantly a motive of self-interest, and the enterprises are enterprises which are embarked in for gain. Obviously this is a condition which does not naturally generate disinterested patriotism. The inevitable tendency of the owners of a private interest, which derives assistance through exaction by indirect contribution from the general public, is a tendency to lean upon the support received, and as far as possible to perpetuate that support.

Thus we find among the different members of the protected class, varied as their special industrial aims are, that in their relation to the government as recipients of assistance, they all possess a common purpose, in seeking this assistance ; and in the furtherance of this purpose there is an inherent tendency among them towards a political solidarity. Accordingly, like the *quasi*-public corporate interests, they have been growing each year more coherent, more organized, more unified, and therefore more difficult to be dealt with by the general and less coherent public.

When the representatives of this interest proclaim, as they do, and possibly think, that the permanent well-being of the nation rests upon the fact that their industries are supported by exactions from the sum of the industries of the nation, it is easy to see how they come to assume that this fact exists by virtue of a fundamental principle of government; and thus that protection is not an expedient or a policy, but a principle. It is under this delusion or pretence that the emotional and sentimental statesman finds his opportunity, hiding the consideration of the fundamental principles of liberty under those vague political generalities which deal only with the immediate results of material prosperity. Here, also, we find the emotional and sentimental statistician, who seeks to supplant the consideration of fundamental rights and duties by an array of figures which shows the totality of the nation's growth, and which conceals under the grand total the misdistribution of this sum,—a misdistribution by which the industries of part of the citizens are depressed, in order that the industries of a class may be overstimulated.

The tariff, as a protective agent, was instituted within two years after the Constitution was adopted. In the House of Representatives of the Congress of 1789, Mr. Hartley, a member from Pennsylvania, suggested it in these modest terms: "I think it both politic and just that the fostering hand of the general government should extend to all those manufactures

which tend to national utility." In a new country, and especially in a country whose industries had been subdued for a long time by the narrow and repressive policy of England—a policy by which manufacturing had become paralyzed,—it doubtless appeared to most minds that a little sacrifice from each citizen, made by a general contribution, indirect and therefore not likely to be felt, was necessary for the well-being of the nation. It was generally believed that this "fostering hand" was only to be temporarily extended; that it would create wholesome industries all over the land; that these would naturally and easily grow into a condition where they would become self-supporting; and that thereafter their owners would of themselves relinquish further assistance from the government, and that the industries would continue to grow, conferring permanent and universal benefit. The leading advocates of the first tariff measures did not hesitate to give this promise; besides, it was implied by their whole conduct of the question; and thus the policy became inaugurated without careful examination. As it seemed to interfere with no principle, to contain no hidden evil, to tend to no mischief, it was accepted with all its exterior appearance of innocence, liberality, patriotism, and wisdom.

Its consequences of inequality, however thus unrealized at first by reason of their indirectness, soon came to manifest themselves. As the Southern States were entirely agricultural and the New Eng-

land States largely manufacturing, the first evidence of this realization came from the South. The tariff began to be considered as a burden upon the agricultural interests of the South, as an exaction from those interests for the support of the manufacturing interests of the North, and especially those of New England. In this way the question came into prominent political discussion. It generated partisanship of the bitterest kind, and culminated in what are known as the "Nullification Laws" of South Carolina. Had it not been for this miserable turn in the contest, involved as it was with the tariff called the "tariff of abominations,"<sup>1</sup> or had the question of protection then been raised before the Supreme Court of the United States as a constitutional question, it is not unlikely that the policy

<sup>1</sup> "The grievance of the South in 1828 is undeniable. So long as the exports of the country were almost exclusively Southern products—cotton and tobacco,—and so long as the federal revenue was almost entirely derived from duties on imports, it is certain that the Southern industries either supported the federal government or paid tribute to the Northern manufacturers. The Southerners could not even get a hearing or patient and proper study of the economic questions at issue. Their interests were being sacrificed to pretended national interests, just as under the embargo the interests of New England were sacrificed to national interests. In each case the party which considered its interests sacrificed came to regard the Union only as a cage, in which all were held in order that the stronger combination might plunder the weaker. No amount of precept or emphasis can make the Union, which is the paramount civil interest of the American people, strong and permanent, if any section or party in it has reason to believe that its interests are sacrificed in the Union; and the Union can never be secure unless there is a disposition in the predominant majority at any time to listen with patience to any remonstrance, and to exercise power with moderation and justice." (See "Life of Andrew Jackson," by William Graham Sumner, Boston, 1886, p. 210.)

would have received a repulse, if not a final overthrow.

But however this may be, with varying stages of growth and decline arising from the alternate predominance of the manufacturing States on the one hand and the agricultural opposition on the other, the contest continued until the War of the Rebellion. Then, as all civil rights were suspended, whatever quality of volition there had been in assisting the fostered interests was supplanted by the necessity of raising means to support the war.

Thereafter, the manufacturing industries were protected not from any motive of fostering, but entirely by reason of the necessities of the nation, since these necessities absorbed all other considerations. At the conclusion of the war the extraordinary debt which had been created afforded pretext for the continuance of the methods for raising the revenue. It was more to secure this continuance than anything else that the protectionists gave their united support to the rapid payment of the debt. So long as protection continued as a result of the real or seeming necessities of the nation, discussion concerning it was inactive; but with the rapid decrease of the debt the necessitous features began to disappear. Meanwhile, the immense growth of the protected interests and the immense and unnecessary revenues resulting from the tariff left the protectionist with constantly diminishing reasons or even pretexts for the continuance of the policy. Among the most prominent of



the few remaining pretexts is "that it is essential to a state of things where great interests have grown up, and whose injury would be that of the community at large, that the existing conditions shall continue." The paraphrase of this may thus be stated: The condition of protection has stimulated certain branches of industry, and this stimulus has given unequal private gains to those who have been assisted by the government. Now, because they have made such unequal gains, the unwholesome policy by which they have been enabled to acquire them shall be allowed to continue, in order that they may preserve and increase them; and this abuse is to become a principle of government.

Whatever circumstances there may have been in the early history of our country to suggest the theory of protection on the grounds of expediency, time and change have overcome. In the place of industries which were once infant, there now exist fully grown but still artificially stimulated industries. These indeed have outgrown the market, or rather the market has been limited by the very policy which created them. We have a condition in which one class of industries is congested by stimulus and another paralyzed by exaction, in which artifices are now invoked to continue the stimulus and appropriate the fruits of it. Thus we are face to face with an immense problem resulting from violated economic principles.

Nothing could be more insidious than the influ-

ence of protection as a gradual means of mis-education. In its incipient stages it was not thought of by its leading advocates as anything but an expedient which needed temporary assistance. At present there has come to be assumed for it permanency as a principle. The conclusion which prevails with many that it is such a principle, seems to them to be a logical conclusion. Men who are easily convinced that protection had its first existence as a matter of right, who are ready to attribute to it all of the material development of our country, and who especially ascribe to it all of the material progress which has been made since the war, find the argument for its first institution overwhelming. The statement of the case is its proof. To them it is plain that because we had ample quantities of iron and coal within our mountains, and laborers who might be employed to bring these into industrial use; that because this coal and iron remained untouched on account of the cheapness of labor in the older civilizations, which enabled them to furnish the product to us at cheaper prices, therefore it was the duty of the government, through a protective tariff, to bring about industrial development. To them this protection seemed to promise everything, to deny nothing. They do not find it difficult, therefore, to conclude that the system by which this result is produced is founded on a principle.

Beside these devotees there are many whose general feelings rather tend in the direction of free trade,

but who look upon this kind of logic as puzzling and very difficult to answer. It seems to them an inexplicable thing, that reasons which appeared so unanswerable for justifying the assistance of the government at first, should produce the consequences from which we are now suffering. Those of us who reason thus need to call to our minds that it is economic and political principles which we are considering; that the violation of these principles began with the first act of fostering; that, however beguiling the pretext, the vice is inherent in the system. The concession first made as a temporary expedient ought not to have been made. Nowhere in its progress has it changed from a theory to a principle. In this view there is nothing which characterizes the infatuation of the protectionist more than the kind of reasoning which he employs for its support. It is little less than a political solecism, that this theory is thus set forth as a principle just at the time when its fallacy as a theory is becoming irresistible, not so much through logical examination as through the magnitude of the resulting evils.

When we examine protection by its present consequences, we find the fact, which can be neither evaded nor denied by the protectionists, that the fostering hand of the government has accomplished one definite result, and that the protectionists are proceeding, out of the condition thus produced, to accomplish another. That which the government has thus accomplished is, that it has restricted the area of the

market by artificially stimulating the fostered trades and thus created for these industries an excess of production. That which the protectionists are seeking to accomplish is the preservation and continuance of the fruits of this system, and at the same time the repression of the growth of the industries. There is no evidence that the protectionists have shown a disposition to seek a solution of the problem through a discussion of principles, by any candid recognition of the effects of over-production, or by steps of any kind which indicate a disposition for reform. They rather sought to suppress discussion, until it was forced upon them. As they have lately begun to realize that there is a party in this country which is becoming more and more cohesive and which is determined on a change, they have suddenly come to claim that if reform is to be undertaken it should be conducted by its friends, meaning themselves, and not by its enemies, meaning those who are opposed to the policy which had produced the evils to be reformed.

But apart from the manner of discussion which the protectionists thus pressed have adopted, the practical means by which they have been and are attempting to deal with the dilemma of over-production are only of a character which tends to produce for them another dilemma. These means consist of artifices auxiliary to existing protection, which are mainly of two kinds, and which, although differently designated, are in their operation and influence prac-

tically the same. The first of these consists of secret associations of manufacturers and of employees, and the second, of the "trust." The iron and steel manufacturers, for instance, have a large secret association which meets from time to time for the purpose of "fixing the scale of prices," and incidentally of influencing the wages of the employees. To counteract the influence of this association so far as wages are concerned, the employees have their secret associations for the maintenance or increase of their wages. The chief purpose of the manufacturers' association is to limit the production within the needs of the restricted market, in order to sustain the prices of the product. The other artifice, "the trust," substantially, as I have said, the same in its influence, is in much more general use.

Illegitimate as these organizations are in the industrial field, their existence there is by no means illogical; they fall in lineal sequence with the condition which protection has created. The interference with natural law which legislation has established renders necessary the introduction of further interferences; and it is this office that these organizations fulfil. The effect of the "trust" is to limit the fostering character of the tariff. With it in command even the assumption of fostering is overcome, because it prevents the possibility of fostering through its control of the industry for the specific purpose of limitation. Under the domination of the "trust," therefore, the government's relation is entirely meta-

morphosed. It becomes a contributor of an indirect premium to an artifice for the restraint of industry; and so protection instead of fostering industry comes to be a fosterer of monopolies and "trusts." Nothing can better illustrate the predominance in the mind of the protectionist of the motive of private gain over the pretended motive of public welfare, than the establishment of this auxiliary machinery; for taking those laws which are miscalled protective, together with these secret associations and "trusts," they constitute a system for the promotion of scarcity and for the prevention of abundance, thus thoroughly subordinating the assumed public welfare to private emolument.

For measuring the theory of protection exactly by the standard of equal political right, we may assume that the typical freeman in whose mind the thought of this equal right is dominant, and who has a just sense of his own duty and the duty of others in furtherance of this right, will claim this freedom as superior to the support of another's industry. He will insist that there cannot exist in the government any right to require any contribution of the fruits of his industry for the encouragement of the private enterprise of others; that any assumption that such enforced contribution is to his general advantage can afford no just warrant for the exaction. When this citizen is challenged as a theorist, as he doubtless will be, he may ask that the theory and the practice involved in the question be judged in ac-

cordance with the law of equal liberty, in order to determine whether he be less practical than his challenger. The appeal to his prejudice against foreign nations will not justify his surrender of equal political right to support such prejudice. It therefore will not move him, since he will realize that deference to such a prejudice will only render his citizenship less secure, and will only make his government less free. Nor can the phenomenal growth of industry, nor the sum of the protected industries appear to him to offer any sounder reason for the protective policy, since it does not seem to him to be the purpose of civilization to exhaust nature's resources most speedily. The nation's real wealth and greatness is not determined exclusively by its gains, and not at all by the misdistribution of its gains. It is not the annual amount of wood-pulp or paper or iron produced which makes the nation great as a free government, nor the rapidity with which it can disforest vast areas of land.

To this typical freeman there is but one legitimate purpose for the assessment and collection of taxes in a free government, and that is, for providing the necessary expenses of that government economically administered. He infers from the immense accumulations of the stimulated manufacturer and the decreasing returns of the farmer, that the indirect contribution from the farmer is by further diversion appropriated by the manufacturer, and that this is more for assistance to private enterprise than

for the promotion of wholesome public growth ; and he sees in the "trusts" and the secret associations nothing but artifices to support this inequality. If during the war he admitted the justice of the exactions from his labor, for the support of the State, his admission came from the belief that the war was waged for the maintenance of his equal right ; that he therefore is entitled to the fruits of that war. Nor will the pretence of preserving and maintaining high wages to the mechanic appear to this citizen as anything but a delusion. He knows that whilst it may be that some mechanics in special industries may temporarily receive higher wages through artificial restrictions, the majority of laborers are not and cannot be benefited. He realizes that the inexorable law of nature is that which produces justice to the producer, the wage-earner, and the consumer alike. In its normal operation it provides that the character of the service to the consumer shall tend toward improvement. It is this law that transcends all artifices. In his view nature says to everyone engaged in the manufacturing industry :

"While your margin of profits upon the specific items of your product shall tend to decrease, the growth in the volume of your business shall tend thereby to increase, thus to enlarge the sum of your profits and insure your efficient service to the consumer. That which, in the earliest stages of your art, you manufacture crudely, imperfectly, in small quantity, and at high cost, you shall, as your art ad-



vances, manufacture with more skill, in larger quantity, at cheaper cost, and thereby better serve the consumer. The progressive compensation which you shall receive in your process of cheapening, shall be that which grows out of your progressive capacity to increase the volume of your product and to improve its quality. The direct compensation which shall come to the laborer engaged in your employ by this progression shall be that which results from his ability to sustain or increase his wages by reason of his improved skill to accomplish so much more, so much better, in a given time than he did in the earlier stages of the art. And besides this his indirect compensation will be that which will result in the cheapening of other products which he will use as a consumer—or in other words, in the higher purchasing power of his wages.”

This is a law of political economy governing industry and tending towards growth and improvement. It is a law by which the wage-earner, the consumer, and the manufacturer are alike protected. It is a law of supreme justice in industry, and any tampering with the relations between either the consumer, the producer, or the wage-earner, which tends to disturb its operation, disturbs normal growth and works inevitable injustice. Moreover, this law is persistent. The attempts of the mechanic to fix his wages by combination, under the delusion that his wages may be permanently supported, or under that other delusion that the appli-

ance of new inventions shall be excluded, or under the still larger delusion of protection, do not annihilate the law. In the general operation of this law, the progress of industry is characterized by the ever-increasing volume of the product and the diffusion of that product, and the enlarged consumption is induced by the gradual cheapening to the consumer. No loss is entailed either upon the producer, the wage-earner, or the consumer ; it operates equally for the advantage of each, and thus the largest diffusion of the fruits of industry is secured to the human race.

This law does not exist for one locality or for one people ; it prevails over the world. Nature condemns any attempt on the part of any one people to appropriate the fruits of industry in disobedience to it. The penalties for such disobedience may not be immediately perceptible. The direct material fruits of violation may indeed be great and the penalties may be postponed. Nevertheless, in proportion as a people are powerful enough and have extent of territory enough to enable them to interfere, and do so interfere, with the operation of this law, just in proportion to the strength of the organized interference will be the final untoward results to that people ; and if we will but trace the results of disobedience, we shall find that the exacted penalty overcomes any assumed beneficence,—any immediate or temporary advantages which are acquired through such interference.

There is no possible means by which a policy of

fostering class-interests can be raised into a principle which shall fall into accord with free government. The antagonism between the two is inherent. The theory, therefore, of protection is false, and does not in any way fit the quality of true liberty; nor can it be made to fit it. It is thus that the typical American freeman may be expected to view the subject.

It is quite likely that no argument which looks to ultimate ends will have much influence on minds that are bent on immediate physical results. Most men are ready to sacrifice remote for temporary advantages. Nevertheless, when we consider the ultimate basis of human freedom, it is necessary that we should look as far into the future as possible.

There is a considerable class who favor tariff reform, and yet condemn free trade as theoretical and utopian. But between this class of reformers and the protectionists themselves it is not a question whether real political liberty shall prevail, but what degree of inequality may be allowed to exist and continue from motives of temporary expediency.

Another class of reformers who express faith in the ultimate freedom of trade, assume that in existing conditions it is imprudent even to advocate such reform. But it seems to me that there can be no political or industrial conditions in which the underlying principles should not be studied with a view to their final establishment, and with a view of creating a present basis of adjustment.

There is still another class, composed mainly of politicians, who indulge in the pretence that in tariff reform the stimulated interests which have grown up will not be seriously affected by a return to freedom of trade. This class have only adopted one of the methods of the protectionists—that of prophesying pleasant things ; but for my part, I have no faith in the power of pretence in the discussion of economic science. Transition from a wrong policy to a right one will involve inevitable disturbance, proportioned to the extent of the structures which have grown up under the wrong policy. The owners of the protected interests have learned to lean upon the support which they have received. Some of their interests possess abnormal vitality through this assistance, and, of course, the first effect of removal will be severely felt. The props upon which they exist being taken away, not only will their industries themselves be interrupted, but collateral dependencies will be disturbed. The most, therefore, that the honest reformer can promise to the protectionist is that the reform may be made upon the line of safe change, so as to afford to the protectionist a reasonable time for the transfer of his reliance upon artificial privileges to self-dependence, with the assurance that after the transfer is effected and his industries adjusted to that transfer, they will exist in the natural order of things for cheapening the product to the consumer and creating an enlargement of his market to the world.

As I suggested at the beginning of this chapter, my purpose in discussing the subject of protection is not so much to deal with any of the immediate details, as to indicate that foundation upon which reform should rest. Whilst it may be, as I have heretofore said with reference to the railway problem, a question of policy as to how this reform shall be begun and accomplished, it cannot be a question of policy as to whether we shall return to those conditions contemplated by the Constitution. Just how the reform shall be begun, at what rate it shall progress, what degree of consideration should be shown to existing protected structures, are questions of political policy; but the questions whether it shall be begun, and what shall be its ultimate aims, are questions of political and industrial liberty.

However far we have drifted from the law of equal right, we are not beyond retracing our steps, although it is doubtless the case that the very distance which we have travelled is one of the causes which will prevent us from realizing the extent of the departure until the penalties of that departure begin to be seriously felt. The evils have grown insidiously. Their supporters have organized them and fortified their growth. They aim to give to a public discussion of the subject that indefiniteness which tends to impart to it a degree of haziness. They have succeeded in selecting the field for contest. They deal with statistics of growth—immediate results. If we

can turn our attention from these immediate results to the principles which lie beneath them we will find these principles neither complex nor difficult to comprehend. So far as the conditions are concerned, which lie between us and the goal to which we should direct our steps, there are the barriers of vast pecuniary accumulation, of false reasoning, and legislative enactments to support it, and even, it may be said, of an organic law in which the ultimate conception of industrial liberty is not fully defined.

The first question, therefore, which we have to ask ourselves is : Is the support of a special private interest, through exaction from the general taxpayer, within the province and power of a republican government? If we answer this question in the negative, there remains only the consideration of the policy to be pursued as to the rate at which the withdrawal of that power shall take place.

It is not within the scope of this work to attempt any discussion of the complicated question involving the principles of taxation; I will therefore only briefly refer to this subject in its relation to the tariff. The science of taxation was not extensively studied in the discussions which preceded and followed the formation of the Constitution. The condition of the nation was not then conducive to such a study. The Revolutionary War seemed to make any means justifiable for raising revenues, and the

system by which they were to be raised did not therefore challenge great examination.<sup>1</sup>

The present method of indirect taxation is so deeply imbedded in our system of government, and is so strongly supported by a sense of convenience, that in all probability it will not soon be eradicated. It is impossible, however, to consider the evil consequences resulting from protection, without regarding the indirect method of raising revenue as in a large measure a promoter of these consequences. The subject of taxation is one which is exceedingly difficult to deal with, for, as Washington said in his Farewell Address, "No taxes could be devised which are not more or less inconvenient and unpleasant." It must be confessed that on the score of convenience, leaving out ultimate consequences, the indirect tax is the less unpleasant of the two. Whatever inconvenience or unpleasantness there may be about the direct system of taxation, however, it is hardly possible that with it there could have existed the degree of protection which has prevailed since the war. No promise of indirect and indefinite benefits to the community at large would have induced a general acquiescence in the exactions which have been made by the government for the stimulation of the protected industries. Whilst these exactions do not ap-

<sup>1</sup> Indirect taxation is referred to only twice in the *Federalist*, and then by Hamilton (Nos. 21 and 34). In the debates on the framing of the Constitution, contained in the Madison Papers, Wilson appears to have been the only one who gave the subject any attention at all. (Vol. I., pp. 282 and 386.) All that was said concerning it was in its favor, founded upon its convenience. Jefferson while President of the United States favors it for this reason. (See Jefferson's Works, vol. III., pp. 261, 461.)

pear upon the laborer's score, they are therefore likely to be larger, since because they are indirect and unperceived they easily grow. Thence, in the protected industries, their proceeds go through secret channels, partly to be absorbed in the clumsy machinery of collection, partly to swell the account of the corporate manager, and partly to inflate the sum of the manufacturer's gains. From the accumulations so made they often furnish those contributions which go to influence legislation, in order to perpetuate and enlarge the channels of diversion. Did the farmer realize this process and result, it must be obvious that the tax-gatherer could not make an argument strong enough to induce him patiently to submit to the exactions.

If the indirect system of taxation is cumbersome and costly in dollars and cents, a far greater reason against it exists in its consequences. One of these is exhibited in the dangers which have resulted from this system in producing an unprecedented surplus in the treasury of the nation. An immense sum of money collected, presumably for the administration of the government, is in excess of its needs. This sum it is impossible by any process to return to the specific sources from which it came. Even were it possible to reach those from whom it was exacted, when we consider the cumbrous and expensive manner of its return, a large part of the amount collected would be dissipated in the process of collection and return. The very existence of this sur-



plus tends to turn the mind of nearly every citizen towards thoughts of its appropriation. It appeals to the imagination and to the cupidity of classes, and especially of those classes who seek a compensation that they do not earn. It stimulates utopian enterprises, and suggests visionary legislation for philanthropic objects. The socialist fancies it to be a realization of that fictitious hoard lying, as Mr. Mill says, in an imaginary strong box supposed to contain all human wealth.

A contrast of the conditions which prevailed immediately after the war with those which exist to-day, will also help us to realize the baneful influence of this surplus. At the close of the war we found ourselves poor. Then our activities were thoroughly aroused, stimulated by the very debt which the war entailed. We realized the necessity for the payment of this debt to the fullest extent of its obligation, and it was only when the fact became apparent that these activities were producing the means of rapid payment, and also a surplus, that the enthusiastic statesmen made the suggestions for its appropriation. Out of this condition have arisen not only these suggestions, but also the avid disposition of the politician to dissipate the surplus in local appropriations, and a like disposition of some of the representatives of the people to barter assistance to one locality in exchange for assistance to another.

Viewing industrial liberty in its comprehensive sense as importing the equal political right of the

citizen, a democratic government fails to fulfil its true functions whenever it exacts taxes from a citizen or class of citizens, either directly or indirectly, with the purpose of supporting the private industry of another citizen or class of citizens. The assumed purpose of promoting the general prosperity does not thereby mitigate the evil. The supreme rule of a democratic government with reference to taxation is that the exaction from the citizens must be limited to the needs of the government economically administered; that any exaction beyond this, from whatever pretext of public policy, is an infringement upon democratic freedom.

In America the great burden of this system falls upon the hitherto unconscious farmer. He belongs to a class which is the first in number and economic importance in the country. I do not regard this numerical superiority as of particular consequence in the consideration of a principle of equal justice, since the farming class would be entitled to equal political right were it one tenth as large or had one tenth its value. It is not under the theory of "the greatest good to the greatest number," but upon the better principle of justice to all that his right is due him. I merely state his numerical strength as a fact, to indicate how necessary this class is to the country. The burden thus falls at last upon the farmer. With him there is no combination or monopoly; he is confronted with the necessity of selling to the world on a purely com-

petitive basis. Little as he has hitherto realized it, his burden is gradually growing heavier. One has but to look at the advertisements of the Eastern papers, and particularly the religious papers, to learn how great a number of organizations in our cities are engaged in the special purpose of placing mortgages all over the West, upon farms, at almost double, and in some cases quite double, the rates of interest prevailing in the region of the protected industries. As a consequence the farmer is becoming overloaded with the burden. Any profit which normally comes from the increase of the value of land in a new country, or from the exercise of skill and labor under normal conditions, is largely abstracted by the corporation and its ally, the protective tariff. To the farmer there can be no unearned increment in increasing values: the process of artificial and indirect abstraction for the favored class is too systematic to permit this. The normal increment to which he would be entitled, having been taken from him by indirect abstraction, is in part loaned back to him and becomes a mortgage on his farm. He bears his burden in a way which would be heroic if he were not unconscious of its cause.

