THE PEOPLE'S GOVERNMENT

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The corruption of each form of government commences with the decay of its principles.

MONTESQUIEU.

PREFACE

In every generation there is need of examining anew the foundations of government. At the present time this duty is more imperative than usual; for we have recently been passing through a period of criticism upon our institutions that has created in some quarters an unwarranted depreciation of their value, in others a genuine solicitude for their preservation.

Unfortunately, little comfort is to be derived from the example of other nations. A period of unprecedented social unrest in most civilized countries has been followed by the breaking out of an armed conflict between ten Sovereign States, including five of the Great Powers of Europe—a conflict which for some of them involves a veritable struggle for existence.

What then is the State, and what is it capable of becoming? How did it originate? Whence is its authority derived? Is there any proper limit to its authority? How far are its results

dependent upon the forms of government? Is there any possible *modus vivendi* whereby the different classes and races of mankind may dwell together in peace?

Undoubtedly these questions appeal to the intelligence of every thoughtful man, but they cannot be answered in an off-hand manner. The State is not a product of individual volition, and cannot be transformed in fact by a mere change in theory. It is, on the contrary, an historical product, and the examination of it should be approached in an historical spirit. In order to grasp the real problem, namely, progress toward our highest human ideals, it is necessary to take into account the natural conditions in which our human existence is placed. Only by an historical and comparative study of the nature of the State can we comprehend why it is that it does not actually afford to mankind that security of well-being which those who bear its burdens might reasonably expect.

To many it may seem that, after all, they have little or nothing to do with the State; but very brief reflection shows how much the State has to do with us. Through the Law it touches every

interest and relation of our lives. Our family, property and social relations are all affected by it. The Law not only claims the privilege of regulating our conduct toward others, and even our personal habits, but it takes our possessions for public purposes and employs the public powers to enforce our obedience to all its requirements. Whence then its authority? Is its right of commandment indefinite and unlimited? If not, what are the limits beyond which it may not justly go? And, finally, to whose hands and by what means shall be entrusted the lofty prerogative of laying down and enforcing upon us the rules according to which our whole existence is to be regulated?

We have, no doubt, a laudable pride in thinking of ourselves as "Citizens" rather than "Subjects"; but if our citizenship is to be anything more than a disguised serfdom, we must possess guarantees of our rights and liberties. What then is our place and our part in the State, and in relation to the Law?

Here are three concepts—the State, the Law and the Citizen—that are fundamental to the realization of any high ideal of human society. They are not merely imaginary elements in a theory of

politics; they are the existing realities upon which any sound theory of political relations must be based. They are not only the results of a long historical process; they are, in fact, the most important products of social evolution in its progress from savagery to civilization.

It is, therefore, with these three concepts, which include all the essential elements of the People's Government, that we are to deal in the following chapters. The substance of them was originally presented in the form of lectures before the Law School of the Boston University during the winter of 1915, when a strong desire was expressed that they might have a wider audience. In preparing them for publication, care has been taken to avoid all technicalities and to render them easy of comprehension by the general reader.

Beginning with the State as an embodiment of force, we shall trace its development as a human ideal. We shall see it long dominated by Law regarded as a sovereign decree, until this conception has been, in some parts of the earth at least, superseded by the idea of Law as mutual obligation. We shall witness the apparition of

a wholly new phenomenon, the Citizen—the self-conscious and responsible constituent of the State—no longer mutely receiving commands from a being of a different order, to whom he stands in the relation of a subject; but, as Law-maker, himself voluntarily determining the limits to which Law may extend, and, as subject to Law, accepting and respecting the principles which he himself has adopted. And thus we shall find, it is hoped, in the Citizen the solution of the problem of human government, and also of the co-ordination of human governments in the world-organization of humanity; for human rights are not the gift of governments, and governments need to be so organized as to furnish a complete security and guarantee for human rights. Upon this basis, and upon this basis alone, is it possible for all governments to submit their own conduct also to the rule of Law.

In the light of the principles here set forth—which in the main have entered into the distinctive American conception of the State—the question naturally arises: Will the experience of the United States of America be of any service to those who, when the battlefields are silent and the

dead are buried, will be called upon to reunite the shattered amities of Europe?

An important lesson of history is, that the value of a system of government does not reside exclusively in its form, but chiefly in its spirit. No matter in what guise injustice may appear, whether in that of Imperialism or that of Democracy, the exploitation of the many by the few, or of the few by the many, the crime remains the same.

Whatever the immediate influence of ethical conceptions and moral standards upon statesmanship may be, in millions of hearts, when in the night-watches the question is wafted from unmarked graves, "Is it not possible for men to live together upon the earth in peace and with honor?" the answer will be, "Yes." And when at last the voices of Reason and Conscience are heard, there will be a demand everywhere for the People's Government.

Washington, D. C.,
May, 1915.

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I

THE STATE AS AN EMBODIMENT OF FORCE

I

THE STATE AS AN EMBODIMENT OF FORCE

Until recent years it was the custom to regard all human institutions as the products of conscious intelligence. Today we are aware of the fact that in many phases of human development the rôle of conscious reflection was originally very slight. In its primitive stages human life depended in great part upon the instincts shared by man with his humbler fellow-creatures of the animal world. Modes of existence respecting such primary needs as food, shelter, and defense were influenced chiefly by urgent necessities enforced by the natural environment. All the elemental arts grew out of these necessities. For science there was as yet no place.

It is idle, therefore, in framing theories of the origin and essential nature of the State, to place emphasis upon abstract ideas, and to imagine that primitive communities—or any communities until recent times—busied themselves with problems of government and the fabrication of laws. It was only gradually, through a long process of time, and parallel with human development along other lines, that any community of men arrived at a stage of social consciousness sufficiently clear and intense to grasp the meaning of law, either in its natural or its juristic sense.

It was in the period of semi-conscious and unreflecting social development that were generated most of the abiding social instincts, such as fear of the strong, dread and distrust of the stranger, the impulse to defend the community from attack, and attachment to the tribe. These primary instincts of society are the most persistent. Essential-

ly local in their origin, they spontaneously resist the idea of more extended unity. Even much reflection upon advantages to be gained from wider association often fails to overcome them. The stranger long continues to be regarded as an enemy.