Those who have come as emigrants from Europe to the West fall under the same conditions. Induced by cheap rates of passage, they bring their families and their little store to some destination in the West, where, further beguiled by the cheap prices, they purchase land. And here, under the pretences of

freedom which are held out to them, they begin to pursue their industries, and gradually to feel the results, of which they have not yet intelligently learned the causes—that the new burdens begin with their settlement. At first the railway exercises a far more complete control over their goings and comings than the government. It affords them transportation, but surcharges this convenience by burdens which are only limited by their ability to bear them; in addition to this the tariff indirectly charges their labor with the support of other industries, thus adding to their burdens. After a few years there comes the necessity of mortgaging, and even if it happens that through the bounty of nature and the exercise of skill the emigrants are able to make more than is necessary to meet the burden of their exactions, the conditions under which they live are not those of freedom. There is imposed upon them a double burden, not for the support of the government, but for the support of the corporate power and of the manufacturing power.

Nor is the common laborer any better off. Whilst it may be that there are some mechanics, skilled or unskilled, directly necessary to the protected interests who get some of the droppings of protection, which temporarily increase their wages, and who thus fancy themselves permanently benefited, yet the vast majority of laborers are only under its oppressive influence. The farmer and the laborer have not hitherto seemed to realize the cause of their indirect

burdens. This kind of blindness is not by any means uncommon, it is owing to what may be called a general mental law. It has often been pointed out, as characteristic of the mass of men that they are little able to conceive a general law apart from the particular application of it with which they are familiar; just as they cannot disassociate the general term or maxim from the special examples which meet them in daily experience. As Emerson aptly puts it, "Most men do not realize a principle except as its light falls upon a fact." Thus the farmer and laborer will attribute their misfortunes to some inscrutable law of nature, rather than to a law enacted at Washington which practically forbids ocean vessels supplying them with their needs, or to that other law, enacted in the railway office at New York, that mercilessly taxes the product which they seek to deliver to their consumers. It is the indirectness of the burdens which has thus made their real cause unperceived.

The protectionist, dealing with immediate material results, ignoring fundamental causes and final results, only darkens counsel and conceals principle with figures and words. I believe that sound political economy is identical with sound political ethics, and that the application of these principles to the question comports with humanity and justice; that when the ethical side of the subject comes to be heard, studied, and understood, when the sense of right comes to be appealed to rather than the

pocket, there will be a clearer perception of the question. When man's avarice and cupidity are uppermost he naturally resorts to compromises and expedients. In this frame of mind he is apt to magnify the importance of immediate results, and correspondingly to underrate the importance of those which are more remote. Industrial emancipation can never be secured merely through measurement by dollars and cents; it is only when a sense of justice is aroused and becomes active that we realize the necessity of equal individual right as the only basis for wholesome industry and permanent liberty. When we come therefore to understand thoroughly that there is involved in the question of protection the alternative of freedom or slavery—not merely slavery of a separate class or race, but a slavery that reaches to each of us, rendering our burdens unequal and our rights insecure,—we shall begin to perceive that there are involved in the question wrongs which can neither be compromised nor concealed behind the dollar. In England the question of the repeal of the Corn Laws was attended by a discussion perhaps as intelligent, active, and far-reaching as was ever applied to an economic subject. As long as the cause depended only upon appeals to self-interest, even though this interest was assumed to be governed by the higher intelligence based on a limited franchise, reform seemed impossible. The landed interest which opposed the reform was governed by a stiff-necked conservatism and blinded by selfishness. The

whole movement would probably have failed had it not been that the Irish famine came to awake the conscience of the nation to the enormous wrong which lay concealed behind the mediæval establishment. It is not impossible that with us the evils of protection will grow to vaster proportions than they have yet reached before we come thoroughly to realize their cause. But of one thing I think we may be certain, that we are moving in the direction of a crisis; and that if we will not learn by intelligent examination to solve the question, we shall somewhere in its progress be taught a solution through necessity. Nevertheless, I believe there are multiplying evidences which go to show that we are approaching a solution by intelligent methods.

As I have pointed out three stages in the development of the railway question, so I think it may be said that, in the progress of the tariff question three periods may also be distinguished. The first began immediately after the war, when in consequence of the enormous debt an unprecedented activity was created, and the public, influenced by a sense of material convenience, were not inclined to consider ultimate results. The next period began when, in consequence of the misdistribution which the tariff accomplished in its field, as the railway did in the transportation field, there grew up organizations which expressed themselves in direct retort—in strikes, and in disturbances of one kind and another, between labor and capital. Out of this condition, as

was natural, theories of all kinds were born. We are beginning to arrive at the third period of the development of the subject, where a dispassionate interest in the question and a discussion of its underlying principles may be expected. This stage of the question can hardly be said to have begun. Up to the present, it has only shown itself to be inevitable. Here, too, as in the case of the railway manager, the protectionist himself, realizing this fact, assumes, that it is a matter belonging exclusively to him and which he alone is to reform. He has had the advantage hitherto, in whatever discussion has taken place, of choosing the methods in which the earlier stages of the contest have been carried on. In these methods results are considered, statistics dealt with, and primal principles neglected. The force of events however, with considerable rapidity is stimulating active thought towards primal principles, and we may hope, therefore, that we are on the threshold of a permanent change. It is not to be expected that the present Congress, or even the next, will come to a thorough consideration of the whole question, but the beginning is at least assured. It is quite probable that the ground chosen by the protectionist will gradually be shifted to a place of higher vantage for his opponent. Upon this new ground there will be opportunities afforded for a wider discussion, for the setting forth of arguments founded upon the fundamental principles of industrial liberty—arguments which the protectionist can neither meet nor answer.



## CHAPTER IX

### PATERNAL GOVERNMENT

IN order accurately to understand political liberty as a right to which every citizen is equally entitled, we must consider it separately from any assumed equality of those faculties which are called the mental, the moral, and the social. It is often assumed that these are faculties to which, in some indefinite way, each citizen has the same right to equality as that right by which he holds his political freedom. I think it may be shown not only that political equality does not imply any equality of these faculties in different individuals, but that, on the contrary, it does imply the necessity of a distinct recognition and furtherance of their inequality.<sup>1</sup> It may also be shown that meddling with these faculties in the endeavor to reduce them to uniformity is one of the chief characteristics of paternal government, and that such endeavor arises from confusion

<sup>1</sup> It must be owned that even the Declaration of Independence is somewhat uncertain upon this point, in setting forth, as it does, that "all men are created equal." It would certainly have been more definite and would have saved a great deal of misconception to have used instead of the term "equal," "with equal political right." The words, however, which follow, "with certain unalienable rights," such as "life, liberty, and the pursuit of happiness," may possibly be construed as limiting the former clause.

concerning their true relation to political liberty. It is from this circumstance that it becomes necessary to place the diverse faculties in a category by themselves in order that they may be discriminated from political equality. It may be shown, as a corollary arising from this diversity of human faculty, that a paternal government cannot be a free government, and that a free government cannot be a paternal one; and further, that whatever pretensions to beneficence there may be in the paternal idea, when we come to examine it with reference to the sum of its consequences, it will be found to be essentially an immoral government.

It will probably appear from such a discrimination that there exists in the public mind a considerable degree of vagueness as to what specific acts are of the paternal kind; that many acts are more or less generally assumed to be paternal which by analysis are not so, and that conversely many acts which are more or less generally assumed to be unpaternal, are paternal. By such examination, therefore, a clear definition of paternal government may be made. Although I have already touched upon the distinction between political equality and the assumed equality of faculty, I deem it of so much importance that I will examine it here more precisely. It is so fundamental in its character that political freedom not only depends upon a clear realization of it, but the continued enjoyment of freedom is essentially based upon that realization. It is only

with this distinction put into practice that we can have true political and industrial equality. All attempts to legislate directly or specifically in order to re-mould these faculties tend to a derogation of political and industrial right. The failure to realize this arises mainly from a surviving figment of theocracy which we unconsciously retain,—a theocracy modified into the vague idea of a power in government which is mysterious because it cannot be traced to any human source. It is possible that these statements may seem somewhat fanciful, standing, as they do, without present illustration, but analysis will warrant them.

Speaking definitely, I therefore propose to show in this chapter: First, that nature produces those faculties of man which we call the intellectual, the social, the moral, and the physical, in persistent diversity; that this diversity has a tendency to increase in kind but not in degree—that is, that while varieties increase in number, differences become less radical; and that such increase of these varieties marks the growth of civilization.

Second, that nature furnishes the physical resources for mankind in a somewhat similar diversity, expressed by differences of soil, of climate, and in the kinds of resources furnished.

Third, that the only legitimate office of government is to legislate in conformity with these natural laws, thus furnishing the largest sum of human incentive and inducing the largest sum of human

activity for the development of these resources ; that these laws are universal, and that only as a government conforms to them does it approach the higher type of political and industrial freedom.

Fourth, that legislation in violation of these laws is based upon a false theory that the government is something more than a mere human institution,—that it possesses a fiat power, and that such a government is necessarily paternal and necessarily vicious.

I will also attempt to furnish a criterion by which paternal government, standing, as it does, in opposition to these laws, may be distinguished from the government of self-dependence, which is in conformity with them ; and will then discuss the qualities of paternal government and illustrate some of its evils.

It is greatly to be regretted that in the multitude of statistics which are given by the governments of the civilized world decennially, we are not furnished with the means of deducing with nicer precision the numerical ratio of the different classes engaged in industry. By deductions from such well-ascertained statistical data we should be enabled to make generalizations by which we could determine with considerable accuracy the force and extent of nature's persistence in the distribution of human faculty. In an effort to derive this numerical ratio from the statistics of the United States Census Bureau for 1880, I have found the data insufficient to enable me to make the desired classification with

anything like satisfactory definiteness. Nevertheless, there is sufficient to be derived from them to afford a basis for an estimate. By classifying these different occupations, therefore, I have made the following distribution of the seventeen millions of persons engaged in industries of one kind and another in the United States :

Of common laborers—that is, those engaged in manual occupations which require a minimum degree of skill . . . . .	60 per cent.
Of those engaged in manual occupations which require a moderate degree of skill . . . . .	20 per cent.
Of those engaged in occupations which require a high degree of skill . . . . .	12 per cent.
Of those engaged in occupations which require a very high degree of skill and intelligence . . . . .	6 per cent.
Of those engaged in occupations which require the highest degree of skill and intelligence . . . . .	2 per cent.

As I have said, it cannot be assumed that this classification is entirely accurate, since it has been necessary to make a discretionary use of the data, and yet, when it is supported, as it is, by observation and experience, and particularly by the generalizations of Quetelet, which I shall presently notice, there is sufficient in it to warrant the reasonable inference of the existence of the ratio which I have approximately indicated as a persistent law.

This distribution of faculty in civilization seems to me to call to mind something like a pyramid. At the base we find the greatest number, comprising those who bear the greatest burden with the lowest

degree of intelligence, the least degree of individuality, the least degree of intellectual quality. They constitute the foundation of human society and come in closest contact with the sternest necessity. Among those a few will exhibit a little higher degree of intelligence, and thus naturally come to be the leaders of the class—"the bosses of the gang." Above this higher class thus constituted by nature's gift of faculty, another smaller proportion exists of a little higher intelligence, possessing a little larger constructive capacity; from this class come the contractors. Out of the class so created, by the same law, come the architects and the constructors and others of larger intellectual capacity; and so on, in the same order, to the top of the pyramid, where the intellectual man, the philosopher, the highest expression of human faculty, appears.

As early as 1835, Quetelet, beginning with the doctrine of probabilities announced by Pascal, studied the available statistics of his time, and noted a certain continuance and regularity in nature with reference to the distribution of human size and weight and of the moral and intellectual faculties. From this he formulated what he called a definite and incontestable law regulating these qualities. His work<sup>1</sup> covered a great space of time and involved a great deal of patient effort. He marshalled his statistics with consummate skill, passionless interest, and judi-

<sup>1</sup> "Sur l'Homme, et le Développement de ses Facultés," par M. A. Quetelet, Paris, 1835.

cial fairness. His work is peculiarly distinguished by the comprehensive character of his researches, and by his acumen in applying the important science of numbers to every subject which he investigated. It is from his deductions more than from anything else, confirmed as they seem to me by all existing conditions, that we are enabled to arrive at the conclusions which I have undertaken to give. If careful generalization from well-ascertained statistics can warrant the formulation of a law, then Quetelet has shown the existence of the law of the persistent diversity of human faculty. But while he established the existence of this law, he did not specifically note its relation to political freedom. The application and corollary which he did not make have naturally arisen from the subsequent teachings of evolution and political science. The necessity of diverse gifts as a social dynamic force, tending persistently, as it does, toward the differentiation of individuality, thereby produces the larger conditions of progressive civilization. It seems to me, therefore, that the most important teachings of the law are contained in this application to political science and this corollary, since it is these that have the most potent bearing upon the political units of society, as showing the relation of those units to one another, and the tendencies of this relation in the sum of civilization. By a knowledge of the law, we shall be enabled to discern the proper limits of any interference—to learn how far we may modify natural law without

contradicting it. Applying such knowledge to political conditions, we shall learn to bring into some harmony those conflicts which are going on between the order of human legislation and the order of natural law. Moreover, if this persistent distribution of faculty be a law of our being, and we come to realize it clearly as a necessity in progressive civilization, we shall be enabled to measure at their true worth all those efforts at paternalism, however beguiling they may seem when proposed as temporary conveniences or temporary alleviations of the rigor of nature, because we shall have the means of measuring those farther-reaching consequences which come inevitably from the violation of the natural law.

In the domain of nature man has a disposition to fancy himself a master, and this is especially the case with reference to those laws which most directly concern his daily doings, and where the consequences of violation are not so immediate as to be easily perceived. On the other hand, in those laws whose operations are more remote—which do not, therefore, admit of the possibility of human interference,—or in those laws the operations of which lie near us, wherein consequences of violation are direct, we are usually more capable of recognizing the certainty of nature's workings. The laws of the movements of the solar system are far more definitely known and appreciated than those of social dynamics. Nature has placed the celestial bodies beyond



our tampering and meddling ; these at least we cannot disturb. We have the opportunity of studying them objectively and divested of the possibility of our interference. Observing their uniform action without our assistance, we come easily to recognize their constancy. Here we bow to the eternal and the immutable. We have long since concluded that we cannot with any hope of obedience command the sun to stand still upon Gibeon or the moon in the Valley of Ajalon. Even in the province of human faculty it may be said that where the relations of cause and effect lie close together and in the light, wherever they cannot without difficulty be separated or mistaken, we readily realize the potency of law over human interference. We do not by direct effort attempt to change the size of the human head, to create convolutions of brain. We do not legislate concerning these. But just as the relations of cause and effect become indirect and more remote, our efforts at interference begin and grow. We have not ceased in our attempts at arbitrarily and artificially interfering with the human temperaments which persist in coming in variety. We have not ceased our efforts to remove those inexorable bounds of necessity which nature persists in making the conditions of life. Stimulated by our sympathies and our sentiments, we seek to make the hardest part of manual labor an unnecessary thing, notwithstanding it persists in confronting us with all its wonted hardship ; nor in our industrial relations do we relax our efforts to defeat

by artifice the inherent obligations of contract; to make an agreement something other than an agreement; to make a day's work less than a day's work; to compel men to agree where they do not agree—indeed, in numerous ways to interfere with and counteract the variety of man's faculties by trying to equalize inherent inequality by legislation—levelling, not upward but downward; in a word, to endeavor to abolish eternal necessity by enactment. Far as these efforts may seem to be from Joshua's command, they fall within the same category; they are simply modifications of the same blind attempt at the impossible.

No matter what the form of government may be, there will always be work of different grades in the industries. Each of these grades will have characteristics which are constant; and for the performance of the work where the least intellectual skill is required, a larger number of human beings will be furnished. The kind of work to be performed will lie nearer the hard lines of necessity as the number required to perform the work increases. Under any form of government, there will be ditches to be dug; the labor which the common laborer performs constitutes the foundation of all human industry, and with all the adaptation of machinery the necessity will remain and the amount of labor to be performed will grow with the increase of the human race. This manual labor is not done from pleasure, and nothing we can accomplish can make it pleasant; it arises from necessity, growing sterner, as I have said, as it

goes lower. So long as the ditches are to be dug, if society is to continue, somebody must do the digging, and nature furnishes the diversity of faculty which is essential for this. There is no alchemy which can dissociate labor from necessity; and if there were, the employment of it would only tend to defeat civilization. As Herbert Spencer says: "Nothing but necessity could make men submit to this discipline, and nothing but this discipline could produce continued progression. . . . Nature secures each step in advance by a succession of trials which are perpetually repeated and cannot fail to be repeated."

Nor is there any direct process which can bring the capacity of the stupid and that of the intelligent man to the same intellectual level. Nothing can directly impart to the constitutionally weak the strength of the constitutionally strong, or directly strengthen the quality of the muscle. Nor can any artificial methods create moral principles in the man who lacks them, or make his moral perceptions equal to those of the man in whom they are vivid.

When we are met with a clear illustration of nature's laws, so that we can easily perceive their effect, we recognize them; but in proportion as their consequences are indirect our inability to perceive the law grows greater; in the courage and confidence of ignorance we fancy that we can effect the subversion of natural law. Nevertheless the law exists; and as it is in the physical and intellectual, so also is it in the social domain, for the social forces are but the anal-

ogues of these other forces. Human will acting objectively cannot create instinct ; it cannot place the man who habitually digs the ditch, and is adapted to that work, in close social companionship with the intellectual thinker ; no power of government can effect this, and the fact that it cannot, imports no favoritism ; it is simply a fact. The laborer has no right to intrude himself within the social circle of the professional man for precisely the same reason that the professional man has no right to intrude himself within the social circle of the laborer ; nor is this because the laborer is any worse or better than the professional man. Each has social rights which belong to him ; these rights are rights to each for the enjoyment of his individual tastes, and these individual tastes are different. In the social domain, as in the intellectual and the moral, no one has any right to command my instincts, as I have no right to command those of another, except where the instincts of either trench upon political equality. When either undertakes political control, by reason of this difference of faculty, he becomes a trespasser. Human fiat may interfere or meddle with the operation of this law, but it cannot finally defeat it.

Our best social ties are formed from our likes ; they grow as the result of an inborn mutual attraction ; they may be cultivated, but they cannot be created ; no compulsory process, no word of command, no artificial condition, can call them into being. To expect intellectual, moral, physical, or

social equality is to expect that which could not be conferred if the whole world joined in the wish to confer it. Classes, therefore, must always exist; they grow out of natural and necessary conditions; and they also grow out of the relations of society. The rich constitute a class as distinguished from the poor, the thrifty as distinguished from the thriftless, the intelligent as distinguished from the stupid. The house servant implies the householder. When we clearly recognize the necessity for these classes and separate them in their category as existing in necessary diversity by the law of nature, we come by this separation to realize that under the law of political liberty, within the political domain, there is no recognition of any class or difference. No one of these necessary classes, nor any member of such class, has any more or less political right than the right to life, liberty, and the pursuit of happiness; and it is the unimpaired preservation of this right that constitutes the true function of political government; it is this that can be guaranteed in equality. As I have elsewhere said, this gift of liberty is to every one alike. If she sometimes permits her units to confer a power upon other units which the single unit may not exercise, her motive for doing this is clear and simple—it is for the furtherance, convenience, and benefit of the sum of the single units, for the political equality of these units before the law. The delegated power comes from the unit for his advantage, not for his detriment.

This law of persistent diversity in faculty is coeval with the human race. From the beginning each one has had some separate quality in him to contribute to the whole. The degree of political slavery in the history of any nation may be measured with reasonable exactness, by the degree in which power has been exercised in the control of human faculties. Just as government was capable of exercising paternal influence, no matter what the motive, whether beneficent or selfish, just in that degree absolutism prevailed and human freedom declined. And if the power to interfere with this natural distribution of faculty had been equal to desire, civilization would long since have been defeated and the world itself lost in chaos. It is due to the persistence with which nature asserts and reasserts this distribution, despite man's efforts at interference, that modern civilization has acquired whatever freedom it possesses. Occasionally, as mankind caught better glimpses of the law and conformed to it, human liberty made its largest strides, and as the perception became dimmed and blurred, civilization gradually went backward.

Political freedom and equality, however, so far from importing in any case the necessity for political classes, demand their entire abolition, and in so doing secure the freest play of all those differences which are created by the diversity of nature's gift of faculty. Paternal government, founded, as I shall presently show, upon the figment of the divine right of kings, presupposing, as it does, a power and

a right in some to govern by favor, cannot help creating political distinctions and thereby of necessity interfering with the operation of nature's law of distribution of faculty. In the normal functions of a free government it is therefore not simply a matter of policy whether this or that faculty or quality shall be restrained or promoted by human legislation; it is a principle inherent in the structure of real political liberty, that they shall not be interfered with; and no matter what pretext there may be for the exercise of power, the power of a free government can be nothing greater than that which is required in order to remove obstructions to individual political right, and thus permit to the diversity of faculty its free scope. It cannot be a legitimate governmental power to take care of the individual or to put him in a class; its functions are fulfilled in preventing artifices from interfering with him—in placing him as nearly as possible in a position of self-dependence by removing restraints, barriers, and hindrances to the exercise of the self-dependence by which individual manhood grows. Were there a democracy containing ideal liberty in which the preservation of such ideal liberty was the paramount consideration, duly impressed upon each individual constituting the public, there could not possibly exist any artificial structure, erected for convenience which would be permitted to interfere with this individual right. There could be in such a government no idea of the divine right of any citizen over another citizen

or of any one class over another class. Each individual right would stand upon its own basis, the individual possessing it being the sole repository of that right, and whatever was contributed by him would be a contribution for the furtherance of the equal political right of all. Thus in a true republic there may be, there are, there must be, classes; but among them there is no law-created political class. Each citizen stands as a political unit, supreme to all classification, and on a perfectly equal plane with every other citizen as a political unit. Each man is essentially different from every other man in respect to his faculties. But his right to the free use of those faculties, in accordance with the right of every other man to a like use of his faculties, constitutes political equality.

Much that I have said on this subject may seem commonplace, but this distinction between political equality on the one hand, and the assumed equality of the faculties on the other, is, I think, one that is more blurred than any in political discussion, and there is no one that needs to be so constantly insisted upon. In almost all of the political ideas of the day there seems to be more or less confusion concerning it, and the clearest possible understanding is needed of the line between the two, because it is also the line between license, communism, socialism, and nihilism on the one hand, and political freedom on the other, and between what is mis-called protection and industrial emancipation.



The French motto, "Liberté, Egalité, Fraternité," furnishes a clear instance of the confusion which comes from confounding political equality with the assumed equalities of faculty. A liberty which aims at social equality, which undertakes to enforce fraternity, is no liberty, but a license, and cannot by any possibility produce equality, since equal political liberty can only live by the recognition of the inequalities of the faculties. Its proper influence upon those inequalities can only be to keep them from interference with each other—to stimulate them to the greatest variety within this bound; and this influence is not only not restraint in the real sense, but it is the removal of restraint from the development of these varieties; rather it is not a restraint of freedom, but a restraint of license, exercised in order that freedom shall have its largest scope in being equal. It is due to the fact that a clearer perception of this prevailed in America than in France, that America has worked out results so radically different from those which, in France after the Revolution, bore the people back into the arms of monarchy as a necessary protection from themselves.

We have not then in legislation to deal with the social contract, but we have to deal with the industrial contract. The freedom, the exactness, and the sanctity of this contract well preserved, the endowments of nature, its gifts of variety, will grow in accordance with it, and grow at their best.

It may be set down therefore as a conclusion, that

civilization rests, not upon the equality of faculty, but upon its inequality—its diffusion into diversity; that its progress is marked by this inequality—by its increase in kind, not in degree; that this is accomplished through the preservation of political equality; and that nature's efforts in preserving this diversity have in the long run been greater than man's efforts at obstruction.

Passing from mankind with his varied faculties to the things upon which man operates, the resources of nature, we shall find these also to exist in necessary diversity, not only of the gifts themselves, but of the conditions under which those gifts are conferred.

As in the artificial treatment of the faculties, so also in the artificial treatment of nature's resources, man conceives himself to be a master wherever he can effect an interference; and this conception exists here, as in the case of the faculties, just where the consequences of violation are indirect and therefore not so readily realized. When these consequences become direct we recognize the potency of the law by the quick penalty of its violation, and are therefore restrained from continued interference and infraction. As cause and effect separate, our efforts at interference begin and enlarge. Because we do not see these consequences of violation we fancy they do not exist, but the results of a violated law of nature are not rendered any the less certain because of their indirectness. In the

end the inexorable penalties are measured out with exactness, and the volume of these penalties is increased in proportion to the length and extent of the violation. We do not attempt to raise a barrier against latitude—to grow tropical fruits, by artificial processes, for commerce in the North, to the exclusion of the natural tropical products; nor have we yet committed ourselves to any effort of legislation by which the lean gold ore of North Carolina shall be made equal in value to the rich gold ore of California, through taxing California's product in order that the mines of Carolina shall be supported; nor by the other artifice of taxing the citizens generally to furnish a bounty of something more than a dollar to those who from their lean ore can produce something less than a dollar. Here the cause and effect are too near; the absurdity of the violation is too manifest. And yet, with a little more indirectness, if we will follow it out, the same kind, although a less degree, of solecism will be found to exist in those artificial regulations of tariff to which we have committed ourselves.

Nature gives her resources to the whole world to be employed in accordance with her law. This law allows the most activity where these resources are most available, the least activity where they are least available. Each part of the globe has some natural advantages over every other part; and in the exchange of these lie the true conditions of barter. The distribution is one which is not made by arti-

ficial geographical State or national limits. It has come from geological deposits, and is modified by climatic influences. Here, as elsewhere, nature will not be juggled with nor defeated. While such artificial interferences as we employ may stimulate the resources of localities into excessive activity and apparent prosperity for ten, twenty, thirty, or forty years, the causes of the interference are abnormal. The effects of these evils may be postponed by the richness and extent of our territory, but they are constantly gathering momentum, and will at last become overwhelming. Every step thus taken is away from liberty, away from natural law; and the penalties are not obliterated, but slowly gather force for the greater retribution which comes from the more persistent violation. Whilst we may thus force a temporary prosperity by such violation, we are sowing the wind that our progeny shall reap the whirlwind.

These advantages of location and natural conditions are exhibited in variety of soil, climate, and volume. It is the province of man to develop the resources in accordance with the law which environs the gift, in exact recognition of the diversity; and nature inevitably resists the creation of any artificial means by which this development in any place is made at the expense of any other place where the development is in accordance with her law. Putting up, therefore, a tariff as an artifice to overcome the law, assume it as we may to be a permanent principle, is inevitably going counter to natural law and equal right.

Here then are nature's great and persistent diversities. She furnishes mankind with varied endowments, and insists on the maintenance of that variety; she furnishes mankind with material resources in like variety, and insists upon the conditions of this variety. The problem of human life and of civilization consists in the proper application of the sum of these diverse faculties to the development of the sum of these diverse resources. Manifestly that people, wherever they are situated, who together make the most natural adaptation of these gifts will be the most free, and, whatever their resources, will have the largest proportionate number of industrial citizens, the best possible diffusion of their wealth, and the most natural and permanent prosperity of which human society is capable.

Three laws may thus be named: nature's gift of diverse faculty, nature's gift of diverse resources, and the equalized human incentives for the development of both the faculties and the resources.

I regard the recognition of these laws as of such transcendent importance that I think I may safely re-affirm that no exact definition of political equality can be made without that recognition; that no such equality can be enjoyed without strict regard to these diversities of faculty and resources, and the necessity for the preservation of the equality of human incentive in their development. The right in a free government which any delegates can acquire from the people is only the right to pass laws in recogni-

tion of that equal incentive. And when such delegates commit themselves to any act by which they assume powers which the people did not and could not give them, the authority for such assumption rests somewhere else than on the principle of political and industrial liberty, it comes somewhere else than from a human constituent, and must rest upon the assumption of divine right. The attempt on the part of any of those delegates to qualify this principle in the least degree, whether such an attempt be made by reason of a majority, or even by reason of universal consent, will be, according to its scope and its persistence, injurious or destructive.

However it may be compounded, compromised, interfered with, political and industrial equal right is not any the less a right. A government of freemen in its simplicity is only a body of men joining in a common political agreement to use their varied gifts of nature without interfering with each other, upon the varied resources furnished by nature, in accordance with the law of the variety of those resources. This constitutes a free government, and such use constitutes classical political equality, political freedom, and industrial freedom.

Thus at last we find political liberty resting upon equal political right, unconfused with those essential differences of endowment which are conferred by birth. We find it thus resting through the vivid recognition of self-restraint in each indi-

vidual, seated at last in the sense of justice. This liberty is entirely clear in all its demands—it insists upon simple recognition by each individual for the recognition which it gives each. These bounds arise from necessity, not from chance; and just so far as we conform to that necessity we possess ourselves of the gift, and just so far as we disregard it we lose our possession.

Manifestly there is no room here for a king, for an hereditary nobility, for an industrial class privilege, for an industrial class immunity, for any favoritism from the common interest. These fundamental terms will produce a government that will be just; they cannot produce one which can be generous, for there is no fund possible with which to be generous. Such a government derives its resources for the common purpose of equality, not for any munificence, not for any favors, but solely to support its power to prevent favors and maintain equality. It is on account of these features that it is a thoroughly human institution; and any other feature introduced into the government is to be attributed to our failure to realize our relations as human—to attribute to them some supernatural quality. As I said at the beginning of this chapter, a part of the common delusion with reference to the functions of government arises from a surviving superstition of the divine right of kings, and that such a view might appear fanciful; but this seems to me, nevertheless, a legitimate conclusion from the prevalent

and growing disposition there is toward a paternal form of government among us. Not, of course, that there is a definite and always concise theory of this kind in our minds, but it lingers as a remnant of the old superstition. So little is this realized that doubtless if the average American citizen were charged with the belief in the divine right of government or of kings, he would promptly resent the charge as a reflection upon his intelligence.

I will very briefly endeavor to trace the history of this superstition through its modifications from theocracy to paternalism. Civilization undoubtedly began with the theocratic idea. In theocracy the dogma was that the government was the direct act of God. Modified by time, the king came to take his authority as the delegate of God, and from this arose the theory of the divine right of kings. It is thus that mankind has persistently, in one way and another, through many phases of modification, assumed the power of government to be from heaven. In Rome, the emperor claimed his direct descent from the gods, and when the gods and the emperor were overthrown the right came from the unction imparted by the Pope. The attempts at paternal interference by ecclesiastical power acting through state authority, were constant and persistent. The conflicts of the claimants of divine right were innumerable. When the Reformation overthrew the direct power of the Church, the conferrer of this right, the superstition did not cease, but continued by the union of



the Church and State in the person of the king as divinely anointed. There were exceptions when the people, pressed by the intolerable tyranny of the monarch, were driven to the necessity of recognizing something other than the divinity of his right. Thus, when at the trial of Charles I. the House of Peers refused to concur and there was no king to approve, the Commons passed an ordinance "that the people under God are the original of all just power." This, however, was but an ebullition arising from the severe exigency of the case; the ordinance was only the warrant which they sought for a special act, and, therefore, not to be regarded as a realization of the principle, for when Cromwell was asked what he would do if he were to meet the king upon the battle-field, and replied, "I would shoot him," it shocked the sense even of his own army. Though they were fighting for this instance of the principle, they could not bring themselves to a realization of the principle itself as governing human right. To the man who sees around him in the fundamental law of his country, in the associations of his life, the existence of laws of primogeniture, entailment, and perpetuity, who has been taught that these are essentials of government, that they underlie all orders of society, and are necessary to wholesome growth, education, culture,—in a word, that they are the very essentials of civilization,—to such an one there can be no such thing as a favorable recognition of a liberty, of a civilization whose existence depends upon the

abolition of limitations which are imposed by one generation upon the incentives of its successors, and upon the absence of all hereditary right to rule,—in other words, upon a larger modern idea of political liberty.

John Locke combated the theory of divine right, and it soon came to be assumed that the theory was overthrown. The Act of Settlement, by which William became the ruler of England as from the people, was mainly the fruit of his work. But the hereditary right of the ruler still continued, and under the conditions upon which English society is constructed the idea could not have been eradicated; it was only one of the first real steps in that direction. The Englishman of to-day will doubtless assume that the theory is exploded and has left no trace in his government. Mr. Freeman, who may be accepted as one of the foremost of the English historians who have addressed themselves to the discussion of modern freedom, cites a sentence from Perikles as a classical definition of democracy. "Democracy," he says, "according to Perikles, is a government of the whole people as opposed to an oligarchy, the government of only part of the people."<sup>1</sup> He thereupon proceeds to limit the force of this definition by saying that "it does not forbid respect for ancient birth, or even an attachment to the hereditary line of rulers," and this

<sup>1</sup> "Growth of the English Constitution," E. A. Freeman. Macmillan & Co., London, p. 10.

statement commits him, whether he will or not, to the dogma of the divine right of kings; because whenever it is conceded that there is any power which confers a right to rule, save only that conferred by delegation of those who are ruled, and where it is conceded that the rule is anything more than a guarding of the equal political right of the originators of that rule, there must be in this concession an acknowledgment of divine right; for such rule of government is something more than a human agreement, and contemplates a source of power which does not and cannot originate in a human right. It presupposes a fiat power, and is an instance of that superstition which invariably attributes to divinity a power and a disposition to interfere with and override natural laws. A people ruled by a king and an order of nobility which has existed for ages, who fancy the security of government to consist in these conditions, whatever degree of constitutional freedom they may have in subjection to them, if they are satisfied with their government, cannot form a just conception of one in which these conditions are entirely extirpated. The English mind is conservative. In this conservatism it believes there is quiet and permanency. It attributes these blessings to existing orders; it is moved by its reverence for traditions and by the fear of those evils which inevitably belong to transition. Whatever transitions there have been, therefore, within the past twenty or thirty years, have

been the result of dynamic influences much more than of intellectual discussion. Yet, measuring time as we do, the ultimate abandonment of a king is a long way off. Meanwhile that class of arguments which is thus assumed to be founded not upon tradition, but upon principle, continues to be impressive and prevalent. Thus it is said that in any stage of civilization the more intelligent ought to influence the less, and this is set forth as the full warrant for the superstition. But this does not constitute the issue. The real question is, whether this influence cannot better be exerted by persuasion and example, which lie in accord with equal political liberty, rather than by the exercise of compulsion, based upon an assumed right to govern which only exists in derogation of this equal liberty.

Mr. Herbert Spencer, in looking at the structural principles rather than the forms, observes that the divine right of kings in England has simply been transferred from a monarch to a parliament. He says that "governmental authority is unlimited and dates back to times when the law-giver was supposed to have a warrant from God; and it survives still, though the belief that the law-giver has God's warrant has died out."<sup>1</sup>

When our ancestors came to America, they undoubtedly aimed to expunge the last remnant of this superstition; and when we became self-governing, our attention was naturally more attracted to the

• <sup>1</sup> "Man vs. The State," New York, 1885, p. 79.

structure of our self-governing institutions. We began to call the individual the sovereign, and the officer of the government the servant of this sovereignty. The Church was divorced from the State; what is called toleration was established; and this was in the direction of the abolition of divine right. But we nevertheless failed to perceive that in the very essential quality of part of our policy there still remained a certain degree of this delusion; that, in order entirely to abolish it with all its consequences, it would be necessary to abolish every element of political class distinction—everything that could possibly be the foundation of such distinction.

Instead of extirpating this delusion, we only modified it; modified it from a positive conscious belief to a negative figment. This figment still exists, not in the assertion of the dogma as an act of faith, but in those necessary inferences which come from our adherence to policies and to acts which are the sequels of that dogma. It lingers still in the assumption that by Heaven's unequal gift in the distribution of faculty there is conferred somewhere the right of some persons assuming to be more capable, to rule others; and there is but a step from this assumption to that other in the same category, that a legislature can supplant natural laws by the force of human edict. Hence it arises that the philanthropic theorist who is educated, measures the needs of humanity by the standard of his own acquisitions, and not by the objective examination of those needs. Assuming it to be his right

to regulate things according to his standard, he seeks a power for enforcing this right through a majority, and securing this, places his artificial restraints upon the equal political liberty of the people.

It is not difficult to see just where this superstition arises in the processes of the formation of what is assumed to be a free government. If two men were to make an agreement for the joint and equal occupancy of a house, and one by shrewdness, craft, or beguilement were to succeed in occupying the greater part of that house to the exclusion of the other, even if acquiesced in,—anyone could readily realize that the agreement for equality was broken. There could be no interposition of mystery, no question of artificial power; it would simply be recognized as a broken agreement. The agreement made by fifty millions of people for the equal enjoyment of political liberty has no essential difference, so far as its human qualities are concerned, from the simpler agreement between these two. Nevertheless, in the case of the agreement of the government, there comes to be the notion that the custodians of that agreement are something more than the custodians for each of the constituents of that agreement, for the preservation of its terms. We come, therefore, to think of this mere aggregation as containing a secret power which is more or less mysterious and supernatural; and this is the survival of the delusion of the divine right. The figment is therefore founded upon the theory that somehow, as

I have said, by Heaven's unequal gift in the distribution of faculty,—an inequality which, as we have seen, is the result of a persistent law,—there is conferred upon some of those who have the higher qualities of faculty a right, not to lead nor to convince, but to govern others who are less favorably endowed; that somehow there is conferred upon some men the right to make rules which shall supplant nature's law of diverse resources; that by persistence in these artifices they can at last overcome this law; that all they need to this end is to secure the machinery of a majority; and that with this there is no limit to their power. This assumes that men who are best endowed are, therefore, favorites of Heaven for the government of those less endowed. Political freedom, upon the other hand, declares that men are endowed with varied gifts of faculty for the purpose of enabling them to make the largest and best contributions to civilization, and not for the purpose of enabling some to repress the faculties of others.

The man who, from a belief in his superior wisdom, or from an assumption of his superior moral quality, reasons himself into a right to interfere, through legislation, in anything which tends to repress or mould the faculties of others in accordance with his morals or his conscience, or to oppose the law of nature's diversity of product with artificial means, or in any manner to reach out directly in interference with another's faculties, reasons, although it may be unconsciously, with precisely the same

mental processes which moved the Church of Rome to regulate the faith of a people by the assumption of an authority for that purpose from Heaven.

When, therefore, we shall succeed in eliminating all trace of the divine right from a government otherwise free, we shall find the necessary result to be exact political equality ; since if no man is born with a right to govern another, nor is recognized as receiving such right by reason of education, intellectual or social qualities, the elimination of these factors from political right must of necessity leave it entirely equal. We thus see that this superstition has been persistent from the beginning of history : first as seated in theocracy ; then when in the progress of civilization theocracy was driven out, superstition remained in the conception of the king as a divine vicegerent. Driven thence by the further growth of civilization, it found its refuge in the Church : and further driven out by the divorce of Church from State, it has at last concealed itself in assumed democracy under the form of paternalism. The worshippers at the shrine of this superstition, conscious or unconscious, comprise those who would recognize in one way and another the right to artificially change the incentives of human industry—the faculties of man, the varied resources of nature,—and to regulate these, not in accordance with natural law, but with theory. These adherents comprise many different classes. Among them are the socialist, who would seize the fruits of all human labor and scatter them



in a kind of Saturnalia; the advocate of hereditary or class privilege, who presses others back in order to promote himself; the corporate power, assuming and exercising functions of government; the protectionist, who contradicts the law of the diversity of nature's gifts, and seeks to place the penalty of the contradiction upon others; the prohibitionist, who endeavors to make his rigorous rule of practice the rule of all others; and the free-school advocate, who interferes with the paternal relation—that unquestionable duty which parents owe to their children—and in this interference tends to unify the faculties of those children by artificial methods mis-called education. Some of these instances I will endeavor to elaborate in the following chapters. It is in uncompromising opposition to all these that the spirit of equal political liberty asserts itself.

## CHAPTER X

### PATERNAL GOVERNMENT—CONTINUED

FROM the conditions described in the preceding chapter as the causes of paternalism, we may by generalization make such a definition of paternal government, in contradistinction to the government of self-dependence, as will enable us in this respect, to measure the usual character of our current legislation.

That government is paternal which in any way erects or creates obstacles tending to interfere with the industrial incentives and equal political rights of the citizen, or which fails to prevent the creation of such obstacles, or to remove any existing ones.

Under this rule a government is paternal: first, when it supports or recognizes any political or industrial class; as, for example, when it supports a tariff for protection, because it thereby necessarily confers industrial privileges upon one class at the expense of another.

Second, when it permits any *quasi*-public corporation to make discriminations between citizen and citizen, or to interfere in any way with their equal industrial rights.

Third, when it exacts contributions from its citizens to be used in interfering with the family relation, and endeavoring to regulate and mould human faculties; as is illustrated in what is called the common-school system.

Fourth, when, through the legislature or the courts, it interferes with the equality and sanctity of contract, either by attempting to impart to the obligations of the government the quality of legal-tender, or by establishing any priority of lien for any industrial or special class.

Fifth, when it engages directly or indirectly in any industry in competition with the individual citizen, where the motive for such industry is profit.

On the other hand, a government is not paternal: first, in providing for the supervision and control of all of its artificial creations, such as the *quasi*-public corporations, whenever the powers granted to such creations may in any way affect the political or industrial right of the citizen.

Second, in undertaking to do those administrative acts for the whole public which may not be done by the individual, but which are necessary for the whole public advantage, and which therefore conduce to the well-being of all of the citizens; such, for instance, as the regulation of weights and measures; the coinage of money; the establishment and support of the army and navy, including the governmental care of the soldiers and sailors who have been disabled in service; the maintenance of the necessary fortifications for de-

fence; the administration of the civil service; and the assessment and collection of taxes for the support of the government.

Third, in providing for the regulation of the manufacture and sale of intoxicants and poisons; for the prevention of the adulteration of food; for the preservation of the peace; for the government of the Indian tribes; and for the prevention of interference by the criminal and defective classes with the industrial and political right of the citizen.

It will thus be seen, in a general way, that what distinguishes a non-paternal government from a paternal one is that the former does not in any case tolerate any interference with the equal industrial incentives, the equal political right, or the freedom and sanctity of contract of the citizen; while the latter not only tolerates but fosters such interference.

As I have already discussed protection and indicated its paternal character, I will not, therefore, consider it here.

Having also considered the relation of the *quasi*-public corporation to the State, I will only say with reference to the paternal phase of it, that a government which permits a *quasi*-public corporation to do anything that is paternal must itself be a paternal government; for the non-paternal government cannot permit the exercise of paternal powers. If, then, there exists in a corporate franchise any element of paternal power incident to the exercise of that franchise, it must be the duty of the non-paternal govern-

ment which created it, to hold such corporation within the non-paternal bound; and in order to do this, it must be able to supervise its management. No act that is necessary to accomplish this purpose can be construed to be paternal, because the whole scope and intention of such act is to prevent paternalism.

I come now to consider and discuss more particularly that instance of paternalism, which is noted above as next in order to the two last mentioned, namely, the common-school system. I choose to discuss this in order to show that in a free government there can be no paternalism whatever, however beneficent its aim or however beneficent its immediate results. I think it may be shown not only that wholesome legislation cannot depend upon the beneficent design of its originators; but that if legislation is paternal in its character, the loftiness of the sentiment which inspires it will not in the least degree mitigate its evil political consequences. Indeed, that a policy which ostensibly promises wholesome results, but whose ultimate results are vicious, is far more dangerous than one which bears iniquity upon its face; since the former is the more likely to receive general acquiescence and support.

I know that it will seem ungracious to very many that one should undertake to question a system which has so many pleasing sentiments about it, and upon which there rests so much honest hope for the future of the race—a system which with many

constitutes a panacea for all political and moral ills. But ungracious as this challenge may seem, if it leads to wholesome conclusions it must become manifest that it has seemed ungracious only because it has disturbed illusions. To determine whether legislation really supports and furthers civilization, it must be measured by the judgment and the intellect, not by the sentiments or the emotions. It is the first duty of a reformer to see that in his attempts at reforming any existing evils his reform does not tend to interfere with persistent natural laws. It is his duty to contemplate dispassionately and analytically not only those things which the proposed legislation is intended to achieve, but what it will achieve—those remoter issues which his movement will set up, and also the collateral issues which it affects. Any political system, therefore, for which permanency is claimed can only properly be measured by taking into view the farthest-reaching consequences which we by any possibility are capable of discerning.

A great deal of the sacredness which surrounds the common-school system, in the minds of most, comes from the assumption that it is a process of enlightenment which will, in some way or other, compel the advance of civilization.

If this assumption be not borne out by the resultant facts, this sacredness must disappear. If it be found upon examination that the methods of this system are artificial, that they tend to unify rather than to diversify and recognize existing diversity in

the human intellect, it must thereupon be admitted that to the extent they do this at least they do not accomplish a wholesome result. If the general growth of civilization does not depend so much upon knowledge derived from books as upon industrial training and education derived from association, and if the study of books is artificially pressed and does not of itself produce a natural or a wholesome result upon the race, then, judged by the sum of its results, the system is not answering the purpose of those who support it.

The objections to this system may be thus indicated in their natural order: First, that it is inconsistent with the principles of a free government to enforce a policy which begins with an unequal exaction from the citizen—a policy which declares that A shall be responsible for the schooling of B's offspring, and that part of A's industry shall be exacted from him for this purpose; second, that it is likewise inconsistent for the government, by arbitrary interference, to assume the father's duty; and third, that it is likewise inconsistent for the government to seek by an artificial effort to unify those faculties which nature has made diverse. The thesis is that such a policy must in the sum of its consequences deteriorate the freedom and well-being of the race.

The common-school system, in its influence upon secular life, exhibits some points of close resemblance to that influence which was exhibited in the province

of religious life by the Church, when the Church and the State were united, with this difference, that in the common-school system the influence which it is intended to exert is primarily upon the secular affairs of life, with the incidental hope of producing a higher quality of morals. It is thus secular and ethical. On the other hand, the influence that the Church aimed to exert, was primarily upon the spiritual faculties. Each of these systems, however, assumed alike the beneficence of the end as a warrant for its existence. This was the supreme motive for their being; and their advocates are equally averse to a passionless examination of the disasters which the systems entail. In the common-school system the influence exerted is upon the general intellect; with the Church, the influence which was exerted was upon the moral and the spiritual faculties. In each case the supreme beneficence of the motive is set forth to forbid all careful inquiry into the methods. The Church, armed with the power of the State, reasoned, if its premises be conceded, with unanswerable logic. It set forth that immortal life was of far more consequence than the vanishing affairs of this world; that therefore that life must receive the greatest thought and attention of all men, even to the exclusion of the concerns of this life; that as a religion was essential for each individual, a rigorous creed must be formulated to keep the ignorant from error; that truth, being a unity, must be assured in uniformity and so accepted, and to insure



this uniformity there must be one authority to enforce this acceptance. This authority, assumed to be direct from God, must be accepted without question, in its unity, for the eternal welfare of each individual. Nothing can be more sacred than the office of the men who were thus to accomplish and preserve this one faith for humanity. In the purer days of the Church its teachers were thoroughly imbued with the belief that they were the divinely appointed agents of Heaven for thus securing the highest hope of the race. By the sanctity of their lives, by their personal abnegation, they illustrated the beauty of this unified faith; and when occasion arose, by their martyrdom they sealed it with their blood. It is impossible to conceive of an ideal higher than theirs, or of aims more beneficent. But their aims were false, and the means which were employed as their power grew, instead of tending to elevate the political condition of mankind, weakened and degraded it. Thus the Church with its authority made man a dependant and not a freeman. The uniform faith which it exacted in all details tended to make him but a part of a machine. Uniformity in belief and in practice was enforced; religion became not a matter of individual conviction from within, for individual conviction was intolerable, but something which must be impressed from without, and which could be forced into uniformity to the gain of eternal salvation even if at the sacrifice of human freedom.

No one who is acquainted with the enthusiastic efforts of the first leaders of the free-school movement can doubt the earnestness of their convictions, the loftiness of their purpose, the philanthropy of their aims. Even in their official reports there is a certain verve which marks them as enthusiasts almost to a spiritual degree. Great, however, as were their aims, they were not greater than those high aspirations which characterized the efforts of the heroes of the early Church and which tended to make man wretched and degraded.

The world for ages bore the yoke of ecclesiastical unity more or less submissively, based as it was upon the assumed conditions of salvation. The processes for producing that unity grew more and more exacting as the authority increased and took to itself those vices which ever accompany the possession of power confident of its domination. This continued until these processes became intolerable. Mankind came at last to realize the utter injustice of the situation, notwithstanding its front of such seeming beneficence. It is not flattering to the wisdom of the race to note the manner in which this realization came about. It was not through intelligent examination, but mainly by dynamic influences that men found the evil results of Church rule. The maxim long since learned and forgotten, re-learned and then again forgotten: *Res nolunt diu maladministrari*, expresses the eternal failure of artifice to work against nature, and the

disasters which must accompany such failure. When the leading countries of western civilization realized their condition, they threw off the yoke. Taught by bitter experience, they learned at length that, dear as the unified faith might be, essential as many still continued to think it, all faith must thenceforth be treated as a matter of individual conviction, not to be dictated by the authority of a council; that the variety of moral and spiritual faculties must be accepted as a fact, in order that greater human liberty should be assured. When this was accomplished, it was found not only that spiritual health did not depend upon the old conditions, not only that humanity could not be raised by being constrained, but that real moral and political health were one; that they could not exist in political slavery, and that both spiritual and temporal welfare flourished best in political freedom,—in recognition of the variety of the moral and spiritual faculties and the impossibility of reducing them to uniformity.

I say it took ages to realize that freedom was thus smothered under the power of a hierarchy; that freedom was thus repressed by the very sublimity of the aims of that hierarchy. We had hardly arrived at this realization when, moved by the same desire for good in the intellectual field that the early Church had exhibited in the religious field, we instituted the free-school system. Thus we began to forget the great lesson, and to lose the high vantage

ground of history. The high-priests of the common-school system took the children from the priests of the Church, who had been attempting to cast men, women, and children into a spiritual and moral mould, and proceeded, though with some modifications of method, in the attempt to cast their minds in other artificial moulds. It may take ages for us to learn that however desirable true education may be, it can only properly be acquired and can only promote freedom in accordance with the law of freedom.

Horace Mann has been regarded as the father of the common-school system. He started with the postulate, which I have indicated, that a system of uniform teaching, from uniform books, by uniform methods, was necessarily beneficial and civilizing. Having satisfied himself of the truth of this postulate, he threw his whole soul and life into a work which, being thus philanthropic, he believed in the end to be virtuous. He justified almost every means for the attainment of the end. He deplored any attempt at variety of instruction, and said that "the multiplicity of books in the schools embarrasses all kinds of instruction." He said that "money for the more liberal payment of teachers was to be won from the pockets of the wealthy by persuasion or exacted by law." He expressed the opinion that existing school-houses were insufficient, and were to be swept away from the State by "appeals to duty, to decency, to paternal love; by rebuke or by ridicule; by any

means not absolutely criminal." In the progress of his work he soon came to find that what he called his "vigorous reformatory measures" aroused opposition; that those whom he designated as "the penurious" would resist taxation; that "the slumberers would beat away the disturbers of their peace"; that "the lovers of caste would repel the companionship of their social inferiors"; that "all malcontents would unite to commend the old as time-hallowed and safe, and to condemn the new as utopian and dangerous."