THE DEVELOPMENT OF SOCIAL STATUS

When, finally, the period of reflective consciousness is reached by a primitive community, it is evidently already subject to law; but it is a form of law imposed chiefly by natural necessity. Unconsciously, however, without purpose or definite intention, a *status* has been created, in which, if there are marked differences in the powers of individuals, there are corresponding differences in their positions in the community. The weak have unconsciously been made subject to the strong, and it is the will of the stronger that rules the group. If a neighboring tribe

is conquered, it is reduced to slavery. Caste is thereby established, privilege is asserted and exercised, and there is one code of conduct for the ruler and another for the ruled. Self-preservation favors the progressive centralization of power in the hands of the ruling class. Thus is gradually built up a system of relations based on superior force. Ability to compel obedience to an order is soon recognized as rightful authority; and the power of command, accorded freely for the common good in time of war, becomes a permanent possession of the chiefs in time of peace. Rivalry between them eliminates the less powerful competitors for headship, or reduces most of them to a position of subordination, rendered effective and permanent by the domination of the supreme leader, who preserves his theoretical supremacy by conceding to these subordinates local authority so long as it is coupled with acknowledged subjection to himself.

THE EMERGENCE OF THE "STATE"

The *status* thus created is the beginning of the "State" in its accepted historic sense. Primarily, it is the product of contending forces, at first purely unconscious and instinctive, but finally becoming aware of the advantages afforded by the possession of personal supremacy and its recognition by others, with a progressive acquisition of the means by which it may be more effectively sustained and extended.

In the first stages of the evolution of the State there is no evidence of any "contract," express or tacit; or of any convention of any kind. Nor is there any evidence of a conception of law as a consciously accepted rule of action. Law there is, but it is simply the mode of behavior, conditioned and determined by the operation of unconscious forces; and, therefore, closely analogous to natural law in its scientific sense, as the rule of se-

quence in the realm of physical causation. The human mind, in the plenitude of its powers, has not yet been brought into action; and, in this period, the community has not attained complete self-consciousness.

The State, then, is older than philosophy, older than art, older than a generally exercised reflective consciousness. Men did not consciously create it, they were born into it. It developed as they matured. The State is a primal reality, practically coeval with man as a social being.

Such being its origin, its primal law is *force.* For a long period men acted as they *must,* rather than as they *would.* In the struggle for existence the first law was natural law. The long arm, the strong hand, the fleet foot, the heavier bulk—these were the titanic forces that laid the foundations of the State. War with wild beasts, the conflicts over the possession of their remains—these

formed the first hard school in which the science of politics learned its A, B, C, and for long ages all its literature was spelled in the runic letters first traced by the primitive weapons of the Stone Age upon the field of battle.

THE PERSISTENCE OF PRIMITIVE ELEMENTS

Will it ever be possible to write the history of the State in other characters? Certainly, it cannot be disputed that for thousands of years it continued to be recorded almost entirely in these. During centuries upon centuries of time, who ever ruled except through the possession of superior force? Is it even now possible to dispense with physical categories in the exposition of political science? The "ruler" and the "ruled"—the impressive antithesis of strength and weakness—persist through all the sequence of rising and fallen kingdoms and empires. Here

lies the key of history—dynasties dating from the battlefield and perishing before some new paladin better armed, more numerously followed, or still heroic with the strength of untamed youth, bearing down to defeat and death the senile victims of luxury and debauchery, sustained in power only by the illusion of a multitude too feeble to overcome its own fears of possible destruction in case of resistance.

It would be unprofitable to review the pageant of conquerors and the conquered which by preëminence has long called itself "history"—the succession of decisive battles upon which are hinged the great periods in the life of mankind—events which, almost exclusively, men have thought worthy in the long roll of human achievements of being remembered and recorded. The generalization is too self-evident to require argument: the archives of the world, down to a very recent period, consist of the story of trium-

phant force, flaunting its banners to the seat of power, and taking possession of the earth in the name of the State.

The language of history, symbolic or articulate, is largely a survival of the primitive forms of expressing power. "I sing of arms," begins the famous epic designed to celebrate the foundation of the world's greatest empire. The wolf stands sponsor for the State, and nourishes its founders. The eagle, swiftest of birds, symbolizes its majesty. The lion, strongest of animals, is set in stone or bronze to guard the city's gates. The dart, the mace, the spear, the sword, the battle-axe, form the sign manual of the State's omnipotence, are figured in the seal placed upon its property, and furnish the symbolism of its coat of arms, expressing its power to defend its possessions against all comers—a token of caution to the would-be trespasser. The sense of sight alone is not a sufficient medium for the proclamation of

the power of the State. The battle-cry, the beating and rattling of drums, the thunder of artillery, voice its power to compel or annihilate. The ambassador is welcomed at the palace gate by a salute that couples friendly salutation with the undertone of formidable strength in the roar of cannon. Among the Byzantines the foreign envoy, surrounded by mailed warriors, was led by an escort of troops from the frontier through well-guarded defiles, over narrow bridges, through stone gateways, by a long detour, into the capital, where great bodies of infantry and cavalry, changing their costumes and returning again and again to the field of review, were deployed before him, in order to impress him with the inexhaustible power of the Empire, and with the thought that whatever consideration he might have reason to expect, that consideration would be an act of grace and not a deed of compulsion.

THE ASSIMILATING POWER OF THE STATE

Originally a military supremacy, the authority of the State does not rest satisfied with the power to exact tribute and compel obedience by the exercise of superior physical force alone. It keeps pace with the whole onward march of society, carefully estimates the value of all its phases of mental development, and promptly appropriates all its newly generated powers of achievement. If the mechanical arts show improvement, the State immediately, and first of all, applies them to the strengthening of its own forces. If a man of letters manifests distinguished talent, it is at once appropriated for the glorification of the State. Great artists are made to add to its embellishment, great thinkers to justify its claims to respect and obedience, great poets to sing its praises, great lawyers to defend the rightfulness of its authority. There is no source of

power at which it does not seek to refresh its strength, and upon which it does not place the sign of its possession.

So true and so evident is this, that, spontaneously, by common consent, the word "civilization," the process or result of civilizing, has come to stand for the totality of human culture, as distinguished from barbarism, the condition of society where the State has not accomplished this work of stimulation and appropriation. It is historically necessary to say the "State," because this progress has been made nowhere where the State did not previously exist.

And here we are able to see what it is that has justified and still continues to commend the existence of the State. Primarily founded on the idea of force, and always including that element as essential to it, the State does not rely upon physical force alone, but aspires to the control of all the powers which influence the activities of men.

It has been, and still is, the essential prerequisite of civilization. It is, in fact, the chief agent of human progress. To the rapacity of the individual and of groups of individuals it opposes its prohibitions. To the artificer, it says: "Work on in peace, improve your workmanship." To the artist: "Seek and find beauty in form and color, and give it perfect expression." To the poet: "Sing of all that is great and heroic in life." To the thinker: "Apply your faculties to the great problems of existence, and elevate the multitude by the nobility of your thought." But to all of these it has usually said: "Exercise all your native powers, vigorously, constantly, and fruitfully; but, see to it, that you think and say *nothing ill of me!*"

THE APPROPRIATION OF RELIGION BY THE STATE

In one great branch of human culture, religion, the State has frequently, and in

fact usually, claimed a large right of superintendence, at the same time asserting the necessity of maintaining its own supremacy. Religious faith, on the other hand, rising above the merely personal interests of the individual, and laying hold of what is most deep, most constant, and most mysterious in human existence, has always challenged mere human power, however strong and however well organized. Death, the extreme penalty which the State can inflict upon the disobedient, to the religious devotee is merely the door of entrance into another form of existence, where faith, courage, and sacrifice are to receive their reward. Here, then, the State has sometimes found an irreconcilable adversary—a foe to its pretensions and a rival to its authority. The empire of souls has, therefore, always been of interest to the State, and, in proportion as that has become formidable, it has been thought necessary either to suppress or to appropriate it.

What the State has gained, or seemed to gain, by alliance with religion, religion has usually lost through the predominance of the State. This, in spite of the inherent potency of religious feeling, has been inevitable; for the State could never tolerate any power superior to its own, and its aims and interests have never been quite coincident with those of religion. In truth, religion, except when completely conquered and reduced to a position of abject servitude to the State, has often been so bold as to repudiate State control, claiming as its own domain, under the sway of a Higher Power, the whole realm of the inner life of thought and feeling, and resigning to its rival only the outer relations of men as alone subject to its jurisdiction.

The conflict between these two claims to obedience has been as prolonged, as general, and as tragic as the contests between rival States. Neither has in the end greatly

profited by their union, which has nearly always proved to be a merely transient compromise. The theocratic State has shown itself to be the rudest, narrowest, and most oppressive form of power; for, from the moment the State has attempted to take possession of the inner life, and to impose its arbitrary decrees upon all that is personal in belief, sentiment, loyalty, and devotion, it has begotten hypocrisy, formalism, and moral cowardice; thus ultimately choking the well-springs of sincere religious faith by destroying the freedom of the spirit in its search for truth. In the end, however, wherever the union between Church and State has been unlimited, it has been the State that has ultimately triumphed. And the reason for it is evident. Religion is not, and cannot be, identified with outward forms and organization. The further the alliance is pressed, the more mere forms and organization triumph; religion, which is essentially

an expanding life drawing its sustenance from the unseen, is cramped and atrophied. The State aims at mechanism, which lightens its task of control; but religion perishes when it is brought under the bondage of merely mechanical devices.

THE STATE AND GOVERNMENT

The State, as power, must, no doubt, always act in its own defense, must protect its own existence. This is, indeed, necessary to the well-being of society; for the State means order, security, the enjoyment by the individual of a part at least of the fruits of his own labors. The destruction of the State results in anarchy, which means the ruin of society.

The State is not a mere abstraction; it is everywhere a concrete and tangible form of existence. Its forms may vary, but form it must always have. Its organs are mul-

tiple, but organs there must always be. When we set out to seek it, we come at once in contact with persons, who claim to represent it. If you would address the State, you must speak to them. If you would change the State, you must influence them. If you would reform the State, you must sometimes antagonize them. These persons are not the State; they are the government.

Governments are of different kinds, good and bad, weak and strong, progressive and reactionary. They possess all the qualities —that is, all the virtues and all the vices— of persons, for the reason that they *are* persons. Governments can never be much better or much worse than the persons who compose them. Wisdom and folly, loyalty and dishonor, greed and self-sacrifice, succeed each other in the control of political power; and the State, and the people who compose the community, must endure all this. It is the price of civilized existence!

Still, governments are not always quite as good, or quite as bad, as the persons who compose them. Something depends upon the *form* in which they are cast, which may either extend or limit the powers of persons within the State. The three great types are, of course, monarchy, oligarchy, and democracy; which, by their very names, express a variation in the concentration or diffusion of power exercised by the government. These types, though nominal, seldom exist in perfect purity; for in every State the council influences the monarch, the leader influences the ruling class, and the masses of the people act and are acted upon in a manner which affects the destinies of the State.

THE PREËMINENCE OF FORCE IN THE STATE

The important point to consider at this time is, that, however it may be localized or

distributed, it is *force* which always remains, under every form of government, the effective attribute of the State, and the one by which it is preëminently characterized. Of this fact there cannot be the slightest doubt. Monarchies, oligarchies, and democracies alike claim to represent, and if they be actual governments, do represent, the whole force of the community. If this were not so, the distinction between forms of government would be of little moment. What renders it important is, that the omnipotence of the State is in question. Shall its power be limited, or shall it be unlimited? Shall it be concentrated, or shall it be divided? Shall it be hereditary, or shall it be elective? Shall it be accorded for a long time, or be subject to frequent changes in the government? These are the fundamental questions of political organization, and it is of consequence to ask them anew from time to time.

Let there be no illusion regarding the affinities of different forms of government as respects the possession of power. It is an error to imagine that monarchy is more greedy of omnipotence than oligarchy, or oligarchy than democracy. The history of the world is an overwhelming refutation of such a misconception. The possession of power is absolutely essential to the State, which can never be governed by phrases and formulas. As for its distribution, that is another question; and the kind and degree of distribution called for by a given community will depend upon the degree of equality or inequality of its constituent members, the general intelligence they may possess, their devotion to public interests, and many other special circumstances; but, in no case, will the State, as a State, freely permit its power to be alienated or diminished or brought into question. It will claim, even though the government be a

pure democracy, and all the more because it is a pure democracy, entire freedom from every form of external coercion, and the unconditional exercise of its perfect autonomy. The right of self-defense for its own reasons, the power of life and death over its own constituent members, the right to define and punish treason, the prerogative of laying tribute and distributing the proceeds —all these have been and will be as completely and as unreservedly exercised by a democracy as by the most absolute sovereign. The State that disavows its own autonomy thereby ceases to be a State. There must be somewhere a power that is superior to all other powers, and which can command the obedience of all.