One of the first discouragements in the progress of the system was public indifference, which caused the non-attendance of pupils. Mann called this "a sad chapter in the year-book of the schools." While he saw a slight improvement from year to year, he thought the "disease" too chronic and deep-seated to yield to anything but energetic treatment, and entertained hope that a government which had passed quarantine laws to prevent the importation of physical disease would soon advance so far in wisdom as to enact similar legislation to overcome what he called "the ignorant and vicious abandonment of children and youth"; and he maintained that until this was done, it was the duty of all officers connected with the cause of education to expose, with stern fidelity, the delinquency of parents who neglected to send their children to the schools provided for them.

Mann was ready to employ the power of the government to carry out his system, in its application to human intellect, to its logical conclusions. If he

had been possessed of the surgical power necessary to mould human faculty into exact unity, he would have produced a fine uniformity—but what would have become of civilization? He assumes the whole process of nature to be artificial—the result of some mechanism. He makes this mechanism an attribute of divinity and says: “At a vast distance, but still in imitation of the divine processes, does man proceed for the completion of every work of his hands.” He further says: “Supposing matter to have been created by the fiat of the Almighty, a substantial and beautiful analogy may be traced between the methods pursued by the Creator and the creature in the formation of the works of their hands.” And with the rapt soul of a seer he declares that “under the providence of God our means of education are the grand machinery by which the ‘raw material’ of human nature can be worked up into inventors and discoverers, into skilled artisans and scientific farmers, into scholars and jurists, into founders of benevolent institutions and the great expounders of ethical and theological science.”<sup>1</sup>

In all this process of reasoning he never endeavored to work out, as a problem, what type of social structure this machinery would ultimately produce. With the postulate that artificial education was a good thing, he was mainly occupied with proximate

<sup>1</sup> “Twelfth Annual Report of the Board of Education of Massachusetts,” together with “The Report of the Secretary of the Board, Boston, 1849,” p. 38.

results, and depended upon his imagination to forecast the general consequences. His conclusion was that if it were possible for all to be equally educated it would be wholesome; and by education he meant a process of mind-cramming with uniform books, the necessary result of which would be to take those who were thus educated away from the conditions of life to which they were best adapted. He failed to see that such an education of the masses was not a differentiation of faculty, but tended to a unification inevitably hostile to general progress.<sup>1</sup> With a thorough faith in his philanthropic ideas, he thinks and says that true statesmanship consists "in organizing these ideas into a system and then putting that system into operation as a mechanic does a machine."<sup>2</sup>

The mind which thus conceived the effect of this system to be necessarily wholesome because it was the intention that it should be wholesome, could not

<sup>1</sup> Nor is it alone with this leader that the results of such mechanical unification are regarded as wholesome. The pulpit also creates its utopias and assumes that healthy growth may arise from mere beneficence of intention. Mr. Savage, in one of his sermons, says:

"Our common graded school system of to-day starts with the idea that every boy who begins in the lowest class in the primary department, if he follows the system clear through, will ultimately land at Harvard. It is a pathway that leads up through all the grades, and is completed only there. Now, I believe it would be well, thoroughly, grandly well, if all the children could follow that pathway from beginning to end." (See "Social Problems" by M. J. Savage, Boston, 1886, p. 149.)

This seems very much like assuming that if all the children could be more thoroughly schooled, by a system which tends towards uniform mental results, mankind, having at length lost their diversity of faculty, would still remain civilized.

<sup>2</sup> "Twelfth Annual Report of the Board of Education of Massachusetts,"

possibly be apprehensive of any danger in uniform books and uniform methods. Such minds are not apt to consider, that among free people, exactions from one man or set of men to support the children of another man or set of men can have any element of wrong in them, or that there can be any element of wrong in substituting the State's interference for the true paternal duty of the father of the family. Nor do they see that there will be likely to be a weakening of the bond of paternal love, and at the same time a loosening of the bond of citizenship, through the assumption by the State of the father's duty. Nor will they be likely to apprehend that in their "ridicule" and "rebuke" of the father they are casting contempt upon political liberty. Nor do they see anything wrong in seeking to bring the father and the child under the criminal law for resisting such interference with the natural and true paternal relation. Mann had no more doubt that he was right than had the mediæval priests, and he was therefore ready to assert the power of the State in behalf of his system and to exert any means that, as he said, were not absolutely criminal, just as the mediæval priests employed the power of the State to enforce the assumptions of the Church. And so he sought to exercise absolutism under the form of democracy. He doubtless would have resented with indignation any imputation of the narrowness or intolerance of Puritanism. Nevertheless he had simply rejected the shell



and was retaining the substance. Thus one may fancy himself to be a freeman, and yet, in dealing with his political equals, possibly unconsciously to himself, be seeking to exercise over them a despotism. While assuming superior knowledge of the laws of nature, he is thus asserting this knowledge by a breach of those very laws. A large degree of the evil done in this world is from the vicious notion of a sense of one's duty to exert a power which has no foundation in right, but for which a right is assumed in some supernatural way. I therefore repeat the thesis, that it is an assumption and not a right by which a majority does the initial wrong of reaching into the pocket of one citizen and taking part of the fruits of his industry, in order to accomplish the second wrong of thrusting the arm of the government into the family of another, to lift from his shoulders the paternal duty; and then to do the third wrong of attempting to substitute for that paternal duty the process of making the minds of children uniform. The process is founded in injustice; it is against equal liberty; it is against the fundamental law of nature, and therefore it cannot work a permanent good. With all of its assumption of beneficence it turns out to be a sin against civilization.

The advocate of the State's control in the common-school system reasons directly in the line of modern socialism. He cannot logically find fault with the socialist, since between them there is only a differ-

ence of degree and not of kind. Both start with the belief that a majority in a free government has the right to take from one man the fruits of his industry and give them to another man who has not helped to produce those fruits. Exacting from one citizen the means to educate another's child is only a modification of the process of exacting from one to furnish bread to another. This system only illustrates the assumption of the power to take all the fruits of human industry and to divide them, not in accordance with the rule by which they were acquired, not in recognition of any degree of skill, energy, or thrift, but by distributing these fruits to thrifty and thriftless alike, and calling such a distribution an equal one. It is a process which makes the government a huge, mysterious, asomatous concern, endowed with omnipotence to accomplish physical and moral impossibilities.

In the case of the common-school system, these evils are so hidden that they are imperceptible to most people, and even when they are perceived they seem to many to be greatly overbalanced by what appears to be the resultant good. Let us see whether this is the case. If the father of a family has any duties of maintenance and education to perform for his children, does the government by its artificial interference in undertaking to perform these services for him improve his sense of duty? Does it enlarge his sense of responsibility to his family when it takes a part of that responsibility from his shoul-

ders? And what is, if possible, more important to the well-being of society, does the artificial education—given, not in accordance with individual adaptation, but by an unbending rule—necessarily benefit the object of solicitude, the person assumed to be educated? When the recipient of this mis-education is sent forth into the world, if, as is surely not impossible, he is educated to a distaste for the work which lies about him, is it to be wondered at, that he should look to the government for further assistance? Has he not some sort of warrant for his expectation that the government which has already extended personal assistance will continue it? If this government has made him less capable of doing for himself, why should it not furnish to him an occupation congenial to tastes which it has created in him? Or else, why should it not furnish to him the means of subsistence, since it has made him less capable of finding them for himself? Then why should it not seize the fruits of industry with the same paternal hand by which it before seized part of them, and make a new distribution? Wherever, as Mann puts it, “under the providence of God our means of education are the grand machinery by which the ‘raw material’ of human nature is worked up,” these means are a machinery set in motion to bring out a more or less artificial product. While the industrial incentive may be stimulated by some element of discontent in the individual’s existing condition, yet there is a point at which discontent produces nothing but hopelessness.

There are kinds of artificial education, therefore, which defeat their object; and those which aim at uniformity are of such kinds. Place a man by such education face to face with what is unattainable to him and he is educated away from his natural aptitudes. You have taken from him the ambition to acquire, and have thus given him a burden to carry with him through life. You may make a tramp or a wild theorist of him; but the work of life for which he was fitted by nature remains undone so far as he is concerned. Instead of being a producer, he becomes only a consumer; instead of a promoter, he becomes an interrupter of civilization. He adds to the number of those who surcharge the activities instead of increasing them. These are but some of the results of the artificial procrustean method; and even if we assume that such methods of instruction may be improved by adaptation to the individual case, yet there are fatal vices which still remain in the system. The principles of equal justice and equal liberty are violated in the exaction by which the system comes into being, and by marring incentive through performance by the government of a duty which belongs to the individual. These principles cannot be taught in any school created by government aid, because there is a necessary violation of them in the very establishment of the system which produces such school. The true incentive of the freeman can never be cultivated where self-dependence is violated by

taking the duty from the shoulders of him who should perform it and placing that duty where it does not belong. As long, therefore, as the common-school system, even under any reformation that may be made in its educational methods, remains a State system, exacting the fruits of labor and marring the incentive both of the parent and of the citizen who is taxed to school the parent's child, it cannot be wholesome, for it necessarily mars that which Carlyle has aptly called the highest of all human possessions: Self-help. In view of all this negation it may naturally be asked: "Is education to be abandoned? Are the children to be permitted to grow up in ignorance? Are the negroes with their defective sense of duty to be left to themselves to go backwards?" But the answer to it all is that real education in a free State must necessarily rest upon the fundamental principles of freedom, the equal right of the individual, and the preservation by the consensus of freemen of the equal incentives of life. It is by his surrounding conditions that each man is individually stimulated to emulate his neighbor, and not by legislative mandate, not by any artificial process which undertakes through mechanism to make him as good as his neighbor. It is the conditions about him which move him to skill, and the incentive cannot be supplied by any other means. Similarly it is his surroundings which stimulate a man to better education. The motives which impel the individual to this accomplishment arise from a disposition to better his

position. They are spontaneous; they come from within. They arise from his sense of necessity—imparting to him an ambition to advance his children beyond his own accomplishment, and yet in this advancement to preserve the paternal relation. No artificial means can supply this motive. The only source, therefore, to which we can look for the improvement of the race through education or any other means is that which comes from the effort of the parent, promoted by his surroundings, in behalf of his child. Here the growth is healthful; it is based upon the principles of a free government and upon the natural relation of parent and child. It may be helped by the suggestion or persuasion of others, or it may arise, as I have said, from the necessities of surrounding circumstances—those great agents of spontaneous growth,—but no man-made system can create or force it, and the whole office of a free government is fulfilled in preserving the surrounding conditions in accord with natural laws. No man can have his incentive stimulated by the effort of the government to do that for him which it is his first duty as a citizen to do for himself. Not only can normal incentive not be thus stimulated, but it can never be created by governmental compulsion.

When, then, the advocate of the modern educational methods says, for instance: "As we have given the negro his freedom, we must therefore take charge of his education," the proper answer would seem to

be that the negro has not received his freedom so long as any part of the people, under the authority of the government, coddle him with paternal care; that he can only have his freedom when he has equal right assured; that it is only a freedom to him when it is freedom to do for himself, and that this cannot be assured by the assumption of any superior political right to control or direct him, even though such control or direction be intended for his advantage. By the amendment to the Constitution the negro was brought within the terms of the common agreement for political equality. It is for all the parties to that agreement to see that this equality is recognized, as well on account of the negro as for its preservation to all.

When such advocate undertakes to point out what we owe, the natural inquiry is, who are the "we" upon whom this assumption of duty rests? So far as can be discerned the term designates a set of people who fancy that those who are called "the masses" are in some way their wards; that they have a duty derived, not from the common agreement, but from Heaven, by which they assume to make these "masses" think and act not for themselves, but in certain lines prescribed by their assumed political superiors. It is this class constituting the "we" who took the negro after the war and undertook to keep him under a kind of servitude by protecting him through a paternal government; who, presumably for his own good, sought to teach him

dependence upon the government for everything and dependence upon himself for little or nothing ; with the utmost benevolence of motive they undertook to make for him a social equality by enacting a law for this purpose. They established a bank for him, which collected his earnings, and permitted them to be abstracted. They threw around him artificial conditions which prevented him from realizing that he must depend upon himself to establish his freedom. They sought to make him vote properly,—which meant that he should vote as they would have him ; and whenever he resented this effort, they tabooed him as an ingrate. They sent well-meaning citizens to live with him and educate him into dependence. Just as the sense of duty arose in their breasts, their views of his true freedom declined. When at last, after repeated efforts followed by failure, the Southern States were thrown upon themselves to work out their problem as self-governing republics, the freedman's condition underwent a change. Whilst it must be confessed that in many respects he has not obtained his full right ; that there are many instances in which he has fared illy enough in his efforts at self-preservation and self-dependence, nevertheless, I think no one can make a dispassionate comparison between his condition under the paternal hand of the government and that condition which has existed since this paternalism ceased, without concluding that whatever acts of injustice have been committed against him, his condition has improved and that he has



steadily moved towards self-dependence through the lifting of the hand of the paternal government from him. Thrown upon his own resources, there was nothing for him but to depend upon himself, and with the spirit of self-dependence that has therefore grown he has gained largely in individual freedom. His value as a citizen is far better appreciated both in its political and in its industrial aspects, the recognition of his political rights is far more vivid than when the government undertook to direct his industries and to create for him social rights. This growth is exhibited everywhere in the strength of the negro himself; and it constitutes one of the most pregnant comments upon the failure of governmental paternalism.

Notwithstanding the failure which has characterized this paternalism, notwithstanding the bettered condition of the freedman, the superserviceable efforts at his protection have not ceased. They still continue in the effort to employ the surplus which has been exacted from the industries of the nation, in the pursuit and enlargement of this false system of education. The effort is but an example of the disposition of paternalism to return to the field of its past failure, to pursue in a modified form those means which in the past have produced results the very opposite to those which were intended.

Turning to statistics we may observe that, so far as they can be taken to indicate the influence of the common-school system upon the moral, the physical,

and the industrial growth of the country, they are not reassuring. I do not mean to say that all untoward results are chargeable to the common-school system; most evils are to be attributed to mixed and multiplied causes. Nevertheless, as this system has been direct and potent in the artificial moulding of the human faculty within the past fifty years, I think it may fairly be said that if in that time there has been a continued lowering of the standard of civilization, a part of the responsibility for the progress in this direction must be attributed to it. If there has been a marked increase, in the proportion of idiots and insane to the proportionate growth of population noticeable in those States in which the free-school system was most extensively organized and operated, a part at least of the fact of this growth may appropriately be attributed to the influence of this system. If there has been a notable increase of discontent in the industrial field, any artificial condition which would tend to produce disturbance of the normal incentives, which would tend from its qualities to produce discontent, would probably have its share of responsibility for that discontent; and when the State has by a system cultivated dependence instead of clearing away the hindrances to self-help, it is reasonable to expect to find in statistics some of the effects of this process.<sup>1</sup> In a natural order of

Mr. Joseph B. Marvin, of Washington, makes the following deductions from an examination of the United States censuses from 1850 to 1880 :

“Comparison of the statistics of the defective and delinquent classes in the United States for the period from 1850 to 1880 with the statistics of

things it is necessity which stimulates man to labor, and when this necessity is removed by the State, the stimulus ceases to operate. The same law which in indiscriminate alms-giving tends to increase pauperism, also operates in causing all artificial efforts which interfere with incentive to produce a deterioration of it. We have for some time been slowly coming to realize that distributing doles indiscriminately to the poor tends to the creation of professional paupers; but we have not yet come to realize fully this same tendency as applicable to what we call education. We are apt to fancy that the same law does not prevail in both cases; but this is because in the latter instance its operation is more indirect. It does operate, however, and if more insidiously and indirectly, all the more dangerously and at last the more potently on that account; and it is with a view to show this working that I present these statistics.

the public schools for the same period, discloses a certain distinct and uniform reciprocal relation between the number of defective and delinquent classes and the number of public-school attendants.

“During the period from 1850 to 1880 the school attendance a little more than doubled, while the number of defective persons—idiots, insane, blind, and deaf-mutes—was five times as great in 1880 as in 1850.

“In New England, where the ratio of school attendance has been the largest, the ratios of defective and delinquent classes have been the largest.

“Although the ratio of the defective classes to the population is still the greatest in the New England States, yet this ratio has only trebled during the thirty years between 1850 and 1880, while it has quadrupled in certain Western and Southern States where the ratio of attendance in the public schools has increased most rapidly in that period.

“The ratio of idiots and insane to the population is greater in the State of Vermont than in any other State in the Union.

“The ratio of paupers is greatest in New Hampshire.

“The ratio of criminals in prison is greatest in Massachusetts.”

The poor girl whose capacities and tastes tend to make her an efficient servant for the household, cannot justly be educated to play the piano, since such education only tends to give her a dislike for earning her livelihood; in place of incentive, it produces inaptitude and discontent; and it is repeated instances of this which tend to swell the volume of existing discontent. We may reasonably look to statistics to indicate these violations of principle.

I am well aware that conclusions derived from a comparison or contrast between the census of one decade and that of another are not to be unreservedly accepted. One who has taken an important official part in gathering government statistics tells us that not all statistics are to be relied upon; that there is a class of facts which, from the nature of things, can rarely be ascertained with accuracy. He places those which relate to physical, mental, and moral conditions in this class.<sup>1</sup> I am aware, too, that it has been shown that in the State of Massachusetts the statistics of important criminal institutions comprised in one census were not comprised in another, a circumstance which led to mistakes by those who have endeavored to make deductions by comparison. There is another class of statistics which is derived from a record of some of the State penitentiaries, showing the characteristics, extent of common

<sup>1</sup> "Problems of the Census," an address before the American Social Science Association, by Carroll D. Wright, President of the Association, Saratoga, Dec. 5, 1887.

schooling, antecedents, and occupations of the prisoners. There is some inadequacy doubtless in the usual deductions from these also, due to the fact that the data in themselves are not sufficient to show with exactness the influence of schooling upon the criminal classes, because in order to show this accurately it would be necessary to know the proportion which exists in the State between the schooled and the unschooled. These statistics are, notwithstanding this, important as showing the proportion of convicts who have learned trades and the proportion who have attended public and private schools; and in this respect, it seems to me, the figures are both impressive and significant. The criminals in the State penitentiaries are likely to represent fairly the general criminal class; and the statistics concerning them are likely to indicate some of the influences of educational methods in this connection. The reports from the Eastern Penitentiary of Pennsylvania seem to furnish more complete and detailed information than those of any other penitentiary in the country, and it is to these therefore that I will mainly refer. The report of the Board of Inspectors of this penitentiary for 1886, says:

“Of the 552 convicts received during the year, 373 had attended public school, 104 attended private school, and 75 had never attended any school.

“Of the 552 convicts received, 39 had acquired trades by apprenticeship, 10 were apprenticed but left before

time expired, and 503 were unapprenticed. Of the 503 unapprenticed, 62 learned trades by working at them, making 101 who were in possession of trade, and partially instructed in handicraft knowledge, leaving 451 entirely ignorant of any trade knowledge. Of the 537 males received, 299 were idle at the time of arrest.

“This examination will disclose the very large number of young persons convicted of crime. It will also show the number sent to ‘public schools,’ to private schools, and those also who never attended any school.

“Of the whole number of persons convicted under 25 years of age, few had been instructed in a trade.

“When it is known that in the city of Philadelphia a million and a half of dollars are yearly expended for public schools, it is extraordinary that no carefully prepared system for teaching the hand is established, while so much is disbursed for mental instruction.

“From January 1, 1877, to December 31, 1886—ten years—there were received from Philadelphia County 1,160 convicts who were 25 years of age and under.

“Of the 1,160 received, 911 attended public school, 103 attended private school, and 146 never attended any school.

“Of the 1,160 received, 136 had trades by apprenticeship, or working at them; 1,024 had no knowledge in handicraft.

“Of the 1,160 received, 832 were idle at the time of arrest.”<sup>1</sup>

This Board of Inspectors, in another of their reports, say:

<sup>1</sup> “Fifty-seventh Annual Report of the Inspectors of the State Penitentiary for the Eastern District of Pennsylvania,” Philadelphia, 1886, pp. 4, 5, and 6.

“The young convicts who have acquired what is called a plain education in schools, but have no trade knowledge or training, are yearly increasing in number. This is a startling exhibit. It invites the most serious consideration. It is manifest that efforts must be made to prevent it. It opens for the reflection of the sociologist grave questions,—so grave as to demand inquiry into the real causes that produce these results.

“That this is by no means a new question, arising out of crude thought, or from occasional connection with some branch of crime treatment, the annexed extracts from the report of the penitentiary are given.

“The report for the year 1876 contains the following :

“The number of unapprenticed but educated young men, educated so far as what is called popular education instructs those who receive it, who were sentenced for crime to this prison during the three years 1874-5-6, is so utterly disproportioned, that it may be surmised that ‘school education’ does not teach the use of trade knowledges.”<sup>1</sup>

I have given these statistics for the purpose, more than anything else, of showing the contrast be-

<sup>1</sup> “Fifty-first Annual Report of the State Penitentiary for the Eastern District of Pennsylvania, for the Year 1880,” Philadelphia, pp. 26 and 27.

The reports for other prisons, although not so complete as those for Pennsylvania, so far as they exhibit the details, indicate the same condition of things.

Thus, of the 1,494 convicts in the prison of Joliet, Ill., 151 are classed as illiterate, while 129 are college graduates, and 1,087 have fair education : 127 can read but not write.

In the Minnesota prison, out of 235 prisoners received, 185 had no trade, while only 35 were reported as illiterate.

Iowa has recently reported 489 convicts, 305 of whom had no trade knowledge, 348 of whom had common schooling, and only 53 of whom were illiterate.

tween the character of the promises which the originators of the system made for it and the manner of fulfilment of those promises in the practical workings of the system after fifty years of trial ; and conceding them to be inconclusive in themselves, I do not depend on them as the basis for my argument against the system, but regard them merely as incidental to an examination of the theory of the structure.

Mann promised at the beginning that his system would produce a diffusion and equality of the fruits of industry and the establishment of political, social, moral, and intellectual well-being. He promised with great confidence that with the common-school system in active and successful operation "the dark host of vices and public crimes which now embitter domestic peace and stain the civilization of the age might in ninety-nine cases out of every hundred be banished from the world." He describes a state of affairs where institutions of learning and religion are revered ; where falsehood, detraction, and perjury are never uttered ; where neither intemperance nor the guilty knowledge how to prepare its means nor the guilty agents to diffuse them are known ; where all the obligations growing out of domestic relations are sacredly kept ; where offices always seek the wisest and best men for incumbents and never fail to find them ; where witnesses are true and jurors just ; in fine, where all men are honest in their dealings and exemplary in their lives, "with the exception of here and there an individual who from the rareness of his



appearance would be regarded almost as a monster." <sup>1</sup> He describes this as a condition, which in the opinion of "our most intelligent, dispassionate, and experienced teachers" could, in the course of two or three generations, and through the instrumentalities of good teachers and good school superintendents, substantially be realized.

For fifty years his system has been in existence; it has had an ever-widening application and an ever-increasing support from the taxes of the people. The most significant statements of its present condition in brief are those of the superintendents of education in several of the States where the system has been longest in existence and is most actively employed. One of these is from the report of the secretary of the State Board of Education of Connecticut. His statement is evidently not made with the view of showing the failure of the system, but simply as a narration of facts. The most significant import of these facts, if we may judge from the context, is not realized even by the writer. He says:

"In every town of this State there are children growing up in ignorance and vice who have failed to receive the minimum schooling which the law requires. There are very many more, as the statement with regard to attendance shows, who attend irregularly and with little advantage to themselves and with positive injury to the school. There is, even where schools are attractive, continuous, and efficient, the most astonishing indifference, develop-

<sup>1</sup>"Twelfth Annual Report of the Board of Education, together with the Twelfth Annual Report of the Secretary of the Board," Boston 1849, p. 96.

ing into evasion, where gain can be made from the labor of the children. These sixteen years of trial and work under a so-called compulsory law have not educated the people who need education to the necessity of every-day training in school. The principle has been lauded, but practice has been wanting.

“Even in the very quarter in which, through vigorous persuasion and action of the efficient State agent, a measure of success has been secured, a serious drawback has developed. Most of those who desire to work attend school three months in order to be able to secure employment, and for no other reason. . . . Such a grave weakness in our education machinery may well fill every mind with alarm, for it points to the unhappy conclusion that the children are losing their rights and the tax-payers wasting their money.”

I do not believe the author of this means to convey the idea that the children are losing their rights in the sense that their freedom is being taken away from them, or in the sense that they are being made poorer citizens by the influence of the system; for it is evident that he ingenuously infers that these children are losing their rights in not being dealt with by a more strict police authority. It is evident that he does not realize that the remedies which he suggests lie in the direction of the Inquisition.