THE MACHIAVELLIAN CONCEPTION OF THE STATE

Of this truth there has never been any serious question; but how to set it forth,

how to formulate it, and how to justify it to the human mind—that has been a problem which has long occupied the thoughts of men.

For a long period the simple fact of the *imperium,* or right of command proceeding from the power to enforce commands, appeared sufficient. Order, which is the first social necessity, requires the observance of rules of conduct on the part of the community. Unless these are in some way ordained, and unless obedience to them can be enforced, order is impossible, life and property are in constant danger, and rapine will inevitably ensue. Enemies of order, both within and without the community, must be guarded against, resisted, repressed, and punished. This was long esteemed to be the function of the "prince," who thereby became the "savior of society."

This is, in effect, Machiavelli's whole conception of the State. To his mind it is es-

sentially non-moral. Its one problem is to maintain itself, in order to accomplish its task, which is to compel obedience. For this purpose it may ally itself with religion, but not to the extent of becoming a mere subject power. If the religious faith of the people prompts them to obey the State, it may well be cultivated and promoted; but only as a means to the one end which the State has in view, namely, the augmentation of its own power and resistance to all that opposes it.

A strong State, the great Florentine contends, can never be produced by its own component elements. The reason for this is that men are essentially corrupt and self-seeking. Each will pursue his own interest, and the common good will be neglected. There is necessary, therefore, a powerful despot, who is able to impose his will upon all others. He alone can produce and maintain order, and for this any means may

be employed. Deceit, falsehood, even assassination, if necessary, are permissible. Above the "prince" there is no law. He is the creator of law. His will is law. Without him, there would be no morality, but theft, murder, license in every form. If he did not possess force he would be impotent to end them. He must, therefore, as much as possible, and by every means, increase his force. Thus only can he maintain the existence of the State.

THE INFLUENCE OF THE MACHIAVELLIAN CONCEPTION

However much our feelings may revolt against this crude form of political philosophy, it must be admitted that it was long dominant in Europe, and that Machiavelli's famous treatise, "The Prince" written in 1513 to restore the glory of his beloved Florence—which he described as "more cap-

tive than the Jews, more enslaved than the Persians, more divided than the Athenians, without a head, bruised, despoiled, lacerated, ravaged, and subjected to every kind of affliction"—has remained for centuries the classic manual of European statesmanship. It is certain that the Emperor Charles V and King Philip II of Spain were close students of it. Catherine de Medici introduced it into France, and both Henry III and Henry IV had a copy of it on their persons when they were murdered. Richelieu esteemed it highly, and it was known and studied by several of the kings of England. Pope Sixtus V, though he publicly condemned it, made a digest of its contents in his own handwriting, and Queen Christina of Sweden left a copy of it marked with interesting marginal annotations.

It is, however, to Machiavelli that we owe in part the subsequent revolt against per-

sonal despotism. In composing its bible he was also writing its epitaph. The "Alcoran de Louis XIV" declares the following lines, under the tutorship of Mazarin, had to be learned by Louis XIV:

" 'My son, in whom do you believe?'

" 'In Nicholas Machiavelli.'

" 'Who was this Nicholas Machiavelli?'

" 'The father of politicians, and the one who has taught princes the art of reigning.' "

Thus publicly pilloried as a system responsible for the reign of absolutism, the teachings of Machiavelli were accepted as a concrete statement of the actual practices of monarchs, which were, therefore, the more readily condemned by those who had suffered from the application of Machiavelli's principles. Frederick the Great, as Crown Prince, formally repudiated Machiavelli's teachings in his "Anti-Machiavel"; but, as King of Prussia, he did not fail to do honor to the Florentine by demonstrat-

ing that he considered force, uncontrolled by ethics, an essential attribute of the State.

JEAN BODIN'S POLITICAL PHILOSOPHY

It is not, however, quite just to Machiavelli to load his name and memory with a burden of infamy for expounding as a theory what history shows to have been the general practice of most of his contemporaries, and long continued to be considered essential to statesmanship by those who came after him. Moreover, that which made his exposition most repugnant has been substantially embodied in most subsequent theories of the true nature of the State, namely, the idea that it is essentially a creation of "blood and iron," and not subject to any law other than that of its own omnipotence.

Jean Bodin's conception of sovereignty (1530-1596)—a conception designed to

veil the omnipotence of the State under a guise of juristic philosophy—is, in reality, not widely separated from it, and yet it is substantially the basis of the theory of the State which still prevails.

Bodin's aim was to establish a reasonable natural foundation for royal omnipotence. The principle from which he deduces it is the idea of "supreme power" as essential to the State, which he then tranquilly identifies with supreme authority. This, he holds, exists in every independent community, and is both absolute and perpetual. It is from this source that all laws proceed. It is the very substance of the State.

To such "supreme power" he gives the name "sovereignty," equivalent to the *imperium* of the Roman Law, which in his Latin edition of 1591 he calls *"majestas."* Although in deducing this principle he refrains from advocating any particular form of government, it is evident that "supreme

power" must be exercised by a person; and, in fact, his exposition proves to be only a philosophic disguise for the idea of absolute royal authority. Still, it is not strictly necessary that "supreme power" be exercised by a *royal* person; for the idea of sovereignty, as "supreme power," is equally applicable to every form of government. The future development of Bodin's principle, which he contends is "absolute, indivisible, and inalienable," shows that it can be equally applied to a monarchy, an oligarchy, or a democracy.

The defect in Bodin's conception of sovereignty is not that it is essentially baseless, but that it is a purely mechanical conception. It belongs to the category of *might,* but not to the category of *right.* The State, he contends, commands simply because it has the *power* to command. But, if that be true, what authority does it possess if one has the power to disobey? If

authority is based merely on the *power to compel,* there is equal authority in the *power to resist;* and government thus becomes merely a problem in the balance of mechanical forces. The State, upon this theory, has no authority whatever, except that derived from its superior force. But there is not in mere *force,* even though it be supreme, any *right* to command. Can human nature be required to bow before "supreme power," merely because, *as power,* it is supreme? Is it possible that all that is dear to the affections, all that is true to the intelligence, all that is obligatory to the moral sense, reason and conscience, must be tacitly surrendered and openly sacrificed merely because the possessor of irresistible force speaks in the name of the State? Can it be a *duty* on the part of a human being to obey the arbitrary decrees of power, simply because it *is* power? It may be that, as a question of fact, submission can be en-

forced; but can that mere fact create an obligation? How is it possible for men to respect, much less to sustain by their free volitions, an institution that demands obedience upon such terms? And, further, can it be that, in their relations to one another, States—the highest forms of social development—are merely so many embodiments of arbitrary force contending with one another for the mastery of the world, restrained by no law, subject to no control, and bound by no obligation?

THE APPEAL TO RELIGION FOR AUTHORITY

It is clear that the idea of "supreme power," even though it be a primary and essential attribute of the State, is a wholly inadequate basis for the conception of rightful authority. It furnishes neither the elements necessary for a logical definition of authority, nor the foundation of an accept-

able theory of governmental action. The mere *power* of the State, even though it be supreme, is no more worthy of respect, and no more entitled to obedience, than any other power; unless, in addition, it possesses attributes of an entirely different order. Sovereignty, conceived merely as power to compel obedience, may be and is essential to the State; but it is not a principle from which can be deduced rightful authority to exact obedience. Either its professed rightful supremacy does not exist, or it must be derived from some other source.

Very early in the process of political development it was perceived that ability to compel action was not sufficient to inspire the assent of the governed. Even alleged utility to the community was incapable of awakening that moral support which every government considers it expedient to possess. Appeal was, therefore, made to religion, and the State was represented as a

divine institution. In the period of paganism the Roman Emperors were regarded not only as the instruments and organs of divinity, but as themselves inchoate deities, to be apotheosized at death and admitted to the Pantheon as objects of religious worship.

It is unnecessary to follow closely the historical development of the claim that the State derives its authority directly from the Divine Will, the recognized source of all power and all authority. It would, indeed, be convenient for supreme power to clothe itself with the garment of supreme authority, if it could show credentials for appearing as an authorized agent for the execution of the divine commands. It was, therefore, to be expected that the throne would seek the support of a divine commission.

It was upon this ground of a special delegation of divine authority that, in the seventeenth century, royal absolutism en-

deavored to erect its foundation. The principle *cujus regio, ejus religio* was a convenient compromise which accorded to each sovereign ruler the decision as to the form of religious faith—Catholic, Lutheran, or Calvinist—which should prevail in the territory over which he exercised jurisdiction; and, whatever this faith might be, it supplied the monarch with the same justification for the exercise of his supreme will. In a sermon preached by Bishop Ogier at Münster, during the Congress of Westphalia, Christ, as "King of kings," was represented as announcing to the assembled princes: "I have made you my lieutenants in this world, to be dispensers of my justice upon other men. I have placed you in a state that is hardly lower than that of my angels: they give impulsion to the heavenly bodies; you give motion to the mechanism of the earth. I have crowned you with honor and glory, and I have established you

over the most beautiful works of my hands. Finally, I have put under your feet all other mortals."

Without doubt, some of the princely auditors who listened to this declaration of their "divine right" as rulers, solemnly believed that they were thus divinely appointed to be dispensers of justice, and even strove with a good conscience to perform this lofty mission; but the evidence upon which this assumption is based is not very impressive to the modern mind. Still, in the time when the *"culte du roi"* was the accepted foundation of the State, it was possible for Omer Talon to say to the child Louis XIV: "The seat of Your Majesty represents the throne of the Living God"; and, later, for the scrupulous Lamoignon to declare to the young king, in the presence of the Parliament of Paris: "This company regards you as the living image of divinity." Soon afterward Bossuet completed the hyperbole

by solemnly affirming: "The royal throne is not the throne of a man, but the throne of God himself. . . . The prince should render to no one an account of what he does."

THE REPUDIATION OF THE STATE AS IRRESPONSIBLE POWER

It required only a short experience of the Bourbon dynasty to demonstrate to a faithful and loyal people the consequences of this doctrine, that "the prince should render to no one an account of what he does." Thus enthroned, the basest personal passions and the most inept statesmanship were sanctified by the assumption that the king, as the chosen representative of the Deity, could do no wrong.

From this unhappy union religion suffered even more than the State, for both were soon challenged and overwhelmed by outraged reason and conscience. The whole structure of society was thus for a time

swept away in the blood and fire of the French Revolution. The burden upon faith had become too great to be borne. In the face of such preposterous contradictions and such brazen insincerity as the era of absolutism presented, it was impossible to respect the State, and equally impossible to accept a form of religious belief that shielded its vices and enormities. Every throne in Europe was shaken by the reaction. The State, as irresponsible power, could no longer be tolerated. If it could not be radically reformed—so profound was the revolt against it—it must disappear altogether; but with its disappearance was threatened for a time the destruction of the whole edifice of civilization.

It was necessary, therefore, to lay new foundations. "Sovereignty," Rousseau had said, "is not an attribute of kings, but of the people." Upon this new basis, then, the State was to be reconstructed.

Unhappily, the conception of sovereignty remained substantially unmodified. For the "supreme power" of kings was to be substituted the "supreme power" of the people.

As a matter of fact, the people had become more powerful than their rulers. It was, therefore, their turn to rule; their turn to become the source of law; their turn to impose their absolute will; their turn to define treason, and to inflict death as a punishment.

THE TRANSFER OF POWER TO THE PEOPLE

The fact of this reversal of positions is not, however, so significant for the welfare of the community as it may at first appear. The substance of the State was not essentially altered by a mere change of masters. Supreme power, which had previously been exclusively in the hands of monarchs, aided by their counselors, was, indeed, transferred

to the hands of the people, or of those who were supposed to represent them; but the change was far less a transformation of the State than a mere alteration in the control of its power to exact obedience.