The Superintendent of Public Instruction for the State of New York, in his report for the year ending August 20, 1886, says :

“From the data in our possession it seems that 59 per cent. of the school population attended the public schools

at some time during the year ; in 1880 it was 62 per cent., and in 1870 it was 69 per cent. The average attendance, taking the entire year together, was 36 per cent. of the children of school age ; in 1880 it was 35 per cent., and in 1870 it was 32 per cent. The average time each child attended school during the last year was 22.1 weeks ; in 1880 it was 20.4 weeks, and in 1870 it was 17.6 weeks. From these figures it is apparent that while the children who do attend the schools come with greater regularity than formerly, still the whole number who attend the schools for some period of the year in proportion to the whole number of school age has been growing smaller since 1870, notwithstanding the 'Compulsory Education Act' enacted in 1874. . . . It is believed that these figures are reliable, with perhaps this exception : There has been no census since 1880, and the number of children of 'school age' reported since that time has, undoubtedly, in some cases, been estimated. The estimate cannot, however, be far out of the way."

I have heretofore said in discussing the corporate power and the theory of protection, that whenever legislation creates an institution which is in essential antagonism to equal political freedom, it becomes necessary in support of that institution to call into being other legislative creations for the continued maintenance of the artificial conditions. This is the only sense in which paternalism may properly be called progressive. Nothing is more logical than this kind of supplementary work ; nothing lies more directly in the line of cause and effect ; and nothing better illustrates the inherent vices of paternalism. In a retrospect of the free-school system, we notice

that in its earlier stages, when it was met by an instinctive resentment on the part of the individual, and therefore failed as a spontaneous development, the next logical step lay in the direction of compulsory legislation. This has been in force for some time. In many of the States, as it fails to perform its office, we find recommendations for additional enactments in the compulsory direction. An instance of this is shown in the following statement, made by the Superintendent of Public Instruction for the State of New York. In his report for 1886, he says :

“ If we are to believe the word of other States which have preceded us in grappling with the problem here presented, a State reform school to which the most flagrant cases might be sent would have a wholesome moral influence upon the first class above spoken of, and a system of free text-books would materially lessen the number of absentees consequent upon the indifference of parents. The legislature once passed a bill providing for a State reform school for truant children, which failed to become a law because of the objections of the Governor.”<sup>1</sup>

Upon this point the following suggestions are made by the same superintendent :

“(1) That provision be made for the annual enumeration of all the children of school age in the State. (2) That the laws for compulsory education be fully revised, and some officer designated in each town to see that they are strictly enforced.”

<sup>1</sup> From the report of Hon. A. S. Draper, Superintendent of Public Instruction, New York, for the year ending August 20, 1886, contained in the “ Report of the Commissioner of Education,” Washington, 1887, p. 43.

It will thus be seen that the whole system is gradually being transferred to the police department of the government, and will finally owe its existence to the enforcement, under the criminal code, of penalties fixed upon the performance of the duties growing out of the natural relation between parent and child.<sup>1</sup>

It has frequently been noticed that one of the chief untoward results of the influence of steam and machinery in modern civilization consists in the repression and loss of individuality. Whilst there is no doubt that this is in a great measure true, and that such repression is unquestionably a misfortune, it is certainly a greater misfortune that instead of endeavoring to counteract this tendency by intelligent means we are aiding it by other artificial agencies. There is not wanting evidence that the very great change which has taken place in the German character—a change which inclines the German towards socialism, and which has been so progressive in the last fifty years—is due to the compulsory and rigorous military and educational methods to which the youth of Germany

<sup>1</sup> In New York the acts of 1874 and 1876 require attendance, but no effective steps have been taken to enforce these laws. See U. S. Commissioner's Report for 1877, p. 175; also for 1885-86, p. 33.

California enacted a compulsory law in 1874; Connecticut in 1882; Illinois in 1883; Maine in 1875; Massachusetts in 1873; Michigan in 1871, repealed it in 1881, and re-enacted it in 1883; New Hampshire in 1871; New Jersey in 1874; Ohio in 1877; Vermont in 1867; Wisconsin in 1873. There is also a compulsory law in Rhode Island, the date of which is not given. (See U. S. Commissioner's Report for 1882-83, p. xxx., and Report for 1885-86, p. 150.)

are subjected ; and that the decrease of individuality exhibited in France is due to a like cause. The French nation never had that degree of individual vigor which has characterized the Teutonic and the Anglo-Saxon races for ages, and the course of circumstances in France has tended to the deterioration of the little they had. Church and State together subdued the individual. At the beginning of the French Revolution the people knew nothing but that they were miserable. Their individuality was so completely broken down, that when they came to express opposition it was not by a revived individuality, but through that which Taine calls a "spontaneous anarchy"<sup>1</sup> coming from a homogeneous mass. Whilst, as I have before said, the Anglo-Saxon race has more vitality and individuality than any other, it is not impossible that a course of systematic repression of this individuality may accomplish its destructive result in time; for the Anglo-Saxon's individuality, great as it is, has of necessity its limit. We should ask ourselves whether, in testing the capacities of the race to assimilate as we are, other races which come as immigrants to our country, we are not, by the mechanism of the common-school system, impairing our capacity to bear the required strain.

We can easily believe that a Romanist, living during the early stages of the Reformation, accustomed as he was to the workings of a unified faith

<sup>1</sup> "History of the French Revolution," by H. A. Taine, vol. I., chap. I.

handed down from his fathers, and preserved by the central authority of the Church, beheld with the utmost horror what to him seemed to be the lapse of humanity into spiritual chaos, arising from the surrender of this faith to individual conviction. He could not bring himself to conceive that his truth could be any other than a unit, or that any concession to individual conviction could be any other than a spiritual degradation. Similarly the firm believer in the common-school system looks upon it with a like reverence, and therefore regards any effort to modify it in the direction of individual freedom, as tending towards unquestioned political and moral degradation. He believes in virtue, but he has no confidence in any guard for virtue in which he has not a hand. As it was heresy to believe that so sacred a thing as truth should, in compliance with political freedom, be left to be governed by individual judgment, just so it is doubtless heresy to the advocate of the common-school system to believe that education should be left, in compliance with the same political freedom, to be governed by individual incentive and the sense of paternal responsibility. The mode of reasoning is precisely the same in the two cases; it began with the Romanist in the assumption that his dogma was all there was of truth, that it was the only truth, and that it could have no error in it.<sup>1</sup> The advocate of the common-

<sup>1</sup> There are those who found their faith in the common-school system upon a dread of the encroachments of Romanism. Whilst it is doubtless

school system assumes it to be the one true system, and asserts that there can be no possible error in it. Each has thus with the same assumption justified his ends. As we have seen, when the assumption of the unity of spiritual faith, born of the authority of the Church, was utterly broken down, thereupon freedom, both secular and religious, received a new impetus, and a new and enlarged civilization resulted. So it seems to me that when the artificial methods which interfere with the incentives of life, with the natural family relation, shall be abolished, we shall experience a like enlargement of moral, industrial, and political freedom, and a still better civilization. But, in order to take this step, we will have to realize how easy it is to mar the incentives of a child by the application to his mind of artificial

well for a people aiming to be free that they be jealous of any religious institution which tends towards proselyting the citizen, and leading him from the principles of freedom, it cannot be a logical step for such a people to seek to counteract these evil tendencies by imitating the methods which prevail in the obnoxious organizations. The chief means by which the downfall of Romanism in England was accomplished were the secularization of the Church and of politics, and the institution by this secularization of methods of free thought, which were entirely opposed to the paternal authority of the Romish Church. The most efficient means possible for overcoming any untoward growth of that Church to-day, are those which cultivate the individuality of the citizen ; and these means cannot be effectively employed whilst there exists an organization which systematically represses this individuality. Romanism must always be expected to make its least progress in a country where the paramount idea consists in guarding the individual freedom. It is far less likely to flourish in a free country, kept free, than in any conditions where its methods of authority are imitated. The effort to form the human faculty and the effort to form the human conscience originate in the same notion of authority, and they are alike out of accord with the principles of individual liberty.



methods unadapted to those incentives; how easy it is to produce by such means a discontent with one's lot in life; how much easier it is for all of us to fall into habits of indolence and thriftlessness than to acquire those of industry and thrift; and we will have therefore to realize that no rigorous rule can be made which will be suited to diverse capacities; that we can no more depend upon a paternal government, and an artificial method for the accomplishment of a wholesome secular education, than we formerly could depend upon the paternal hierarchy for the accomplishment of spiritual welfare. The ultimate attainment of a civilization must, of necessity, rest at last upon the recognition of the individual right, and of the fact that all incentive grows from within, and cannot be created by enactment; that we cannot, in the effort to maintain the standards of life, expect artificial agencies to create the moral initiative; that we cannot disregard the more potent influences of surrounding circumstances upon character; that we can depend no more upon a paternal government for freedom than we formerly could upon a paternal hierarchy. I confess there is no fair prospect for immediate or near realization of this hope. While no array of statistics nor any argument from principal could ever have convinced the early Romanist to whom I have referred, that the concession of individual right in matters of belief was anything other than a surrender of all that was sacred and true, so no array of statistics nor any ar-

gument from principle can be expected to convince the advocate of the common-school system that a dependence upon individual freedom with the consequent diffusion of incentive for the support of such freedom is the only basis for normal growth. This system is too deeply rooted in the minds of the people, as was unified faith under ecclesiastical domination; and it is therefore altogether likely that we shall have to await its removal by dynamic influences similar to those which broke down forever the supreme authority of the Church of Rome.

## CHAPTER XI

### PATERNAL GOVERNMENT—CONTINUED

CONTINUING in the order which I marked out at the beginning of the last chapter, I will briefly notice those instances of paternalism which have their origin in the interference by legislatures and courts with the freedom and sanctity of contract.

The constituents of a contract are certain and constant, and in all contracts, whether of a public or a private nature, there inhere the following elements: first, the proposal and acceptance; second, the presence of either form or consideration; third, the capacity of the parties to make the contract; fourth, the genuineness of their consent; and fifth, the legality of the object which the contract proposes to affect.<sup>1</sup> In other words, these essential qualities may be thus expressed: first, the parties intending to contract must be able; second, they must be willing; third, they must actually contract; fourth, there must be a consideration, express or implied; and fifth, the subject matter of their agreement must come within the limits of public policy,—the public policy being mainly a guard against immoralities and perpetui-

<sup>1</sup> Sir William Anson, "The Law of Contract," Oxford, 1886, p. 10.

ties. Thus the power to contract in a free government imports the right of citizens to make agreements with one another in reference to their lawful possessions or services, unrestrained except by a clear and definite public policy, and the sanctity of contract includes the right to enforce performance of the agreements so made or to obtain compensation for violation. The freedom for industrial contract in a free State exists equally, without distinction of person or class, to all who are within the industrial field. When this right is preserved equally to each individual citizen, a fundamental basis of industrial liberty is established, and the equal incentive of industrial liberty is maintained. This is the brief of the freedom of contract; and the preservation of this freedom unimpaired necessarily includes the preservation of its sanctity. These elements cannot be created; they do not exist only because a legislative or judicial body enacts or defines them; they owe their real being to natural economic laws. They arise out of the conditions which inhere in the idea of agreement: as a thing made by free consent without duress or interference; made by those who have unchallenged right in the subject-matter, the obligations of which, once entered into, cannot be discharged otherwise than by performance or by common consent. Legislative attempts to interfere with the operation of this freedom, and judicial decisions which interrupt it, do not annihilate the principle. It is, however, only when judicial decision and legislation conform to these natural

laws that their normal operation is secured. Upon examining existing statutes and decisions with reference to their influence upon the contractual right, we find that law makers and judges have sometimes sought to impart this freedom and sanctity to certain legislative creations which they have called contracts, but which, measured by this definition, are not and cannot be such; and that conversely they have withheld this freedom and sanctity from certain conventional structures, which, whether they call or refuse to call them contracts, are, by this definition entitled the sanctity and freedom belonging to contracts.

Keeping the definition in mind, I will endeavor to use it first to measure those certain legislative enactments which are assumed to be contracts but which by the definition are not, and therefore are not entitled to the freedom which belongs to the making of a contract, or to the sanctity which should mark its obligation; and thereafter I will endeavor to demonstrate that certain agreements which according to the definition are contracts have, by mistaken judicial decisions, been denied the sanctity which properly belongs to them.

When questioned upon the subject the average American citizen will usually say without reserve that his government is based upon the sovereignty of the people. No statement is more common; and yet he cannot mean what he says with all that it imports, since in practice he is constantly approving acts which

radically contradict this statement—acts, in fact, which tend to deteriorate this sovereignty. The common notion of sovereignty must therefore be something of an abstract idea rather than a perception of a principle of action, and I think it may be shown that both our judicial decisions and our legislative enactments indicate the considerable prevalence in the higher circles of thought of this abstract view, and the corresponding neglect of the concrete. For instance, nothing is more common in discussing the relations of the State to the *quasi*-public corporation than the citation of that clause of the Constitution which forbids the State to pass laws impairing the obligation of contract. It is almost universal to speak of these *quasi*-public corporations as holding their charters from the State as contracts; and yet, examining them in the light of the definition I have given, they will be found to possess none of the constituent elements of contract.

The relation of the legislator to his constituents is essentially a relation of trust; he is not the owner of the sovereignty which he exercises. He cannot assign any part of that sovereignty; he cannot therefore erect an artificial being and deal with it as an equal; he cannot, for industrial purposes, construct an artificial being and make with it a contract which confers any part of the functions of the the government. When, therefore, he grants a franchise for commercial convenience, he grants it subject to this sovereignty. Such a grant cannot be a con-

tract. The relation between a sovereign people and a corporation as holder of the franchise, so far from having any element of contract as between equals, is essentially the relation of the creator to the created,—the master to the servant; and just so far as the service to be performed is important or delicate, just in the degree that it touches the sovereign master's right, it must be subjected to the more constant surveillance. When a railway charter is given, this relation necessarily subsists, necessarily because the charter is given for the well-being of the creator, and the duty of inspection, of guarding the master's well-being, is imperative as a duty upon the representative of the sovereign creator.

The corporation is not a natural person; it is not an individual citizen; it has no existence until it is created by legislative enactment; it comes into being with its charter. Granting that when once created it is endowed with certain powers for certain purposes; that among these there is the power to contract with individuals, with other corporations, or with its sovereign creator, still this power only arises after its creation, and it is a power which is necessarily so limited that it cannot interfere with the power and right to which it owes its being—the power and right of the individual sovereign. The theory, therefore, that a corporate charter is a contract, must rest upon the assumption that its creator in the very act of calling it into being is contracting with it. Such an assumption would make the process a species of legislative miracle.

The practical consequences which have followed this construction of the charter as a contract have been well illustrated by the history of the railway management. These consequences, as we have seen, have involved the subversion of the sanctity of individual contract which the Constitution particularly aimed to guard. If it be the theory that the corporate power shall be exercised within the bound of individual right; and that whenever it exceeds this bound the proper remedy shall be by declaration of forfeiture, this theory does not and cannot change the fact of railway aggression; nor is it one which in practice affords an available remedy. Instances of flagrant abuse in corporate management abound, whilst nothing is more rare than the successful forfeiture of a charter for abuse of corporate power; and this rarity exists for the reason that such forfeiture is impracticable, partly because of intervening vested interests, and partly because the charter which is treated by its holders as a private interest so long as it is claimed to be a contract with the State, comes to be claimed as a public necessity in defence to any effort at forfeiture.<sup>1</sup>

<sup>1</sup> As I have elsewhere shown, the power conferred by the States upon railways necessarily places the corporation in a position where it may interfere with the individual right—with the freedom of the citizen; and there is no remedy provided by the promise that the courts will annul railway charters when they interfere with this individual freedom, since it is an essential power of the railway companies that they may make their own commercial contracts, and in making them may make discriminations, not as a matter of right, but as a matter of fact. Indeed, it is often the case that a contract which may be entirely allowable at one point or under one set of circumstances for the reason that it does not interfere with the indi-



Practically, therefore, if an artificial structure, such as the *quasi*-public corporation, dictates terms to vast industries, distributes population, determines the relation between the producer and consumer, changes this relation at its own will and for its own interest, and often in disregard of the interests and in derogation of the contracts between buyer and seller—between the individual citizens,—if it can hold this power by the same sanction by which the Constitution intends the sovereign individual to hold his fundamental right to liberty in contract, then it is idle to say that the provision of the Constitution which forbids the State to impair the obligation of private contract has any vital force left in it.

There are not a few who, apprehensive of the disastrous results of corporate aggression, and conceiving these aggressions to be the result of too

vidual right, at another point or under different circumstances may be entirely objectionable because it does interfere with such right. The history of the railway management of the United States is replete with instances of the evil arising from this fact. That history is also replete with evidence that a forfeiture of the charter does not constitute a remedy. The necessity for the railway as a public convenience makes the forfeiture, even where it occurs, only the opportunity for another management to come into power. Experience has shown that the new management will be likely to follow the course of its predecessor in the use of its power, except, perhaps, warned by the forfeiture of its predecessor, its aggressions will be more insidious. The forfeiture of the charter, therefore, in the rare instances where it has occurred, only invites greater secrecy and suggests more covert methods for accomplishing the purposes which originally provoked the forfeiture. The latest instance of the failure of an effort to effect the forfeiture of a charter is shown in the case of the Broadway Railway.

great freedom of contract, believe that the remedy for all existing evils lies in the restriction of that freedom. It seems to me that no theory could be more mistaken than this. The political and industrial freedom of the individual can never be assured by placing it in bonds. The remedy, therefore, cannot lie in placing a limit to the freedom of real contract; but it does lie in retaining complete control over those artificial structures which the State has created, and which are constantly seeking to over-ride the individual right. The error of the reformer who would seek to limit the freedom of contract lies, therefore, in assuming that an artificial structure created by the sovereignty can be permitted to interfere with the individual sovereign. It would seem to be the better reasoning to construe the constitutional provision as a guard for what it specifically declares—the contract—the sanctity of individual right; and to hold that a corporation under this construction shall not be permitted to exercise any power whereby the right of the citizen is invaded; that the charter of such corporation is for service and convenience; and that, inasmuch as this charter confers large and necessary power for the furtherance of this service and this convenience—power which unrestrained is likely to be used aggressively,—the sovereigns who grant this power owe it to themselves, owe it to the constituent sovereigns, that it shall be guarded and regulated as a trust for equal right.

I do not believe there is a more pregnant instance to be found anywhere where a guard provided by the Constitution for the preservation of a prime essential of individual freedom has been transferred to an artificial body, and used by that body to the detriment of the very liberty which that guard was intended to support. It looks like the irony of fate that the *quasi*-public corporation, which has in our commerce been made the greatest engine for interference with the freedom and sanctity of private contract, owes its immunity to a construction of the constitutional provision which was intended to preserve the obligation of individual contract. In metaphor the corporation may be said to have entered the citadel of individual right, and appropriated the armor of freedom, under cover of which it practises its tyranny.

The state of affairs which I have indicated as the result of the treatment of corporate charters by the courts has arisen from the case of *Dartmouth College vs. Woodward*, decided by the Supreme Court of the United States, and commonly known as the *Dartmouth College Case*.<sup>1</sup> The misapplication of the fundamental principles of the law of contract to the facts before the court in this case, and the further circumstance that this decision has been cited in subsequent cases as an authority for positions which it does not sustain, have brought about the solecism to which I have made reference. In this way there has been established a construction which tends to a

<sup>1</sup> *Dartmouth College vs. Woodward*, 4 Wheat., 518.

continual violation of that sanctity of private contract which the original decision was meant to support.<sup>1</sup>

It was definitely set forth as early as the reign of Edward I. as part of the confirmation of the Great Charter, and as a principle by which the nation bound that monarch, that "that which touches all shall be allowed of all,—the law that binds all, a tax that is paid by all, the policy that affects the interest of all, shall be authorized by the consent of all."<sup>2</sup> From that date party politics took a new form. Definitely as this was thus set forth, however, it was not then fully realized; it is not yet fully realized. Nevertheless it constitutes the basis of the contract relation and of liberty; and it is in contradiction to this that the Dartmouth College case has been made the corner-stone upon which rests the whole structure of aggression that has grown up in the railway corporation.

I have thus indicated the consequences of an effort to clothe with all the qualities of a contract that which according to the definition is not one. We

<sup>1</sup> Daniel Webster made the leading argument in this case in behalf of the College. According to one of his biographers, the argument, able as it was, was perhaps the most emotional act of his life. His biographer says:

"Great lawyer as he undoubtedly was, he felt on this occasion that he could not rely on legal argument and pure reason alone. Without appearing to go beyond the line of propriety, without indulging in a declamation unsuited to the place, he had to step outside of legal points in a freer air, where he could use his keenest and strongest weapons, appeal to the court not as lawyers, but as men subject to passion, emotion, and prejudice. This he did boldly, delicately, successfully, and thus he won his case." (See "Daniel Webster," by Henry Cabot Lodge, Boston, 1886, p. 91.)

<sup>2</sup> Stubbs' "Constitutional History of England," vol. II., p. 5

have now to look at two instances of the opposite character, namely, the effort by judicial decision and legislative enactment to treat that which falls specifically within the definition of contract as not entitled to its sanctity; and an instance of this we find in another decision of the Supreme Court of the United States.

On the third of March, 1884, that Court, without any public argument in the case, pronounced a decision which is doubtless destined to become of very great public importance, the gist of which is set forth in these words:

“The power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution, we are irresistibly impelled to the conclusion that the impressing upon the Treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress.”<sup>1</sup>

Mr. George Bancroft has written a monograph upon this decision, in which he arrays the authority of the framers of our Constitution, and of the fathers of the republic in support of his trenchant criticism upon its baleful effect. In a characteristic sentence, speaking of the decision, he says:

“The opinion thus confidently expressed, if it be accepted as a law, would be a death-blow to the

<sup>1</sup> *Juilliard vs. Greenman*, 110 U. S. R., p. 421.

Constitution; in defiance of which it not only gives a sanction to irredeemable paper money, but clothes the government with powers that have no defined limit in its relations with the people.”<sup>1</sup>

If this clear and vigorous arraignment has any warrant in it, it is difficult to conceive of a decision more unfortunate than this. While Mr. Bancroft views and discusses the case in its bearing upon the question of preserving the medium of exchange, I propose to touch upon its larger phase as involving the principle of sovereignty and the relation of that principle to the sanctity of contract. The decision of the court specifically rests upon two postulates: the first of which is that the sovereignty of the Federal Government is to be ascertained by the sovereignty belonging to the other civilized nations; and the second, that a power not expressly withheld from Congress by the Constitution, may be exercised by it. Under the first of these it is obvious that the Court in taking a foreign warrant for its finding, could not have been mindful of the injunction of Chief-Justice Marshall: “We must never forget that it is a constitution we are expounding.” No foreign sovereignty can have any true analogy to sovereignty as established by the American Constitution. Our sovereignty was intended to be a human sovereignty created by an agreement. It can have no quality of fiat in it. Fiat is only

<sup>1</sup> “A Plea for the Constitution of the U. S. of America, Wounded in the House of its Guardians.” New York, 1886. p. 6.

pretended in that kind of sovereignty which comes from the assumption of divine right ; and even there it can only be pretended, for it is not within the reach of any power whatever, however absolute it may assume to be, to make a promise take the place of performance,—whether such a promise is from the State to the people, or is contained in agreements between citizen and citizen. Natural law is not to be thus defeated ; nor can the assumed superiority to the obligation of a promise be so justified. I do not mean to say that the Supreme Court may not declare what it has in effect declared ; viz., that the performance of a contract can be indefinitely postponed. It may even, by the power of its decree, establish among the people a habit of such postponement ; but what it cannot do is to make the principle of contract and its sanctity anything else or other than it is. It is only in foreign sovereignties, therefore, where divine right is assumed, that this pretence is to be looked for. It was set forth and probably believed in with great confidence by Louis XV. when he gave John Law the right hand of his power, made him Controller-General of the finances of France, and issued illimitable paper money. Perhaps the highest expression of assumed potentiality over natural law ever given, at least since the days of theocracy, was that given by Calonne to Marie Antoinette, in answer to her request for money from the government : “ Madame, if it is possible, it is done ; if it is impossible, it shall be done.” But in a free government,

for the highest ethical reasons, no power is great enough to make a broken pledge a virtue, and for the highest political reasons, that which points towards the impossible is never attempted.

The principle involved couples the duty of the citizen who freely makes a promise, and of the State which makes a promise, to its performance, and requires that no State in its relations with its citizens may give to its promises the quality of performance; nor compel its citizens in their relations to each other so to regard them. The denial, therefore, by the Constitution to the States of the right to impair the obligation of contract was based upon a principle and not upon a policy; and it cannot possibly imply the right of the Federal Government to violate that principle. The Supreme Court, then, sought authority for the sovereignty which it was defining not in our Constitution, but in the assumed authority of other governments whose sovereignties pretend to rest upon divine right.

Upon the second assumption, namely, that a power not expressly withheld from Congress by the Constitution may be exercised by the Federal Government, and that a fiat power not withheld can be so exercised, it may be noted that what the Constitution did provide expressly was "that no State shall pass any law impairing the obligation of contract." The better reasoning would seem to be that when the Constitution directed that between a State and its citizens, or between citizen and citizen, a contract shall be no



less than a contract, it meant by necessary implication that the Federal Government could not in its relation to the citizen or in the relation between citizen and citizen declare that a contract shall be something less than a contract. The denial by the Constitution of the State's authority to impair the obligation of contract is not simply because it was inexpedient to allow a State to impair such obligation, but because the sanctity of contract is a vital principle of liberty. The reasoning in the case under discussion seems very much like reasoning that because the Constitution forbids a State to pass a law impairing the obligation of contract, and does not specifically forbid the Federal Government to pass such a law, that therefore it is within the power of the Federal Government, in the exercise of unforbidden sovereignty, to impair the obligation of contract.