Call the roll of the persons who, after the Revolution in France, became the chief depositories of power, and ask the question, "In what sense was its exercise ameliorated?" and you are immediately impressed by the fact that authority, in any defensible sense, had made no substantial progress in defining its essential nature, as distinguished from mere power to compel obedience. The populace of Paris; Brissot, with his policy of a universal "war on kings"; Danton, and the massacres of the nobility by the Commune; Robespierre, and the "*culte de la Raison*"; the impersonal reign of War and Famine in the midst of universal terror; the Directory; the Consulate; Napoleon Bonaparte—liberator, emperor,

and conqueror of Europe—were these less tyrannical than the King they had superseded?

In all this dreadful drama, there is not one act or scene that has not had its defenders; not one that did not seem to some enthusiast to have a justification for its enormity in still greater enormities which it was intended to suppress. And behind all this continued tragedy there was always one and the same philosophy: the theory that the State is *power*, "supreme power," exercised in the name of some isolated virtue—the redress of wrong, the establishment of right—perpetual homage to the idea of justice; but justice ill conceived and violently administered!

Where, then, is the true theory of the State to be found? Evidently, it is not to be sought in the idea of power alone, no matter by whom it is possessed and exercised. Monarchies, oligarchies, and de-

mocracies, all and equally, have failed, and will always continue to fail, so long as they cling to the belief that power to command and to enforce obedience is the true essence of public authority. Nor can it be found in the idea of abstract justice as a merely personal conception. To give it stability and to evoke for it universal respect, a larger consensus and a more impersonal origin are demanded. To discover and to formulate the true nature of the State, appeal must be made to a more complete analysis of the constitution of man and of society than that which is embodied in the empirical art of imposing a dominant will. The true principle of authority is not to be found in any attribute of the ruler, whoever the ruler may be, but in the nature of the being who is to be ruled. The ultimate foundation of the law, as an expression of the power of the State, is to be sought in the virtue of the citizen.

II

THE STATE AS A HUMAN IDEAL

II

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If society were a purely human invention, and if the conditions of existence could be determined entirely by human laws, life on this planet would be somewhat different from what it is. The more we reflect upon the subject, however, the more evident it appears that the nature of man as an individual, the essential relations of men in their community life, and especially the material conditions upon which the continuance of life depends, are, for the most part, beyond the power of the human will to control, or even appreciably to change. Nature has so completely fashioned her human product, and so bound him by her own ties of instinct and habit, that he remains, in spite of all the

efforts of culture, from generation to generation, in a certain sense, the "natural man."

This statement is intended to convey the truth that the larger part of human activity is the product of unconscious causes. It is not without interest to recall how complicated and how complete the structure of the human body must be before individual consciousness is possible, and how long a time must elapse after consciousness begins before we are aware of even the most elementary conditions of our own existence. Manhood itself is only a prolonged childhood. How long, then, must men have waited, how completely must community life have been developed, before reflective social consciousness ever came into existence? When it did, the body politic was already there. The State, in a rudimentary form at least, had spontaneously come into being.

But this social consciousness, when developed, was not equally possessed by all individuals; and, in fact, the communities of men are rare, if they anywhere exist, even in the present stage of human culture, where interest in the community is equally distributed. The immediate personal needs of the individual, for the most part, absorb his attention and preoccupy his mind. Only the few reflect upon the general condition of society; and to those who have known no better fortunes, so long as customary conditions are not disturbed, these appear to be tolerable, and even satisfactory. Instinct and habit dominate; the cycle of individual life is soon completed; with each generation tradition binds the community more firmly to the past; and the familiar thus comes to be regarded as the normal, the reasonable, and the authoritative order of existence.

THE SLOWNESS OF POLITICAL PROGRESS

In all primitive communities, therefore, the spirit of conservatism prevails; and wisely so, for even slight experience teaches how infrequently sudden and lasting changes in the conditions of human life can be produced by mere volition. The illusion that thought can be readily transformed into reality is persistent; and yet, when the trial is made, men quickly discover how difficult the process is. It then becomes easy for them to decide to accept what circumstances grant to them, to adapt themselves to stern realities, and thus maintain an existence which a more spirited effort to introduce changes might put in jeopardy.

The first great obstacle to social change is found in the material conditions of life. Against this array of purely natural forces the mind rebels in vain. The fact that a large portion of every twenty-four hours

must be spent in restoring exhausted energies, that food and shelter are necessary to existence, and that the individual capable of toil and conflict is closely associated with the incapable, who demand a portion of his energy for their support and protection, compels the units composing society to rest content with what it is possible to obtain under existing limitations.

Even a slight material difference may prove an impediment to liberty of action or afford an advantage in determining social position, whether regarded from the economical or the political point of view. Take into account, for example, the difference that existed in the feudal age between men of equal bodily strength and equal mental powers, produced by a circumstance at first thought so trivial as the possession of a horse and a suit of mail. Yet in this simple difference lay the distinction between the abject helplessness of the peasant and the

power of compulsion possessed by the armed knight or the country squire, for whose protection as a dispenser of justice the unarmed man was willing to accept the position of a serf, bowing with reverence before a fellow-creature upon whose clemency toward his protégés hung the issues of life and death.

Consider also for a moment the revolution that occurred in the nature of the State as an institution, when the invention of gunpowder and the use of artillery concentrated power in the hands of those who alone were able to possess them. In the presence of this new set of material conditions the mailed knight was an anachronism.

Unless he possessed the means to arm with muskets his troop of vassals, and even to provide them with artillery, the superiority formerly afforded him by the ownership of a horse and a suit of armor suddenly disappeared. Only a few powerful princes could organize standing armies equipped

with the new weapons. In the presence of these more capable protectors the mailed cavalier, armed with spear and battle-axe, even though he dwelt in a castle, was a poor competitor. The king now superseded the feudal overlord. To strengthen his hands against the local despot, from whose extortions he alone could rescue them, the people were willing to contribute freely of their substance. What they paid in regularly assessed taxes was less than they had forfeited in arbitrarily exacted tribute, and they were thus made faithful partisans of royal supremacy. Before this formidable concentration and centralization of power feudalism gradually vanished away. The monarch became the sole dispenser of favors, his court the center of all that was potent or brilliant within his realm, his service the only pathway to distinction within the State.