There is one hopeful prophecy in the report of the case. It comes from Mr. Justice Field. In delivering the dissenting opinion he says: "The question has come again, and it will continue to come until it is settled so as to uphold and not mar the contracts of parties; to promote and not defeat justice."

In looking at the consequences of this decision, we must not be misled by the fact that it has had but small disastrous effect upon the present credit of the nation. Although the decision stands, we are not yet seriously suffering from its consequences. Our credit

is yet unimpaired, but this is because of our material prosperity and not by reason of our high sense of obligation. The consequences may be postponed for a long time; but when examined, it will be found that the postponement rests more upon our ability to pay than upon our appreciation of the obligation of our contracts. Nevertheless, whilst the direct consequences are thus postponed, the collateral influence of the decision is by no means invisible to those who will examine the conditions surrounding us. It would be interesting to know how far the reasoning which influenced the Supreme Court in thus marring the sanctity of contract has been instinctively adopted in all the field of industry. If it be in the power of the people in their collective capacity to make a promise to pay, a payment, it easily comes to be thought within the power of the individual to conform to this example, and instinct leads to this course more readily than reason directs. If a government may make a fiat indefinitely postponing a substantial performance, a citizen of that government may easily be supposed to fall into accord with the reasoning and apply it to his promises and thereupon devise the artifices which he may set up in the place of performance. When the door to the supplanting of a performance by the promise of one, is thus opened by an authority to which the whole nation looks for its direction in right, the whole field of malcontents may enter. The active participants in the struggle for existence are often turbulent,

sometimes moved by a sense of fancied or real power, by selfishness, ignorance, or cupidity, sometimes driven to resent the untoward oppression of corporate power. We may expect these participants thus excited to ignore the sanction of right. But severe as are the results thus created by the turbulence of the immediate contestants, they can only be temporary so long as our law-givers and our law-interpreters remain firm in the right. When the passions of the turbulent subside we may have hope of the readjustment of things to normal conditions. But when the example of wrong comes from the citadel of the Constitution itself; when it is announced upon a solemn adjudication; or when it is imbedded in the permanent law of the land and confirmed by this authority, there is grave cause for apprehension in regard to the continuance of liberty.

I do not mean to say that we have not had deviations from the right of freedom of contract in legislative enactment before. The existence of the special lien laws and of class legislation of all kinds proves the contrary. But I think it is safe to say that we have never before had so direct an announcement by authority in support of this deviation from the essence of contract; and whilst legislation of this untoward character has flourished before this decision, it may now take encouragement from the reasoning of the Supreme Court in confirmation of the loosened sense of obligation, and thus continue and enlarge the mischief; and from some appearances it is so

taking this encouragement. Part at least of the indirect influence of this decision may be seen in the increased activity of the State legislatures in tampering in one way and another with the freedom of contract; in the enactment of class legislation, arising from the assumption of beneficence, and supporting the inferior, at the expense of the normal, in the contract relation.

We have now to look at the second illustration of paternalism as shown in the effort, through legislative enactment, to limit the freedom of contract, and to treat that which falls strictly within the definition of contract as not entitled to its sanctity. This instance we will find in what are called usury laws.

Usury laws have marked the contest between industry and feudalism, and as part of this contest nothing has been more persistent than the ecclesiastical resistance to the right of parties to agree in reference to the use of money upon rates of interest. Whilst one by one the sumptuary laws which regulated the prices of commodities were overcome and repealed in the progress of industry until freedom in the barter of everything came to be regarded as necessary, yet the economical principle of this freedom concerning the great medium through which all barter is accomplished was steadily denied. Montesquieu's "Spirit of Laws" was put upon the *Index Expurgatorius* almost entirely for advocating the taking of interest; and in the whole history of industrialism, wherever the law of usury was most

rigorously asserted, there industry languished; and wherever, through caprice, interest, or neglect, the natural economic law was allowed to prevail, in proportion to that prevalence, freedom with reference to the rates of interest marked the degree of freedom of commerce and industry. It was so with the Hanseatic League; it was so during the time of the free city of Venice; and when thereafter this freedom was overcome by the Church and the nobility, money-lending came to be confined to the proscribed Jews, its practice became odious and industry subsided. Up to the time Bentham wrote, the opinion was little less than universal that severe usury laws were essentials of civilization, and the statute-books of all nations were cumbered with them. The restriction upon these laws which has taken place since that time is mainly traceable, I think, to the influence of his writings. In the introduction to a series of letters written in 1787, he says:

“I do not recollect ever seeing anything yet in behalf of the liberty of making one’s own terms in money bargains. From so general and universal a neglect, it is an old opinion of mine that this meek and unassuming species of liberty has been suffering much injustice.

“A proposition I have been accustomed to lay down to myself on this subject is the following one, viz.: that no man of ripe years and sound mind, acting freely, with his eyes open, ought to be hindered, with a view to his own advantage, from making such a bargain, in the way of obtaining money, as he thinks fit; nor (what is a neces-

sary consequence) anybody hindered from supplying him upon any terms he may see fit to accede to.

“This proposition, were it received, would level, you see, at one stroke, all the barriers which laws, either statute or common, have in their united wisdom set up against the crying sin of usury.”

There is no new argument to be set forth in support of the repeal of these laws. The most comprehensive reason, perhaps, is that usury laws are contrary to the freedom of contract; that, like all paternal acts, they do not accomplish the object aimed at; and when they do accomplish the more direct purpose, the accomplishment is always at the sacrifice of some larger interest. The effort to protect the spendthrift interferes with the freedom of the thrifty, and the effort to guard the poor by limiting the freedom of contract in the rates of interest, operates as a restraint upon the freedom of the poor and the rich alike.<sup>1</sup>

The usury laws were abolished altogether in England in 1854; Denmark in 1855; Spain in 1856; Sardinia, Holland, Norway, and the Swiss Canton of Geneva in 1857; Oldenburg in 1858; Bremen in 1859; Saxony and Sweden in 1864; Belgium in 1865; Prussia, the North German Confederacy, and Austria (in part) in 1867; and in fourteen of the

<sup>1</sup> Adam Smith based his acceptance of the usury laws upon two points: that they tended “to protect spendthrifts” and “to repress projectors”; but in the latter part of his life, through the influence of Bentham’s reasoning, he entirely admitted his mistake upon these points.

States and Territories of the Federal Union they no longer exist.<sup>1</sup>

Under no governments in the world does interest rule so low as in England and Holland, where the only rate established by law is where there is no agreement, as in legal rates on the result of a lawsuit; and in no State in the United States does the rate of interest rule so low as in the State of Massachusetts, where the usury laws were abolished in 1867<sup>2</sup>. Of course, it is not pretended that the abolition of the usury laws in itself reduces the rate of interest, for its normal rate rests upon economic laws, and legislation limiting such rate is only an interference. Where freedom and

<sup>1</sup> In none of these is it pretended that the people or the business interests labor under any disadvantage therefrom, as compared with the condition of things in other States and Territories where a different policy is maintained. In eight States the only penalty imposed for taking interest in excess of the legal rate is the forfeiture of the interest, and in eight more the lender forfeits only the excess of the contract over the legal rate. New York, Oregon, and Virginia are the only States which still maintain extreme usury laws, needing only the old-time provision debarring the offender from the right of Christian burial, to make them equal in all respects to the laws of the Middle Ages. In New York, where the statute in its most essential provisions is rarely enforced, the recipient of usury forfeits both principal and interest, and is made liable, in addition, to fine and imprisonment. Virginia forfeits contract and exacts a penalty of twice the principal. Oregon forfeits principal, interest, and costs. Idaho Territory prescribes a fine of \$300, or imprisonment for six months, or both. (See "Usury Laws," Economic Tracts, No. 4, New York, 1881.)

<sup>2</sup> The following is an extract from the act to repeal the laws against usury, as passed in the legislature of Massachusetts. (See General Statutes of Massachusetts, 1867, c. 56.)

SECTION I. When there is no agreement for a different rate of interest of money, the same shall continue to be at the rate of six dollars upon one

sanctity of contract prevail the rate of interest will always be regulated by the sense of security or insecurity, and by the abundance or scarcity of money. The sense of security will result either from a faith in the honesty of the borrower, or in his ability to pay, or from both these causes combined; sometimes one of the causes is preponderant and sometimes the other; sometimes they are equally strong. Manifestly here is a difference which legislation cannot regulate, and the fixing of an arbitrary rate in contracts conduces to nothing else than a resort to evasion and artifice to overcome such artificial restriction. Legislation can never create an abundance of any commodity; nor can it produce confidence from conditions which do not themselves warrant confidence. It makes no difference what the form or the potency of the government may be, the effort to accomplish these artificial conditions tends to the deterioration of credit. Such efforts made in Rome in the highest stage of its power; in France when it was most paternal; such efforts as are now being made in Egypt, Turkey, Austria, and Russia are standing illustrations of this.

In the State of New York the rate of interest has

hundred dollars for one year, and at the same rate for a greater or less sum, or for a longer or shorter time.

SECTION 2. It shall be lawful to contract to pay or reserve discount at any rate, and to contract for payment and receipt of any rate of interest, provided, however, that no greater rate of interest than six per centum per annum shall be recovered in any action, except when the agreement to pay such greater rate of interest is in writing.



been fixed by statute at six per cent. and Draconian penalties have been attached to the violation of this artificial law. And yet, anyone who knows anything of the manner of doing business in the city of New York, knows that this rigorous law does not in the least operate as anything but an obstacle to the natural current of business, an obstacle which is overcome by systematic evasion. Rates of interest rise far above the six per cent. when scarcity prevails, and run very much below it when the market is easy. The existence of the law only has the effect of making commerce indirect in its methods instead of direct. A man may not loan directly for more than six per cent., but the borrower places his paper in the hands of a broker to be sold for what it will bring. Thus there comes to be thrown about every transaction the necessity of intermediaries for the purpose of evading the law and its penalties, or, more accurately speaking, for evading a penalty inflicted for acting in conformity with those economic laws which the artificial legislation undertakes to interrupt.<sup>1</sup>

I have said that the rate of interest depends on the

<sup>1</sup> "In New York City, during the year 1880, the demand for the use of money for a time was such that loans were made at from 1-32 to 1-8 and (in a few rare instances) even 1-4 per cent. per day in addition to legal interest. In 1879, rates, during a period of stringency, reached 3-8 per day above the prescribed rate, which was equivalent to 144 per cent. a year. Just before the panic in 1873, rates reached 1 1-2 per day, or 547 per cent. a year. From twenty to seventy-eight times the rates prescribed by law were thus paid. The law of New York expressly ordaining that the hire of money should be at the rate of seven dollars for a hundred dollars for

sense of security or of insecurity, and the abundance or scarcity of money; and that this sense of security or insecurity will prevail either from a faith in the borrower's honesty and his ability to pay, or from a faith in his ability and his policy to keep up his credit. Unhappily it must be conceded, I think, that the extent of credit which we, as a people have, in our relations as borrowers, arises more largely from the latter condition; that is, rather from our ability to pay and the policy of keeping up our credit, than from the nicer considerations of honesty. When the end of the war found us with a depleted treasury and a great debt, we exhibited a phenomenal activity in industrial development, and began paying off our debt with unprecedented rapidity, at the same time gaining rapidly in all directions, and advancing with great strides. This exterior success struck the English mind with amazement, and produced unbounded confidence in our commercial power. England thereupon became as eager to loan as before she was anxious to withhold. The apprehension of our near failure which existed during the war and for a while thereafter changed with these indications of physical

one year, and in the same proportion for a longer or shorter time, and prescribing heavy penalties for the same, was therefore a dead letter, wholly unsustained by public opinion, and without any effect in attempting to regulate the price of the most important of all commodities. In June, 1879, the Legislature of New York, after consideration of the subject, refused to repeal her usury laws, but lowered the prescribed rate from seven to six per cent. The alteration of the rate has, however, produced no change in either public action or public opinion." (See "Usury Laws, Economic Tracts, No. 4," p. 61.)

success and entirely disappeared, and in its place came unbounded confidence. But one attitude was as capricious, if not as illogical, as the other. Any one examining the grounds of this confidence cannot conclude that it rests largely upon our sense of the obligation or sanctity of contract. We have, on the contrary, risen in spite of State repudiations, multiplying instances of defalcation of trust and of the dishonest management of railways. Of course there were incidents of material growth in the change which of themselves inspired confidence, such as the large product of the precious metals, the development of the mining industry and transportation, the liberation of volumes of coin by reason of the return to specie payments, and the increase in the representative currency through the establishment of national banks, based upon the national credit; yet, in spite of these and similar facts, one must conclude, in surveying the whole field, that the species of confidence which is born of commercial integrity, a sense of obligation of contract, of individual and national honesty, has little reason to exist; for these badges of integrity, unfortunately, are not conspicuous signs of the times.

Thirty years ago such a decision as that which the Supreme Court of the United States has rendered in the legal-tender case would have filled the minds of all creditors with distrust. As borrowers then, we would have been taught the necessity of honesty as a prerequisite for credit. Thirty years ago the repudiations of the States of Virginia, North Carolina,

South Carolina, Georgia, Louisiana, Tennessee, and Minnesota, the defalcations of the townships and cities in the West, would have caused the financier of London to withhold his money. The conclusion under such circumstances must be that foreigners are ready to lend us, not because we are believed to be honest, but because we are known to be successful.

Having thus given two illustrations of paternalism in its untoward relation to the freedom and sanctity of contract, it remains to be noted that there are many other instances of such legislation yet unmentioned. Among these I will only name the creation of liens for priorities to certain classes of workmen, the creation of liens for particular kinds of work, and priorities of right to certain classes of creditors. It is not within the scope of my work to discuss these in detail, and I will not notice them any further than by saying that they are necessarily paternal by reason of their tendency to confer class privileges. There is no delusion more prevalent than that which presumes the existence of equal political right in such legislation. If we will follow these legislative attempts to their legitimate conclusions, we shall find that they invariably rank as political inferiors the men or class thus intended to be protected, and that the acceptance by this class of the protection involves a recognition on its part of political inferiority. The inevitable tendency of this legislation is to lower the tone of the industrial

man, to impair his thrift, energy, and manhood, to lessen his capacity to take care of himself and to protect his own end of the bargain. We shall find also that in other respects such legislation inevitably defeats its own end, because the normal citizen, whether he be capitalist or laborer, instinctively prefers to make his contracts with those who exhibit manhood in making and performing their bargains. It is the natural tendency of all industry in wholesome conditions to avoid contact with those who either make themselves inferior, or permit the law to make them so. The man who puts himself in the position of asking or accepting assistance from the State in the conduct of his business necessarily proclaims himself to some extent an incapable; and it is not by such that the welfare of the community is best promoted, or that the individual incentive is best preserved. Political and industrial vigor flourish by self-dependence; and this is best preserved by the removal of restraints, not by the rendering of assistance.

There is another phase of paternalism which I have noted in its order at the beginning of the last chapter, namely, the carrying on by the government of any business enterprise, such, for example, as the management and control of railways. A government which engages in any industry for profit, unless it excludes the individual from all effort in that particular industry, necessarily comes in contact with the citizen as a competitor. The competition under

such circumstances cannot possibly be on equal terms, nor can the industry so managed by the government be wholesomely managed, since it constantly invites and receives political manipulation; and as the government has a motive for profit and a power to employ this motive in discriminating against those who are in competition with it, it cannot deal justly with, or preserve the equal rights of, the citizen. Therefore, there is a tendency in such ownership towards a deterioration of business integrity; a tendency, too, toward the creation of class interests, and of those obstructions to equal individual right which class interests produce.

I have thus undertaken, as briefly as possible, to discuss paternalism in its bearing, tendencies, and effects, and to illustrate the definition which marks its character. I will now very briefly and without discussion touch upon some of those acts of government which I have designated at the beginning of the last chapter as non-paternal in their character. The coinage of money by the general government, the regulation of weights and measures, the collection of taxes equitably assessed, are acts which are non-paternal because they are essential for the administration of the whole government, and contain in themselves no elements which tend toward the creation of class distinction.

Similarly, the erection of fortifications for the defence of the nation, the creation and maintenance of the army and navy, are national necessities which

conduce to the benefit of all the people alike. They are the means whereby the freedom and security of the nation are maintained. The support of the soldiers and sailors disabled in service is an incident to those necessities ; this creates no class ; it is given simply as an act of justice to those who have rendered service for the protection of the government and become disabled in that service ; and it is only when the government undertakes to stretch the bounds of its care beyond the limits of justice, that this support becomes an evil.

Other necessary and non-paternal functions of the government are to provide for the protection of the public lands, and to establish the prerequisites for naturalization in accordance with the Constitution ; for where the public lands are held not for profit, but to be disposed of for the well-being of the citizen, without distinction, in accordance with the growth of the country, there can be no paternalism in the management of them. By the establishment of the prerequisites for naturalization, and in the regulation by the government of its relations with other governments, the prime essentials for its solidarity are secured ; and the purpose of this solidarity is the maintenance of the equal right of the citizens, without distinction.

There are then left to be considered those non-paternal acts which belong to the police duties of government. Among these are the following : the regulation of the manufacture and sale of intoxicants

and poisons ; the prevention of the adulteration of food ; the preservation of the peace, the government of the Indian tribes, and the prevention of interference by the criminal and defective classes with the industrial and political rights of citizens.

The control of the manufacture and sale of intoxicants and poisons, the regulations concerning adulterated food, the preservation of the peace, and the control of the Indian tribes, fall so obviously within the province of the police department of government as subject to police administration, that they cannot be misunderstood, and need not, therefore, be particularly discussed. The necessity for the strict preservation of the equal industrial right, by the prevention of interference on the part of the criminal and defective classes, is not, however, so clearly or so generally realized, since it is one of the characteristics of paternal government in practice to make the line of distinction between the police domain and the civil and industrial domain in many instances more or less indistinct. This indefiniteness arises often from beneficence of motive in the government,—a beneficence which I think it may be shown necessarily involves injustice. Although I have indicated the failure of such beneficence to produce the desired result, I will notice the effect of this motive more particularly here, in order that I may more clearly define the police functions of the government with respect to the criminal and defective classes.



Without accepting the nice shades of distinction which modern philosophers employ touching the underlying human motives, I think we may consider charity as one of the most lovely of the private and individual virtues. Nevertheless, we shall find upon examination that it cannot be a political virtue; that, indeed, in a government it is a dangerous vice, and all the more dangerous because it is so apt to be mistaken for a virtue. A man or an association of men as private citizens may exercise the grace of giving and helping, if they have the individual means with which to give and help; but a free government can never dispense gifts or render direct charitable aid, either to individuals or to classes, from motives of generosity, for the reason that such a government has nothing of its own with which to be generous. It itself lives solely by contribution; it gets this contribution from the citizens for the specific purpose of preserving the equal political right. It is therefore a trustee of all that it holds for the purpose of this preservation, because it has received its whole power and all of its resources upon such a trust. Its sole virtue, therefore, is justice; and when it attempts generosity with the trust fund or the trust power, it necessarily does it at the expense of justice. A free government, therefore, cannot distribute favors; it can only measure out exact justice.

By the inherent law which governs custody of property, whether the trustee be a State, a corporation, or an individual, it must be that any effort to

divert that property for any purpose whatever; any use of it, except in accordance with the strict limitation of the trust, is not and cannot be virtuous; it must be vicious, because it is the misappropriation of trust funds or trust power. This is a rule to which no safe exception can be made. There are doubtless many who mean to be uncompromising in their demands for reform, as, for example, those opposed to the existing methods of railway management, who are nevertheless led by a sense of beneficence to make exceptions in favor of certain kinds of management which would strike at the very central principle upon which real reform must rest. As an instance of this, the *New York Times*, in its issue of Feb. 27th, 1888, editorially says :

“ It is undoubtedly difficult to devise any amendment to the inter-State commerce law by which the railroads shall be able to give reduced rates or free transportation to religious or charitable bodies without opening the door to fraud. But we should say that it might be safe to leave this to the discretion of the companies under such regulations as it is practicable to devise. The Children’s Aid Society of this city, for instance, formerly obtained help from the railway companies in furnishing homes in the West to children rescued from poverty or worse. To this action on the part of the companies there could be no possible objection, nor do we see how the right to renew it would give rise to any serious abuse. If any company chose, under cover of granting such facilities, to give free passes to those who have no claim to them, it would, if refused this right, find some other mode of

evasion, as, indeed, it is reported many companies do. If a company wishes to violate the law, it will do so without this amendment, while a real service to a very good work is now impossible."

What is the tendency of this reasoning? The country is at present engaged in an effort to check the abuses of railway management. It is for this that the Inter-State Commerce Law has been enacted. If it be admitted that those who exercise offices of trust must be held to a strict performance of their duties as trustees, it must be realized that these duties can never be fully performed if the trustee is permitted to make any exception whatever whereby he may use his trust funds, or his trust authority, in order to gratify his sympathies or the sympathies of others; in other words, he cannot be generous or kind with what he does not own. If this were thoroughly appreciated in all its consequences, the minister would realize that he could do no better service to Christianity and to justice than by insisting upon paying his full railway fare, and the legislator and the judicial officer would realize they could not better express their desire to guard the real trust relation than by declining to receive free passage; and the philanthropist, although moved by his sympathy to relieve suffering and correct crime, would understand that any sum contributed for such purpose must be a voluntary contribution from an owner, and not a contribution by a custodian, from the property of others.

It is not altogether unreasonable to suppose that some of these very poor children, for whom assistance is thus asked, owe their condition in part at least to the loose sense of trust which is so prevalent, and that therefore their condition is one which the acceptance of the half-fare and free passage have helped to create. When there shall be a better realization, then of the unalterable principle that a man entrusted with the control of a railway, or an office, or property, or powers, or rights of any kind which do not belong to him, is a custodian, and only has the rights of such, it will be seen that no beneficent intention, direct or indirect, can sanction his diversion of that property, or in any way make a virtue out of such generosity.

Besides this, the beneficence of the aim does not always accomplish its end, even when the right to give exists. Virtuous as the intentions may be, results of virtuous intentions are not always wholesome. In spite of all that can be done, help often enervates the recipient instead of strengthening him. Efforts to relieve poverty by indiscriminate giving only tend to increase it. When we propose to establish homes for the poor, even setting aside the question of who is to provide them, setting aside the fact that they do not come from any effort on the part of the poor, that they are the product of the industry of others, there remains the other question, when they are thus furnished, what is the effect? Obviously, the poor are not stimulated to industry; their in-

centive is not increased, but, on the contrary, it is lessened; and behind the apparently beneficent project there is often not only the misdistribution of the results of energy, but a general increase of the number of the poor, and a greater or less deterioration of their character.

When by continued beneficence we increase the poor-rates to make the poor more comfortable, experience has shown, especially in England, that the result is an immediate increase in the number of the poor, and a corresponding discouragement of the efforts of the thrifty. When we erect lying-in hospitals with "tours" for the quiet reception of illegitimate births, nature's response to this assumed beneficence is an increase in the number of illegitimates.

The sentiment of friendship is closely allied to that of beneficence. This is also an individual grace; its true office is exerted in the private and social relations. There it often mitigates the struggles and levels the asperities of life. But it is not a political virtue any more than is charity. When a custodian of right or power in a free government undertakes to gratify his private sense of friendship in dispensing right or power, he commits injustice and violates his trust. When friendship is made the reason for an appointment to a political office, the true test of ability to perform the duties of that office is disregarded. The office is not a gift; it is a trust—the duties of which, in the interest of the whole people should be performed as a trust.

When we have eliminated benevolent and paternal aims from the administration of government, there will still remain to be dealt with, a large number of human beings who, by reason of their deficiency in physical, mental, or moral qualities, constitute the delinquent and defective classes of the body-politic. . The care of these falls upon the government as a necessity. With the faculties and persons of these the government can deal only directly ; not through any benevolence, but from the necessity which brings them, as persons, within the control of the State. When the functions of government are rigorously, faithfully, and promptly performed, there will be all the more complete freedom of action among the normal industries of civilization, and a smaller number of delinquents and defectives to be taken care of. The vicious are to be treated as criminals, or, where they are imbecile or incapable, as the responsibilities of society, and so treated in order that they may be kept from interference with its activities. This police protection does not in the least degree require that they shall be foisted upon the industrial field. They become the care of the government only because they cannot take care of themselves, or because they require restraint.

There should be no difficulty in drawing with precision the line between the incapables and the defectives on the one hand, and the industrious on the other, and in adhering to this line. It marks the

difference between paternalism and non-paternalism; and yet it is just in this department of government that the largest vagueness exists—a vagueness which, as we have seen, is due to false sentiment, and which affords a pretext for the claims of the socialist, the protectionist, and the paternalist generally. There ought to be no difficulty, because the motive of justice is the test; the desire for the preservation of the freedom of the contract relation in the industrial field; for the prevention of all interference with that freedom, by which industry is burdened; the desire for pursuing that exact course by which the incapables and malcontents will be reduced to a minimum in number, while the normal and industrial class will be increased to its maximum. Surely, if the fullest possible social, industrial, and political health of the race be desirable, the conditions upon which this is acquired are worthy of exact study. Such well-being comes from the preservation of those conditions which promote political health and decrease political disease, rather than from those which, by tampering, increase pauperism, and, by infecting the healthy region by association with the diseased, increase crime.

All the defective classes of society are, by reason of their defects, outside the pale of industry; and it is the prime function of government to keep them outside; to keep separate the diseased from the healthy, in order that the largest degree of health may be preserved. This is the only course which can

lessen the number to be taken care of, and at the same time, afford the fullest opportunity for the exercise of the strength of those who do not need care; and herein the workings of justice are more beneficent than the efforts of beneficence itself.