In such conditions, what had at first been

freely accorded by the people, for the purpose of obtaining exemption, was demanded and enforced as a sovereign right. Monarchy, in time, becoming absolute, was even more oppressive than feudalism had once been. In place of trivial combats, in which a handful of servile followers fought body to body with a posse of equally rude contestants, under the walls of rival castles, at whose feet the medieval villages sheltered their dependent inhabitants, great armies were mustered and led afar upon ambitious schemes of world conquest, in which every subject of the Crown was compelled to contribute without murmuring his substance, his service, and, in case of need, his life.

Not until after large sums of money were needed for these vast enterprises did the will of the commons become the balance of power in the State, able to determine peace or war by according or withholding the needed tribute. It was by the triumph

of financial economy on the part of the people that in England parliamentary government was finally enforced—not only the right of the people to be represented in Parliament, but the right of Parliament to accord or withhold contributions to the royal treasury. Originally the admitted privilege of landed proprietors only, with the growth of industrialism as a coördinate producer and controller of wealth, parliamentary government has finally become—but only after long and bitter struggles—the recognized prerogative of all civilized peoples.

PROGRESS AND RETROGRESSION

In the light of this short review of political progress, it becomes clear that no form of political advancement can be made without regard to the material conditions upon which it must depend. It would, however, be a serious error to assume that, because

of this dependence, there is an inherently necessary principle of progress, or any naturally predetermined process of political evolution which automatically brings to realization certain desirable results.

There is, in fact, no such principle, and there is no such process. Expressions of this kind are deceptive and illusory. They originate from purely abstract reasoning, and have no validity. On the contrary, if we regard the facts of history inductively, and above all genetically, we are forced to the conclusion that there is no "inherent law" of political progress. If we extend our range of observation sufficiently, we shall see that advance is often followed by recession, not only in one country but in the whole world. There is no such phenomenon as a regular, unbroken, linear advance toward any political ideals whatever. Reasoning based upon such an assumption is misleading; and, in view of

its possible consequences, even dangerous. Without the continued vigorous assertion of the resolution by which it has been acquired, liberty has no security. Every type of government, if left to itself, tends to degenerate into some form of tyranny.

Not only this, but it is necessary to take into account the fact that the failure to realize political ideals for which a struggle has once been undertaken is often followed by a period not merely of reaction, but of dejection and hopelessness. No pessimist is so bitter as a disappointed optimist. The lesson of history is, that it is only by persistent and unrelaxing effort that political progress can be maintained. As in the human body, so in the body politic, a daily renewal of energy is essential to counterbalance the forces of disintegration which incessantly tear down that which is not unceasingly rebuilt.

That this is true in principle as well as

in fact is evident from the universal result of the uncontrolled play of natural forces. The processes of nature uniformly move in the form of cycles. These may be of greater or less extent and duration, but they consist without exception of a period of integration followed by a period of disintegration. They tear down with the same facility with which they build up. Every natural structure tends to degenerate. It may be renewed, it may be surpassed by others; but, as a concrete thing, it tends to return to its constituent elements.

THE SUBSTITUTION OF THOUGHT FOR FORCE

There is, then, in the course of political development, no natural or unconscious process upon which it is possible to depend to assure either its progress or its permanence in any ideal sense. Material conditions there are, but these are not *causes;*

they merely furnish *occasions* for the operation of a constructive power above and outside of them. That power is the human mind.

Left to itself, let us repeat, every type of government tends to degenerate into some form of tyranny. Just in proportion as the mental determinations which have entered into the development of the State are withdrawn from action, in that degree the purely natural, or mechanical, forces regain the ascendancy. In the end, therefore, if the determination on the part of the community to maintain the rights and liberties already acquired were to cease, society would soon return to the condition of social unconsciousness in which the autocratic State was spontaneously formed by the interplay of purely natural forces. The physically stronger would dominate over the weaker; the antithesis of "ruler" and "ruled" would be restored; and government would return en-

tirely to the category of *might*, from which, under the impulsion of the idea of *right*, it has slowly and painfully emerged.

Never, however, since men began to think, has mere force, unaided, been sufficient to inspire with sincere respect the minds of men. Always, in addition, there has been needed some alliance of the *power* to enforce obedience with the *right* to command it; and thought has, therefore, played a large rôle in the development of the modern State.

Historically, as well as theoretically, it is through their own thoughts, as well as by brute force, that men have been governed. Behind the reasoning there has always gleamed the glaive, but even the naked sword has made its appeal to reason. In truth, the history of the State, and of the theories of the State, reveals a progressive substitution of thought for force.

THE SEAT OF PUBLIC AUTHORITY

It would carry us far beyond the limits of time to which this discussion must of necessity be confined, to notice, even in a summary manner, all the stages of thought through which the conception of the State has passed. First of all, would be the glorification of the hero, the reverence for the person of the one who, by courage and achievement, seemed to share in the powers of divinity, and through his godlike superiority appeared to deserve the right to command obedience. Thus, in the very beginning of conscious reflection upon the nature of authority, the ruler was invested with qualities of a moral nature and became in the minds of the people an incarnation of virtue, the personal embodiment of the ideals of his time.

From this stage of hero worship to the conception of the ruler as the delegate and

representative of divine power and authority the transition was not difficult. Even upon a high plane of culture and mental development, this tendency to see in rulers the bearers of a divine commission is not only possible but almost universal. The craving of the mind for the embodiment of ideals is irresistible. The abstract virtues and the social needs—such as public order, personal security, and established justice—seem barren and incomplete until they are personified. When it is considered how many artificial ways there are in which to crown a man in power with a halo of righteousness, and how strong the temptation is to employ such means, it is not wonderful that, even in an age of enlightenment, public authority is readily attributed to those who profess, in the name of their superior personal excellence, to prescribe the conduct of all others.

It cannot be doubted that minds wholly

incapable of conceiving, in a scientific sense, of an institution so complex as the State, or of forming any consistent theory of the source of its authority, have nevertheless contributed greatly to the process of political development by sustaining the personal ideals of great leaders whom they have considered as intrinsically worthy to command their support.

The transition of confidence from a person to a dynasty, and from a dynasty to monarchy as an institution, was a process of extreme simplicity, finally ending in the dogma, "The king can do no wrong." Thus, mere power has often come to be identified with rightful authority, which has been felt to be a social necessity, not because it has been proved to exist, but because it was evidently needed.