Therefore, there can be no other purpose to a free government in treating with the defective classes than to treat them with a view of keeping them from interference with the healthy classes, and thus preserving the best qualities of the race against the delinquent, the recalcitrant, or whoever undertake in any way to violate the terms of the political compact, or are incapable of compliance with those terms. Whilst the penitentiary, the insane asylum, and the almshouse are necessities of civilization, they afford no reason for protecting the idle or maintaining the thriftless, or for creating an individual class, or for bolstering up the contracting power of those who are incapable of meeting its demands, or for interfering in any way with the freedom or sanctity of contract. A free government in taking care of the incapables and the malcontents does so from the duty which it owes to civilization; it does so from its sense of justice, and in adhering to this sense it cannot faithfully administer this duty by adopting any course which tends to increase the number of these defectives and malcontents, or to place them in the way of the normal and industrious. They are not in the race of industry, and cannot properly be placed there. To put them in that



race, and to maintain them by props through sympathy, is only preventing equality in the conditions of the race. The government's benevolence, therefore, is the sin of political injustice. The penalty which is visited upon this, is political and moral deterioration.

## CHAPTER XII

### ENGLAND AND AMERICA ; THE RELATION OF EACH TO INDUSTRIAL LIBERTY.

IN the reign of Queen Anne, the policy of non-paternalism, which had been growing for a long time, became predominant. This policy originated partly, no doubt, in the reaction from the intense feeling generated by the religious discussion which had prevailed in the preceding reign, and partly because the industrial classes had been steadily increasing in importance with the accumulation of industrial wealth. Within fifty years after the creation of the Whig party, which originated in 1680, so great was the reaction from the violence which had characterized the contest between the Popish and Protestant parties that, as Green says, "before fifty years of their rule had passed, Englishmen had forgotten that it was possible to persecute for differences of religion, or to put down the liberty of the press, or to tamper with justice, or to rule without a parliament."<sup>1</sup> The motives which characterized the Whig

<sup>1</sup> "A Short History of the English People," p. 696.

party in its secular administration have been set forth as the preservation of the power and majesty of the people; the authority and independency of parliament in its relation to the king, liberty, resistance, deposition.<sup>1</sup> The motives which characterized this party in its religious administration were expressed in the maxim that the government "should accord toleration to all Protestant sects, and in this maxim it found new strength in the manifest material benefits which it produced."<sup>2</sup> The whole power of the party was exerted in decreasing the coercive power of the ruler over the subject and in furthering toleration. Its principles were exemplified in such legislation as the Habeas Corpus Act, and later in the Bill of Rights, framed to secure the subject against monarchical aggressions.<sup>3</sup>

This disposition against paternalism continued to be manifested, and in the main prevailed, until it was interrupted by the French Revolution, and afterwards by the Napoleonic wars, which tended to unsettle all European policies, and, as I have heretofore shown, imparted to the English statesmen a fear of the people. The non-paternal movement, however, somewhat recovered from its lapse, and in the early part of the present century was exerting its influence manifestly for the cultivation of individuality in the citizen. The legislation which proceeded from this

<sup>1</sup> Bolingbroke's "Dissertations on Parties," p. 5.

<sup>2</sup> Lecky "England in the Eighteenth Century," vol. I., p. 209.

<sup>3</sup> Spencer "The Man *versus* the State," p. 3.

spirit was characterized by an encouragement of self-dependence and a discouragement of governmental assistance, until the policy of non-paternalism produced at last the repeal of the Corn Laws. From that time to the present, there has been a gradually growing tendency in the opposite direction, exhibited in the ever-increasing efforts on the part of the government to reach out its paternal hand in interference with the citizen. In America, after our Revolution, inspired partly by the more liberal policy which had prevailed in England, but more by the sense of independence born of our Constitution and promoted by surrounding conditions, the legislation was chiefly of a character which promoted individual self-dependence. The influence of the French Revolution, which stayed the progress of this phase of freedom in England had, as I have already indicated, but slight effect in that direction in America. It rather afforded an opportunity for following the middle path between the extreme conservatism that set in in England, and the violence which was born of the French Revolution.

After the return of the English to their former policy of non-interference, the conditions both in England and in America continued favorable to the growth of self-dependence and self-restraint, until steam and the mechanical inventions became potent factors in the progress of industry. These produced a sudden change, which threw the industrial orders of society altogether out of their customary channels,

and made necessary a new adjustment of the methods of industry to the fundamental principles of industrial liberty.

In England the existence of hereditary classes and the influence of the prevailing land tenures have introduced into the problem of this new adjustment several factors that are not to be met with in the problem as it exists in America.<sup>1</sup> If it be desirable,

<sup>1</sup>In order that we may more easily realize the influences and consequences of tenure in the two countries, I will very briefly note the most prominent acts of English land legislation and of English judicial decisions upon land tenure. While the practice of tying up estates by means of entails was not unknown to the Anglo-Saxon, such methods were not in accord with the spirit of his inherited institutions; and alienation of land became so general by the time of Edward I. that in the thirteenth year of his reign the barons procured the passage of the statute "De donis," the effect of which was to establish strict entails and permit the conversion of existing tenures into a perpetual succession of life estates. The object of the barons in obtaining this legislation was to strengthen their hands in the struggle with the king. This condition of affairs lasted about two hundred years, until, in 1472, it was decided in *Taltarum's case* ("Year-Book," 12 Ed. IV., p. 19) that the entail might be docted by a collusive action known as a "common recovery," instituted by the proposed purchaser against the tenant-in-tail. The freedom of alienation consequent upon this decision continued until the time of the civil wars, when, by the ingenuity of the lawyers, were originated those devices for perpetuating succession in land that have reached their full growth in the modern "settlement." By the act of 3 & 4 Wm. IV., c. 74, common recoveries were abolished and entails were permitted to be barred by a deed for that purpose enrolled in chancery: inasmuch, however, as this statute interposes a "protector of the settlement" whose consent is necessary before the entail can be barred, it renders the alienation of a settled estate more difficult even than was the case before its passage. There have been recent attempts made by Parliament to mitigate the recognized evils resulting from the system of settlement; notably in 1856, when the tenant-for-life was empowered to grant leases for twenty-one years; and later in 1882, when his powers over the estate were enlarged by what is known as the Settled Estates Act (Reign of Queen Victoria, London, 1887.

in the existing condition of civilization, that family honors and titles should be preserved and family estates perpetuated, then some device is essential to such perpetuation. But if, on the other hand, these come to be regarded by mankind as the means for maintaining posthumous pride of present owners rather than for the welfare of future generations, they must be viewed as barriers to industrial progress, and their continuance cannot be any longer desirable.<sup>1</sup>

vol. I., p. 65). These measures, however, were palliative merely and not remedial. Finally in March, 1887, the Land Transfer Bill was introduced into the House of Lords. This act proposed to abolish primogeniture and entails, and to provide for the granting, by the tenant *in esse*, of an indefeasible title. It however never became a law.

Of course entails and settlements have in their origin no necessary connection with primogeniture or with each other; but in their modern development the interconnection has become inseverable, and together they constitute an artificial system, whether founded upon law or custom, whereby over two thirds of the land in England is practically kept out of the market, and political class distinctions are maintained in derogation of equal individual right.

<sup>1</sup> One has but to note the earlier hardships of land tenure inherent in the system in order to appreciate its utter antagonism to industrial progress.

While we are not accustomed to look in Blackstone for instances of pathetic feeling, I think there are few anywhere which are more pathetic than the following :

“ The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of relief and primer seisin; and if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith very feelingly complains, ‘ when he came to his own, after he was out of wardship, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to be barren,’ to reduce him still further, he was yet to pay a half year’s profits as a fine for suing out his livery; and also the price or value of his marriage, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value if he married another woman. Add to this the untimely and expensive honor of knighthood, to make his poverty more completely splendid. And when, by these deductions, his fortune was so shat-

It is impossible to estimate with any accuracy the extent to which the laws and customs of primogeniture, entails, and settlements which exist in England have retarded the growth of industrial liberty and the development of individual self-dependence. In the domain of social science ultimate results are produced by causes more or less indirect, remote, and obscure. It can be shown, however, that generally the period of greatest intellectual awakening and material progress in English history coincides closely with the interval between the general breaking down of entails and the subsequent revival of their objectionable features in the more modern "settlement"—an interval during which alienation of land was less restricted than it has been at any period since. A recent authority upon the subject says:

"By the end of the Tudor period the practice of breaking entails by means of common recoveries had already become well established, and must have brought many estates into the market. . . . It is impossible not to connect the rapid growth and singular independence of the English gentry under the Tudors and Stuarts with the limitation of entails and the freedom of alienation which characterized this remarkable period."<sup>1</sup>

As we have seen, it is not only lately that this system of tenure has been called into question; from its tered and ruined that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a license of alienation." (See "Blackstone's Commentaries," Bk. II., p. 76.)

<sup>1</sup> Hon. G. Broderick: "Systems of Land Tenure," Cobden Club Essays, p. 99.

earliest existence it has from time to time been challenged, and it is this challenging which has produced whatever modification of its rigors exists. Bacon, in describing the new expedients which were resorted to for defeating that legislation of his day which was enacted against entails, strikes at the very root of the question in one sentence. "Therefore," he says, "it is worthy of good consideration, whether it is better for the subject and sovereign to have land secured to men's names and blood by perpetuities with all the inconveniences above named, or to be free with the hazard of undoing his house by unthrifty posterity."<sup>1</sup> More recently it was asked by Berkeley, "What right hath the eldest son to the worst education?" And more recently still, Newman, in an essay on English laws, speaks of that tendency to establish "a magnificently fed and colored drone, the incorporation of wealth and social dignity, the visible end of all human endeavor, a sort of great Final Cause, immanent in every family."

Before the discovery of steam and the invention of machinery incident to it, or, perhaps more correctly speaking, before this element of civilization grew to great proportions, the general tendency of the people of England was, as we have seen, rather steadily progressive against paternalism and in favor of the true *laissez faire*, non-paternalism, and individual self-dependence; and it was only when the progress of industry became overwhelming as the

<sup>1</sup> Bacon's Works, Boston, vol. XIV., p. 414.



result of the supremacy of steam, that the instances of paternalism in legislation began to multiply. There were before that time many examples of paternal legislation, as it is natural to expect there would be in a government containing so many essentially paternal features in its fundamental structure; these were, however, far fewer than they have since grown to be, and after the discovery of steam the new paternal devices have, one after another, multiplying as time progressed, been invoked to make compromise between the new industrial and the old feudal orders. It may be said that the hereditary class has an instinctive disposition to preserve its status against the growing encroachments of industry, and that this instinct has become one of self-preservation, since these industries have grown into great political importance. The most natural course, therefore, for the stational class under these circumstances is to make its necessary concessions to the inevitable progress of industry rather out of its bounty than in recognition of the political right of the industrial class. Such a course rests upon the hope that the rigorous tenures may be preserved and the class distinctions perpetuated through patronage on the part of the hereditary favorites of the government toward the dependants; and such patronage also falls into accord with the sense of political superiority of the hereditary class. As a result, then, the hereditary class, with this disposition toward the industrial class, readily fell in with that

spirit of benevolence which, with the public, came to impart a tone of paternal character to all legislation.

The philanthropic element, however, is not of itself sufficient to account for the extent of paternalism which has characterized English legislation. A natural coalition therefore, arose between it and the landed interest. As far as the philanthropist is concerned, his motive in this sympathetic legislation was identical with that which had inspired the old religious domination. Each tended to produce the same result; for the disposition to govern a man's faith promotes the desire to govern and direct his physical welfare. To the statical class, on the other hand, the encouragement of such legislation appeared to afford an opportunity for quieting the demands of industrial progress, and at the same time keeping intact their own hereditary privileges. Thus under the influence of the sympathetic spirit, combined with that of the statical interest, paternalism grew just as it had grown under dogmatism. I do not mean to say that this coalition was the result of a scheme deliberately planned by the landed interest, but it accounts for the adhesion of that interest to the benevolent paternalism in part at least. Such illustrations as the poor-laws, where the exactors from industry and the recipients of the exactions—the poor—made common cause in extracting from the industrious, are to be attributed in some measure to the half-conscious repugnance of

the statical establishment to the progressive growth of industrial power. Besides this, it cannot be denied that the landed interest has steadily exhibited hostility towards the growth of the power of the industrial class in politics. This hostility has existed from the time of the beginning of the Tory party; and it is expressed in that maxim which has been made a fundamental one of that party from its origin, the maxim to which I have heretofore alluded, that "law in a free country is, or ought to be, the determination of the majority of those who have property in land," and that "the right strength of this kingdom depends upon the land, which is infinitely superior and ought much more to be regarded than our concerns in trade."<sup>1</sup> The effect of this philanthropic legislation upon the progress of industry may be clearly noted from its burdening this industry, so far as it could, with growing and excessive exactions, extracting the means from it indirectly for the performance of the assumed beneficence. Obviously this was a method whose tendency was to limit the progress of industry, not only by weakening it through exactions upon it, but by the use of those exactions in increasing the number of those for whom they were intended. This is the genesis of sympathetic legislation. Notwithstanding all this burden, industry with its momentum continued to grow towards an irrepressible issue.

<sup>1</sup> "England in the Eighteenth Century," by W. E. H. Lecky, New York 1878, vol. I., p. 217.

When the citizen comes to realize that the surplus that gets into the government vaults is extracted from his labor; when he realizes that it represents at last so much of the toil of the workingman, and that all that is expended by the government, no matter how beneficent the intention, with any other purpose than to secure exact justice and equality of right to the individual citizen, necessarily tends to lessen the industrial capacity and increase the incapacity and number of those who receive but do not earn; in other words, to learn that the revenues of the country come from the labor of the country, whether intermediately through the landed proprietor or not, and that the expenditures of the government which are made for any purpose other than that of keeping equal the citizen's right necessarily make his right less, his burden heavier, and increase the number of undeserving recipients;—when he realizes all this and begins to appreciate his own relative political strength, he is likely to grow restive under the restraints by which artificial legislation protects rigorous tenure. And usually his instinct in some measure makes him conscious of the existence of wrongs before his intelligence enables him to perceive the causes, and by slow degrees his reverence for existing orders wears away, and in its place there comes the disposition to assert his right.

Among the very earliest results of industrial growth in England, long before the invention of

steam, was the absorption of the smaller holdings of land by the more successful in the industrial field, and the disappearance of the smaller holder. Such a result in itself rather emphasized the dependent condition of the laboring class generally, but in the further progress of industrialism there grew, as incident to the new conditions, a place of larger importance for the laborer. Some of the drippings of the increased products of industry came to fall to the people generally, and this effected the gradual improvement of the physical condition of the laborer, through the cheapening of the product to him as a consumer, as well as through the better wages which he received. In this progress, especially in the last half-century, as Mr. Giffen has shown,<sup>1</sup> the laborer's condition has become considerably improved. Whilst some of the economic writers set this down as a reason why the working classes should be contented, it seems to me, as I have before intimated, that instead of producing satisfaction, its tendency is and has been to stimulate discontent; for it is through this condition that the laborer is taught the disparity of his position, and it is through such teachings and such realization that there grows a dissatisfaction in his mind, which finds more and more expression, just as he realizes his political power. While in England the disparity between the landed proprietor and the wage-earner has not lately increased, there are many in-

<sup>1</sup> "Essays on Finance," by Robert Giffen, New York, 1886, p. 365.

dications that the existence of this disparity has become more perceptible to the wage-earner, and is therefore unmistakably more of a source of discontent to him ; and as the industry to which he is allied grows stronger, it promotes in him more of the spirit of independence and aggression.

Meanwhile the vested and hereditary interest exhibits but slight disposition to relax the rigor of its tenure. The old order, guarded by, and dependent for its existence upon the old forms, and stimulated by the value of social worth which is associated with land, continues to preserve its holdings from generation to generation, to keep the system crystallized and to present the same unyielding front to the varied and increased activities of the new force of industry. While it, however, is thus stationary in its position, industry is growing, and growing aggressive ; and thus the disparity increases.

The English have none of those checks to constitutional change which exist in America. By the result of one general election both ministry and constitution may be changed ; and when we consider the extent to which the franchise has become enlarged, we may easily realize that such a change is now more possible than it has hitherto been, because the influence of the growth of industry is becoming more impressive and potent each day. Indeed, when we consider the conservatism of English thought, the deliberateness in the past of its progress towards radical change, the prominence of this influ-

ence of industry which has developed within the last ten or twelve years is no less than amazing. The law of personal property is inevitably supplanting the law of real property. It is exercising that which Maine calls a "dissolving and a transforming influence."

If we will eliminate from the question all secondary and minor matters, we will find standing out prominently in the political and social conditions of England to-day two salient and opposing tendencies. On the one hand, there is this force of industry, progressive, dynamic, and aggressive; on the other, the land tenure with its restrictions upon alienation, more or less statical, rigid, and immovable. The contest suggested—considering the fibre, power, and growth of the dynamic force, and the waning political strength of the statical element—is a contest which points towards the ultimate supremacy of the industrial power. No degree of resistance on the part of the landed power, such as that which was exhibited in France at the time of the calling together of the States-General just previous to the Revolution, can be expected. The temper of the English nation cannot be compared to that of the French; for, although the Englishman is slower, he has a far keener perception of equal right and justice. Whilst the progress of industry will not stay or grow any the less aggressive; whilst it will continue to move in a definite line upon the rigid tenures of the landed and hereditary interests, the solution of

the problem will in all probability come by less hostile methods ; and before the ultimate victory of industry becomes inevitable, changes will be accomplished by concession. At present the attempt upon the part of the landed class, as we have seen, is to delay the issue and preserve their status by alliance with the revived paternalism. It is at best but a temporizing expedient, and cannot fail to defeat itself and precipitate the result, the ultimate of which will be the abolition of the prevailing system of land tenure in England. The present distribution of landed property, however, depending, as it does, upon legal conditions which have for over two centuries favored the aggregation of estates, is one which will not be altered without considerable resistance upon the part of the landed interest. They can be expected to relinquish this restraint upon industry only with great reluctance. When we consider the prominence, in the mind of the Englishman, of the social importance of land, and the sanctions which time has thrown about it, and the fact that the nobility and the landed classes have owed their political preëminence to the system whose existence is threatened, it is not to be supposed that an immediate radical reform will be accomplished. Even with the abolition of primogeniture and entails, with the largest freedom of alienation, social influences arising from deep-rooted customs will, for a considerable time, delay such a redistribution of the land as will be necessary to conform with ultimate industrial demands.



Nevertheless, the freedom of alienation lies in the direction of industrial progress, and it is one of the steps towards the inevitable supremacy of industrial power. In force and progressiveness, the cities and the industries which centre in them far outweigh the landed interest; and with the enlargement of the franchise in England, we may expect the industrial element to assert itself in such legislation as will ultimately result in the accomplishment of its freedom.

It is more than possible that the first breaking down of the prevailing tenures will occur in the methods to be adopted for the settlement of the Irish question. It becomes daily more plain that no palliative treatment can cure the condition of affairs which exists in Ireland, and that the question does not involve merely the fertility of the soil. The issue there has come to be one of ownership as against occupation; and this issue cannot be indefinitely postponed. The complaint is not that the land is unproductive, but that the tenant is not and cannot become an owner. Whilst the true remedy does not lie in the confiscation of property, I believe it will eventually be found to exist only in the establishment of freedom of alienation and in the encouragement of the exercise of that freedom upon the part of the owner *in esse*. This course, with the time necessary for the adjustment of existing conditions to the new freedom, and this only, will accomplish the permanent political and social well-being of the Irish.

Turning to America, we find that whilst paternal-

ism exists and flourishes here, the conditions upon which it thrives are in important respects essentially different from those which exist in England. In one respect America possesses a signal advantage over England, and this lies in the freedom of her land system from entailments and primogeniture. There is nothing in our Constitution, or our Federal statute law, which prohibits the creation of perpetual tenures with reference to land. Whilst this is a subject which, under the Constitution, belongs to the regulation of the several States, it is due to the genius of American liberty that in nearly every one of these States entails are prohibited and primogeniture abolished by statute. Whilst, however, this subject is not dealt with by the Federal Constitution, the policy of the several States falls into accord with its spirit, and has thus prevented the existence here of those evils of land tenure which complicate the political problems of Europe. All that the Constitution does provide against in this connection is the creation of titles of nobility with their consequences of personal privileges and authority, and by this prohibition one of the chief motives for the preservation and perpetuation of family estates is removed. In this freedom from the primogeniture and entailments of the Common Law we have the opportunity of readjusting our vested interests with greater facility each generation, thereby bringing them into agreement with the current activities and incentives of the citizen. We are thus enabled, with less

disturbance and with a better opportunity for examination, to reform political wrongs and to bring into harmony the rights of all classes from one generation to another.

To recapitulate, therefore, the advantage which America has over England, in addition to her geographical isolation, lies in the fact of the prevailing freedom of alienation of land. As a result of this freedom, alienation has become common, and land has become a commodity of almost as easy exchange as personal property, and therefore as fully adapted to the activities of the generation in being. Besides this, the habits of the American mind have grown to accord with the exercise of this freedom; and the distribution which results from the exercise of the free right of alienation tends to meet and satisfy the higher individual capacity for acquiring, holding, and, within certain limitations of public policy, bequeathing property. There is in America, therefore, no system created by the posthumous pride of preceding generations to confront the citizen born into the world as a barrier to his progress, to weaken his incentives and obstruct his freedom: there is here no tyranny of the dead.

Nevertheless, we cannot congratulate ourselves that in possessing these immunities we have everything. Whilst under our fundamental law we have not the power of creating and transmitting personal places from generation to generation, there remain with us, recognized by both State and Federal

laws, certain legislative creations whose paternal characteristics I have discussed in former chapters, and which essentially partake of the nature of perpetuities. These have had their origin either directly in the Civil Law or have indirectly sprung from the ideas of government and habits of thought born of that law and still potent in civilization. As these features of perpetuity exist in this country they are embodied in the corporation, the protective tariff, and the common-school system. They are structures which by their own constitution and character are continuous. They continue from age to age, and by their influence affect each succeeding generation. They contain within themselves those potentialities which confront the coming generation and affect its activities and incentives. It is by them, so far as their intrinsic qualities are untoward, that the chances for the existence of personal capacity in the generations to come are marred, and the existing generation is prevented from the fair exercise of its faculties. When we come to realize the inevitable tendency against freedom of action which exists in any perpetuity, that there is nothing which is more apt to gather evil qualities than an artificial structure continuing its existence from generation to generation, we will be jealous in guarding this freedom by the abolition of such perpetuities as may be abolished, and by the careful supervision of any which remain as necessary to the support of physical convenience. If we have to recognize any of these

structures as necessary to the requirements of civilization and the maintenance of physical convenience, then it is manifestly the duty of the government to remove such of them as cannot be moulded into accord with the rule of freedom, and to set such guards around those remaining as will definitely secure individual right. If the government does not do this, nature will express herself in constantly recurring retorts against such artificial systems, until either the failure of the devices shall become overwhelmingly illustrated, or the resulting loss of individuality shall leave the people with the loss of their civilization.

In contrasting, then, the conditions which prevail in England with those which prevail in America, it is obvious that whilst paternalism, according to the standard which I have undertaken to make for it, exists in the two countries, its causes are far more deep-seated in England than in America; and the chief reason of its tenacity there lies in the fact of the survival of the mediæval law of tenure, the habits and customs which have grown up about that law, and the reluctance of a conservative people to yield those habits and customs to the progressive demands of industry; that, therefore, the great advantages which are possessed by America for setting herself in the van of civilization are that she is already divested of the older and more serious clogs which surround progress, in the freedom of alienation of her land, and in the fact that the law of the land has come here to assimilate itself, in the habits,

in the thoughts, and in the legislation of the people, with what Maine calls the law of the market. In view of this progress, which has been one of evolution, the evolution toward freedom, it seems somewhat inconsistent that Mr. Spencer should claim for the tenure of land a treatment different from that to be given the tenure of all other species of property over which ownership can be predicated. He claims government ownership of land as one of the pre-requisites of freedom, and insists upon the abolition of all private title. From the unanswerable postulate of liberty that "each man has freedom to do what he wills, provided he infringe not the equal freedom of every other," he draws this conclusion :

"Equity does not permit property in land. For if one portion of the earth's surface may justly become the possession of an individual, and may be held by him for his sole use and benefit, as a thing to which he has an exclusive right, then other portions of the earth's surface may be so held, and eventually the whole of the earth's surface may be so held; and our planet may thus lapse altogether into private hands."<sup>1</sup>

But is this conclusion warranted by the postulate? It seems to me as plain as that two men cannot occupy the same ground at the same time, that there must be some recognition in real freedom of that right which comes from previous acquisition; in other words, that the recognition of the freedom of others in-

<sup>1</sup> "Social Statics," New York, 1870, p. 132.

cludes the recognition of the precedent acts of acquisition of others, provided those acts of acquisition were made in accordance with the law of the freedom to acquire ; and that the holder's right to this recognition cannot be negated by State ownership or control. It is irrelevant to the argument that, as Mr. Spencer claims, title was formerly acquired by violence, fraud, the prerogative of force, and the use of superior cunning, since the same may be said of the acquisition of personal property and of supremacy of any kind. The question of present right, the principles which should govern present holding, cannot be determined by conditions which surrounded holding in other stages of civilization. It is a question of what conduces to the largest freedom to-day, of what conduces to the sum of the freedom of the world. Mr. Spencer seems, therefore, to some extent, to have lost sight of the application of that principle of *Natur-recht* by which he justifies the performance of those acts in civilization which conduce most normally and largely to the well-being of mankind, which for this reason are to be regarded as natural rights and the justification for those liberties and those claims which render the progress of civilization most possible. The attachment for home is as deep-seated as any that mankind is capable of forming. Whilst it is this attachment which distinguishes civilized nations from the nomadic types, it is also this which is common to the owner of the Kaffir hut and the owner of the palace ;

and the gratification of this attachment, which is essentially accompanied with a desire for possession and ownership, falls as plainly within the conception of natural rights as the illustrations which Mr. Spencer so clearly sets forth in support of other natural rights, wherein his conclusion is that these rights originated "in recognition of the truth that if life is justifiable, there must be a justification for the performance of acts essential to its preservation, and therefore a justification of those liberties and claims which make such acts possible."

The objection to Mr. Spencer's position is partly upon the ground that government ownership and immediate control, supplanting private ownership, of necessity involves paternal functions and throws upon the state multitudinous details entirely inconsistent with simple non-paternalism; that it affords opportunity for cupidity and dishonesty; temptations, not only to the administrative officer, but also to the lessee, or whoever he may be, who comes into competitive conflict with other lessees in dealing with such officer. The chief objection to his position, however, arises from the fact that government ownership tends to interfere with that equality of individual incentive upon which Mr. Spencer in other places sets so great and so appropriate a stress. It is only by private ownership, supported by the constant freedom of alienation in the owner *in esse*, that individual incentive can be preserved. When incentives for acquisition are unimpaired, we may



depend upon a distribution of land in accordance with the demands of the generation in being; we may depend upon a well-established public policy whose supreme motive shall be to keep the world and its fruits for the fullest enjoyment possible of that generation, thus enabling it to hand down its achievements to the generation succeeding, not only unimpaired but improved in quality. This, and this only, lies in accord with the solicitude of nature for the preservation of individual incentive.

The law of land, therefore, may be expressed just as the law of personal property is expressed, in the freest use by the owner *in esse* and the encouragement of that freedom in accordance with the equal incentive. The truest law of land tenure, then, will provide for freedom of alienation, just as the freedom of personal property involves freedom of barter. This will be accomplished by obliterating the distinctions between the right to land and the right to anything else; and this course will produce the largest freedom of use for the generation in being that is consistent with the preservation of equal incentives, a freedom limited only to the extent of restraining the right to bequeath to those who come within the personal affections of the owner of the property, a limitation which, as it is necessary for the equalization of the incentives, is, as I have heretofore shown, more of an amplification than a restriction.

In the progress of human activity, stimulated by

modern invention, I believe that man's intelligence is destined to play a more prominent part in the science of government and of life than it has ever done heretofore. I base this belief upon the stimulus which this intelligence receives from these dynamic forces—the inventions. As each invention requires a higher degree of skill in its application, a higher degree of intelligence in this direction is produced; and from the many inventions, a general improvement of skill must result. Man, therefore, will come to be more capable of directing the forces of nature which are susceptible of direction, and thereby capable of more clearly discerning those natural laws which must be obeyed. I think there is a higher degree of hope for intellectual movement and intellectual influence in the progress of evolution than Mr. Spencer himself is altogether willing to concede. One of the mistaken conclusions usually drawn from the theory of evolution is, that in considering man's relation to force, its advocates are disposed to place too much stress upon the permanency of the power of dynamic forces over man's intellect. What has conduced most largely to this conclusion is the immense potency of the material and mechanical forces which have come into being during the last fifty years, creating an unprecedented force of things in themselves. It is the irresistible momentum of these forces which seems to have impressed upon some of the philosophers of evolution the smallness of human intelligence as a factor in civilization. This view has

arisen from the circumstance that as we look around us and see the overwhelming force of these material and mechanical factors, and note the inadequacy of man's recent efforts to adapt them to human liberty, we are impressed with the magnitude of the influence of the one, and the minuteness of the influence of the other. This conclusion is one which Mr. Spencer himself has to some extent accepted in summing up the influence of sociology. He says that "the man of higher type must be content with greatly moderated expectations while he perseveres in undiminished efforts. He has to see how comparatively little can be done, and yet to find it worth while to do that little; so uniting a philanthropic energy with a philosophic calm." There is thus, meliorist as he is, a certain tone of discouragement pervading his general conclusions of the relative rate of intellectual growth which accompanies evolution. He estimates man's progress as smaller than it is likely to be. A more hopeful and at the same time a more justifiable view of his progress is that derived from the conclusion that this latest force and gift to humanity is exerting a revivifying influence upon the human intellect, and especially upon individuality; that its potency over man's endeavors at last only comes to stimulate him into a larger sense of being; and that we may therefore look for an enlarged result from the increased advancement and immense improvement in machinery—a result exhibiting the increase

of human faculty, the influence of intellectual power which shall appropriate to civilization and make subservient to human freedom and to justice that very force which has hitherto been hostile to individual growth.

It must be admitted that we have hitherto been aiding the dynamic force in its tendency to repress individuality rather than opposing it. We have done this by our persevering use of artificial methods constructed in imitation of the mechanism which characterizes that force ; and nowhere more signally and, it seems to me, more hurtfully than in adopting a system of compulsory training which is wholly empirical, because, for the most part, it not only ignores, but interferes with, the individual differences of character and temperament of the recipients, and thus works counter to the known laws according to which intellectual faculties are distributed. But as the bark of the forest tree grows more hardy and rugged because of the necessity under which it lies of resisting the severest part of the winter storm, so we may hope that these very obstacles and interruptions to the growth of individuality will enable it finally to overcome them. It is thus that man's intelligence may grow more vigorous from the very discipline through which it has passed in the contest for supremacy between the dynamic and intellectual forces, and the degree of intellectual growth will in some measure be proportioned to the degree of severity of this discipline. When we shall arrive

at the conclusion of this larger contest now going on ; when we shall have accomplished the subjugation of the dynamic force to the law of freedom, we may expect for the race a capacity which will enable it to adjust to this law the new and improved methods that shall spring from industrial progress. This expectation accords with the scientific tendency of the age. Hitherto mankind in its progress has learned more from failures than from successes ; but we may hope that with an increase of intellectual vigor we shall be able, in advance, to measure failure and success by those rules and principles which secure us freedom, founded upon justice first, and all things else afterwards. When this time comes, we will be able to look backward and estimate at their true worth the makeshifts of the past. We shall realize that in the government of a free people, benevolence and indulgence have no place ; that no political privilege can be granted, no political right denied ; that all legislation must accord with the standard of exact justice ; and that benevolence, which in the private citizen is one of the highest virtues, is in the State one of the most dangerous vices.

Industry, re-inforced as it has been by steam and the inventions, constitutes a dynamic potency altogether without parallel in history, and it is but in the first stages of its political accomplishment. The ultimate is industrial liberty for the world, and this can only be secured through democracy. If it remains

for the Anglo-Saxon race to lead the way to this democracy, the only question will be whether England or America is to be the leader. England has hitherto rather assumed this leadership in civilization; but the power and disposition of her hereditary classes tend in some important respects to retard her steps; and so far as this influence has been prevalent she has resisted rather than furthered the progress of ultimate democracy, and at the same time she has misdelineated its real characteristics. The English conservative and higher social classes exhibit rather too ready a disposition to attribute whatever excesses of plutocracy America has lately furnished, to the assumed democracy of her institutions. A better analysis, however, of underlying conditions will show that these excesses are but the parasites of material growth; and that it is a libel upon real democracy to call them her fruits. Besides this, in the minds of many well-wishers there is a fear concerning the permanency of democratic institutions, founded upon the dismal platitude that history repeats itself. Some of the English writers have been especially active within the last few years in drawing parallels between the democracies of Greece and Rome and that of America, and in holding up the ancient republics as warnings which indicate the inevitable fate of modern democracy. But, in point of fact, the repetition of history is to a considerable extent a delusion. History in the larger sense does not repeat itself. No one century is like its prede-

cessor. In all the resemblances of the past to the present there are important differences. New factors constantly make their appearance for the first time to modify the existing civilization, and so essentially to distinguish it from its predecessors as to make an analogy misleading. Each age takes to itself new and important qualities, which had no existence in any preceding age. Viewing each age as the sum of its predecessors, civilization has been essentially progressive.

Among the types of government which have been thoroughly tried in the past, democracy is not one. In the meantime each of the other types has had a thorough and an efficient trial. Viewing the general tendency of civilization from the beginning, there is a warrant, therefore, for the belief that the true trial for democracy is yet to come; that this form of government is gradually taking to itself those elements of permanency which it never possessed before.

In undertaking an analogy between Hellenic and Roman democracy, on the one hand, and that which is struggling for expression in America to-day, on the other, one cannot but be struck with the utter unlikeness between the ancient and the modern types in all that relates to industry. Nothing is so characteristic of the Grecian and Roman democracies as the abject servitude in which all industry was held, and the corresponding predominance in which the military spirit prevailed. Contempt

was universally felt and shown for all industrial pursuits, and this was especially the case among the Greeks.<sup>1</sup>

While human nature, generally speaking, has like characteristics in each age, the conditions which surround it change. The relation of the individual towards the consensus of individuals, called the government, whether that government be a monarchy, an aristocracy, or a republic, has essentially new features at each succession; and the change has not been a capricious one; it has been persistent and in one direction under the constant law of evolution—interrupted at times, lapsing at times, but reasserting itself, overcoming the interruptions and obstacles, and proceeding in its fixed course. Democracy may be described to-day in the same terms that were employed by Perikles. Human frailties may be described in the same terms now as then. But this relation of the individual toward his government, by reason of the intervening influences, has essentially changed; and the changes are all of a

<sup>1</sup> “It is observable that in the cities of Greece, especially those whose principal object was war, all lucrative arts and professions were considered unworthy of a freeman. ‘Most arts,’ says Xenophon (*Memorabilia*, Bk. V.), ‘corrupt and enervate the bodies of those that exercise them; they oblige them to sit in the shade, or near the fire. They can find no leisure, either for their friends or for the republic.’ It was only by the corruption of some democracies that artisans became freemen. This we learn from Aristotle (*Polit.*, Bk. III., ch. iv), who maintains that a well regulated republic will never give them the right and freedom of the city.

“In fine, every kind of low commerce was infamous among the Greeks; as it obliged a citizen to serve and wait on a slave, on a lodger, or a stranger. This was a notion that clashed with the spirit of Greek liberty; hence



character which tend to confer national longevity and political and industrial equality. There does not appear to have been the slightest conception among the Greeks or the Romans of the dignity of industry, or of its influence toward the promotion of political equality. They dreamed of no material bond of union from this source. Neither the Grecian nor the Roman republic conceived of any thing like a federation upon equal terms. They could therefore entertain no idea of the prevalence of industry, or the entire subjection of militancy to it. When these essential differences are considered, it must be plain to any one with a moderate capacity for right-thinking, how impossible to the Greek or to the Roman was such an idea as the federation of our thirteen States, beginning with a population of three millions of people, and growing within a hundred years into thirty-eight States with a population of sixty millions, with but one civil war in the century to interfere with the progress of that growth, and that war brought about to eradicate an evil which was a legacy from a preceding type of civilization—a war which had its motive in furthering the security and perpetuity of the federation.

Plato (Bk. XI.), in his laws, orders a citizen to be punished if he attempts to concern himself with trade.

“ Thus in the Greek republics the magistrates were extremely embarrassed. They would not have the citizens apply themselves to trade, to agriculture, or to the arts, and yet they would not have them idle. They found, therefore, employment for them in gymnastic and military exercises; and none else were allowed by their institution.” (See “ Spirit of Laws,” Montesquieu, Book IV., Chap. 8.)

As in contrast with England, then, our advantages seem to be the greater; but in both England and America a great deal yet remains to be accomplished. In our progress, as we have seen, there are many deterrents, not the least of which is a sentimental reverence for old orders joined with the fear of retrogression in the substitution of political right for hereditary privilege. There are many whose minds are pre-occupied with memories and regrets, who fancy that we are passing from a better stage to a worse, and who reverence the past all the more on account of their ever-increasing dread of the unknown future.

Sixty years ago the Poet-laureate dreamed of a future for the race, the consummation of which was that "the common-sense of most shall hold the fretful realm in awe." Sixty years after, revisiting the scene of his early inspiration, finding the dream unrealized, the illusion broken, the idol shattered, he exclaims:

"Poor old Heraldry, poor old History, poor old Poetry, passing hence,

In the common deluge drowning old political common-sense!"

When we consider that no preceding century has been signalized by anything like the degree of physical change which has marked the past twenty-five years we may realize the weight of these regrets. Among those who are lingering in the march of civilization many have passed the meridian of life; these come by habit of thought to live in the past, and

mourn that it is irremediable; and there seems to them no possible compensation for the changes which are so rapidly taking place. They see in these changes nothing but destruction; the breaking down of associations, the shattering of ideals. To them there appears to be nothing whatever that indicates the removal of the barriers to human freedom—nothing but vandalism and irreverence, which bring unmitigated and irremediable loss. Nevertheless, the sure years are slowly revealing the deep remedial process which underlies all facts, and the transitions which thus seem to them without compensation are the assurances to the incoming generations of the beginning of a larger civilization. If art is dwindling, science is growing; if the graces of life are not now flourishing at their best, a new foundation is being laid for them. In the progress of the change we are falling back upon a new fundamental basis; and although it is not to be expected that in the process of the construction of the foundation, art and grace will flourish, we must remember that these are the flowerings which grow upon the superstructure, and that they will be all the more perfect by reason of the truer and better conditions which shall be made for their growth.

It is not too much to hope, therefore, that the man who will be the product of the next civilization will be a fairer development than any the world has yet seen. If real democracy can be attained, he will be the one to prove his title; not by immemorial claim or by ancestral achievement secured by mediæ-

val enactment, but by imprescriptible right, common to all, founded upon even-handed justice, and accompanied by present accomplishment. He will be the product of the race as the heir of the ages. His nobility will be that which rests upon his merit and his performance, not that which is based upon artificial conditions repressing the better qualities of others.

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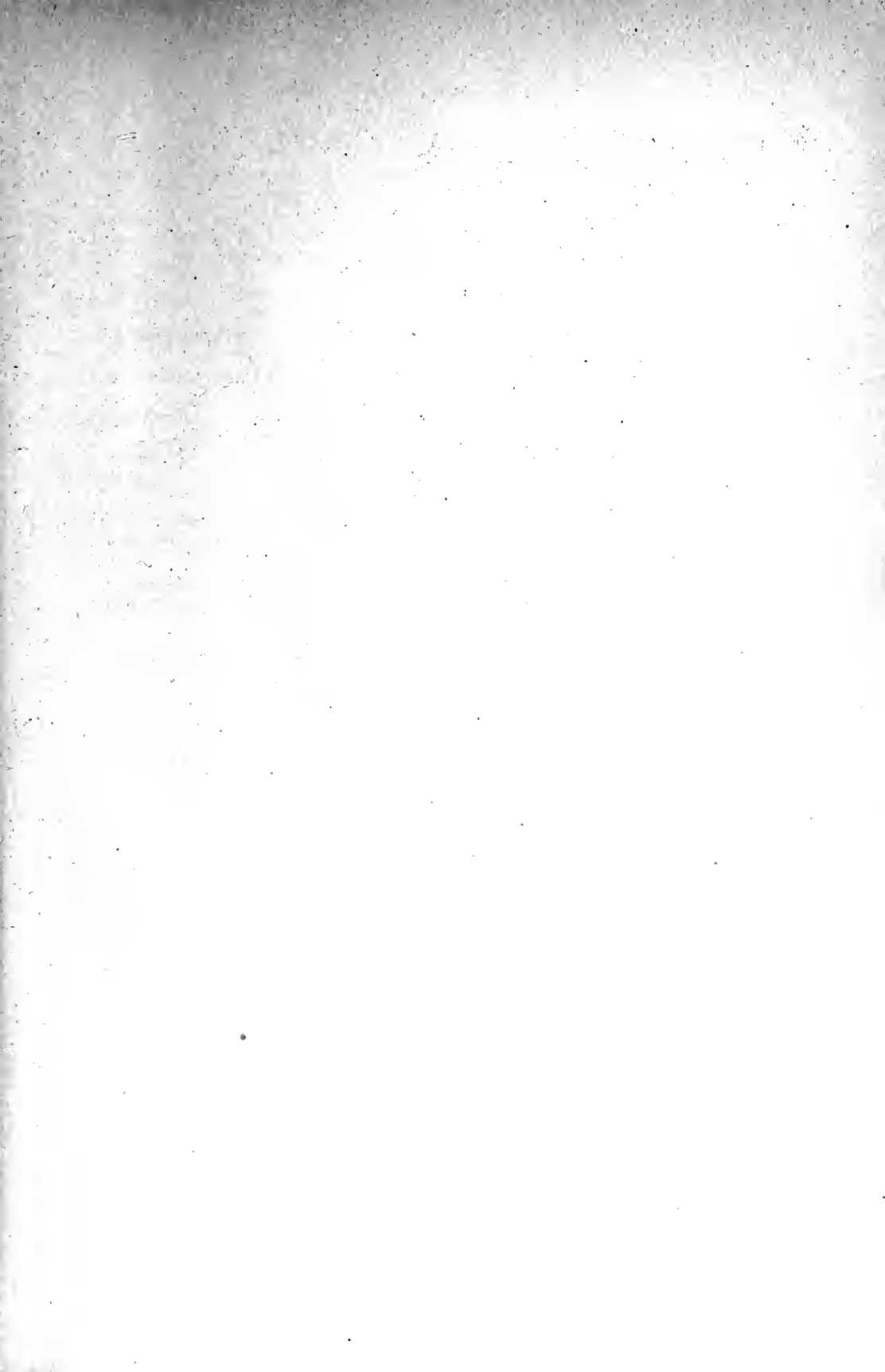
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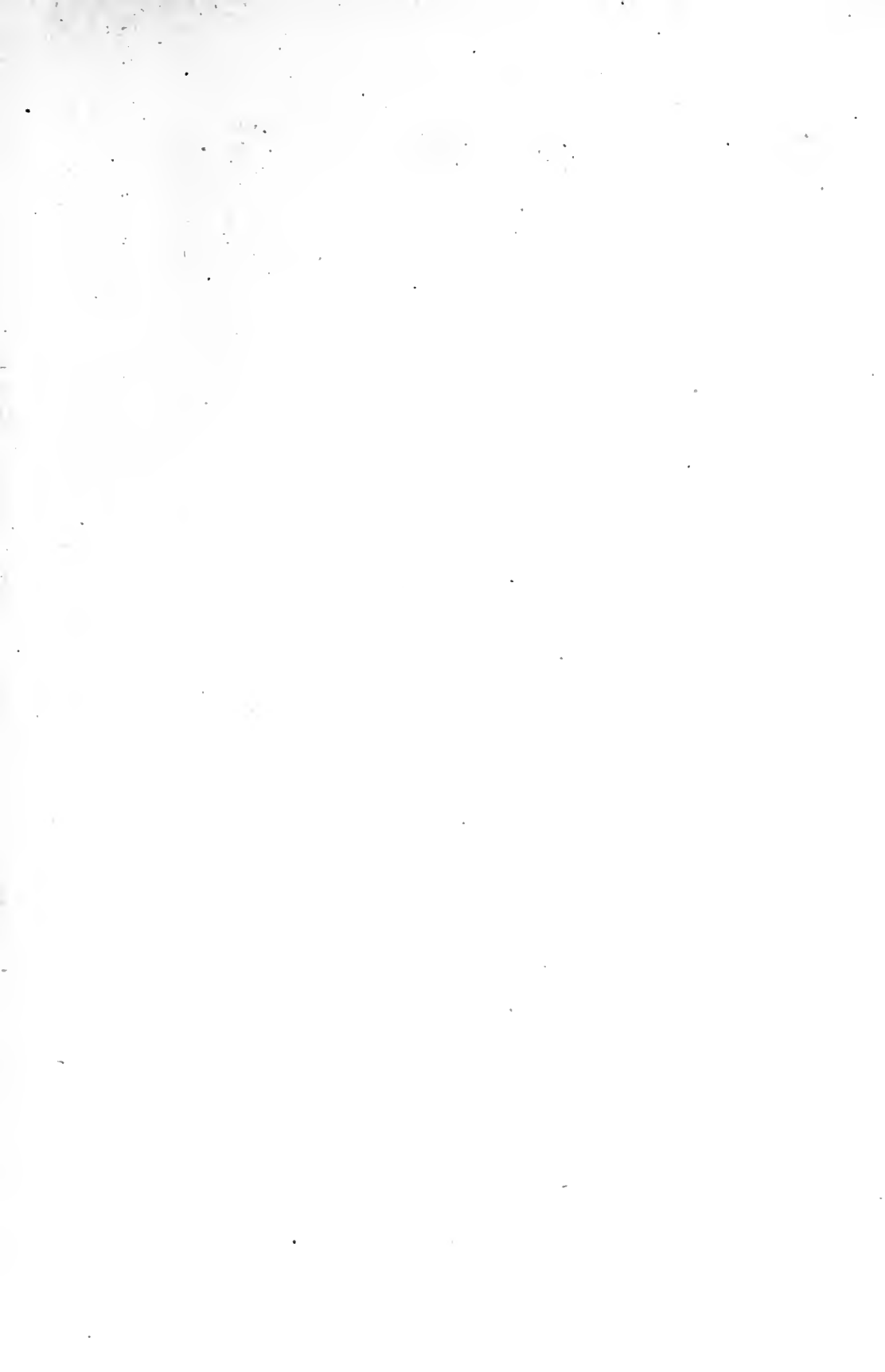
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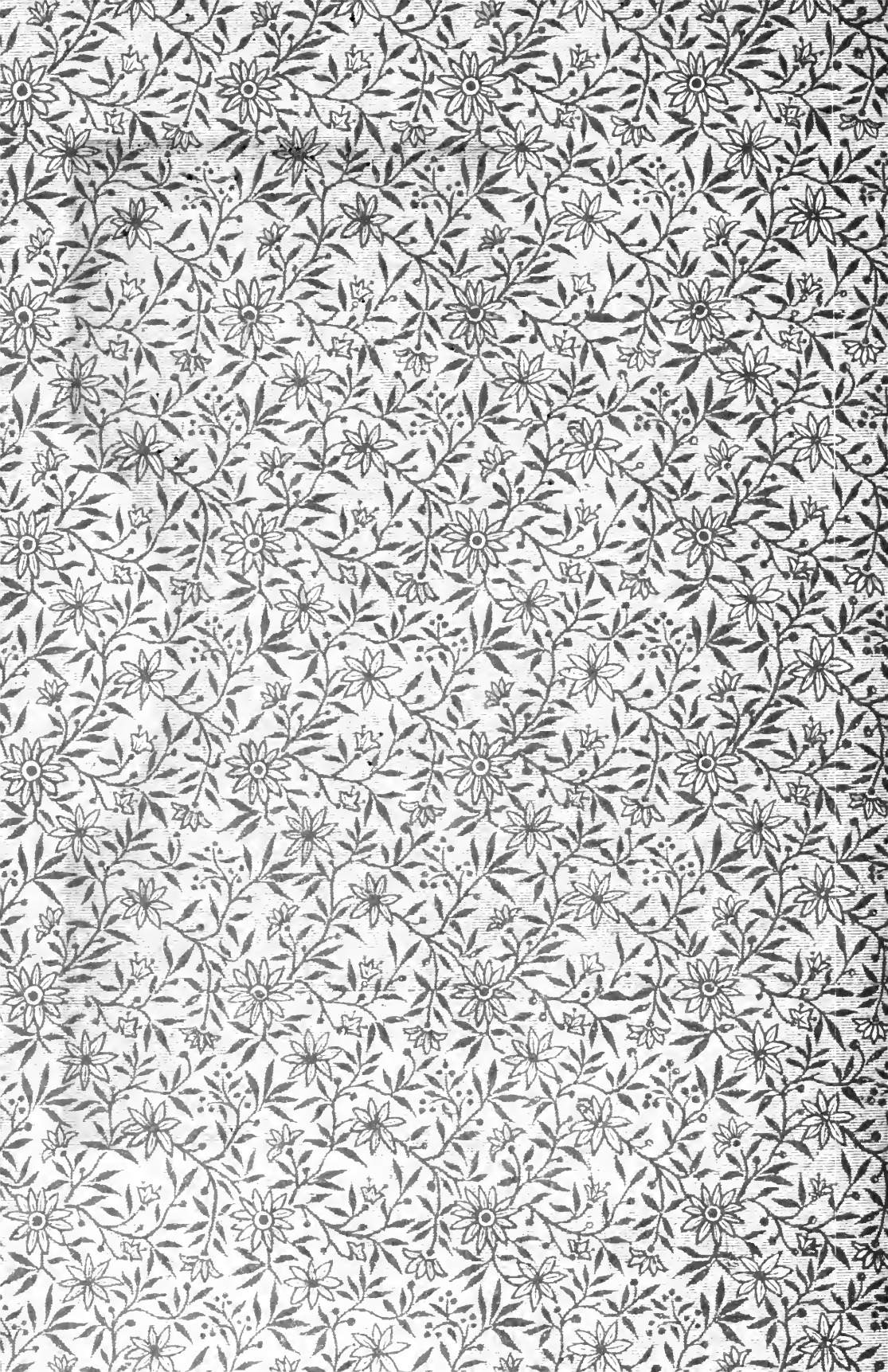
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