In fact, the claim to authority is older than any theory of its origin. The theories have been invented to justify the claim; but

the claim is, none the less, in part a result of purely mental action. Although the authority of the State existed before a theory of its nature was attempted, it was nevertheless assumed, conceded, and exercised. It is only when it is challenged that its nature and validity become a question. Neither the fact that it is exercised, or assumed, or conceded, can, however, be offered as a sufficient justification for its existence. Until authority can be placed upon a logical foundation, the human mind, which has aided in establishing it, cannot be quite satisfied with its own achievements. Heroes have been applauded, they have been invested with superhuman powers, they have been glorified as the personification of virtue, they have been conceded to possess moral as well as physical supremacy, they have been esteemed as the source of law, placed above the law, and regarded as absolute; but the question long remained unan-

swered, by what *right* they were entitled to command and to compel obedience. This question gave birth to theories regarding the true nature of public authority and of the State.

THE THEORY OF DIVINE RIGHT

There is something at first thought extremely plausible in the assertion that princes rule by divine right. Assuming the existence of a Divine Being as the Creator of the world, omnipotent, omniscient, and benevolent, it would seem unreasonable to doubt that, somewhere in the scheme of creation, provision would be made for the rightful governance of mankind. What, then, more simple than to suppose that the actual rulers of the world possess a commission of divine authority? Having admitted its existence, the State would at once be clothed with all the claims to respect, fidelity, and self-sacrificing devotion that could be con-

ferred by the most sacred religious obligation. Were it not for the moral contradictions revealed by a comparison of these lofty claims with the actual practices of sovereign rulers, this theory could hardly fail to secure the assent of all religious minds. It was not until these contradictions had become so numerous, so palpable, and so shocking as to discredit this theory in the minds of all thinking men, that another foundation for the State seemed to be required.

This dogma had, indeed, an ancient rival. Long before Jean Jacques Rousseau challenged the theory of divine right with the declaration that the People are the rightful sovereign, John Locke had announced and defended that doctrine. Even long before Locke, Jean Jandun, at the University of Paris, in the first quarter of the fourteenth century, had taught that sovereignty is inherent in the people, who merely confer it upon their ruler. But even Jandun's doc-

trine was only a revival of what from the second to the sixth century of our era had been the interpretation of the "Lex Regia" by the Roman jurisconsults.

It is curious how a great and fertile idea could, after having once been so clearly expressed, so long lie dormant. "*Quidquid principi placuit legis habet vigorem,*" was, indeed, a maxim of the Roman jurisprudence as transmitted to us by Justinian; but, in stating that the will of the prince is law, he had not forgotten the true source of imperial authority. Quite as distinctly, it was stated, "*Populus ei et in eum suum imperium et potestatem conferat.*" It was only by long abuse that in the Roman Empire the power of the State had been violently acquired, and had ceased to be conferred by the free act of the people, in whom it was still believed legally to reside.

It was a German emperor, Frederick II, who, in his contest with the Italian munici-

palities, in the twelfth century, first openly and boldly challenged this ancient restraint upon imperial absolutism, and extorted from his jurisconsults the formal decision that the emperor is "*lex animata in terris,*" —the living law for the whole earth, responsible to no one but God, in whose name he proclaimed his legislation; but even some of these obsequious flatterers could not accept the unlimited authority of their ambitious lord. Walking, one day, with Bulgarus and Martinus, Barbarossa is said to have asked if they did not think he was rightfully master of the world. "Yes," replied Martinus. "No," answered Bulgarus, "not as to property." Having proved the better courtier, Martinus, it is said, was rewarded with the present of a horse. Bulgarus, whose conscience was more tender, was obliged to console himself by making a Latin pun. "*Amissi equum,*" he wrote, "*quia dixi aequum!*"

SOVEREIGNTY CONCEIVED AS INHERENT IN THE BODY POLITIC

It is chiefly in periods of material change that thought obtains its opportunity of free expression. Potent as it may be in arriving at rationally defensible theories, it is only when exempt from forcible suppression that the human mind may freely apply itself to the unfettered discussion of the true nature of the State. It is such periods, therefore, that form the milestones in the progress of political development.

It was in such a period, for example, when the United Netherlands in the sixteenth century had thrown off the yoke of Spain, and were making an experiment in self-government, that Johannes Althusius, a German jurist resident in Holland, made a new attempt to discover the true foundation of the State.

Like Jean Bodin, Althusius (1567-1638)

regarded sovereignty as "indivisible, incommunicable, and imprescriptible"; but, seeking for its substance, not in "supreme power," but in some form of moral obligation, he defined it as, "a *right* inherent in the entire body politic to unite by free association for its own protection and government."

Thus conceived, sovereignty is not derived from force, but from the right to employ force for the protection of society. Even more skillfully than Rousseau, who wrote long after him, Althusius derives it, not vaguely from the "people," but from the "body politic" *as a moral organism.* It is not, as he conceives it, an attribute of individuals, considered singly or as a mass; but of a community of free men united to secure and preserve their inherent rights to life, to property, and to liberty. As an expression of a moral necessity, he contends, the substance of the State is not "supreme power," or power of any kind. The State

has authority because it is a moral organism, founded on moral principle, and representing a totality of human rights. Thus it belongs primarily and exclusively to the category of *right*, rather than to the category of *might*.

The State, thus defined, at once takes its place in the realm of jurisprudence. It exists *de jure*, but also *sub jure*. In this it differs from the State conceived as absolute, and by the diameter of the universe from the State conceived as "supreme power." It may have but little power, but its *right* is indefeasible. A greater force may overwhelm it, take possession of its territory, enslave its population, and obliterate its name; but, in writing its epitaph, we may place over its grave the legend: "Here lies the victim of a crime!"

De jure, a State thus destroyed still continues to exist, and may at any time reassert its existence. But, even at the maximum of

its powers, it exists *sub jure* also. Belonging by definition to the order of jurisprudence, a State, however powerful, is essentially under law. As a member of the society of States, every State is responsible for its acts, and possesses outwardly as well as inwardly its rights and duties. The laws that govern its conduct may be enforceable or not, its obligations remain the same. As a moral organism endowed with consciousness of its rights and duties, it may be regarded as a moral person. Justly considered, it sustains to other like communities of men all the relations of a person. It may properly sue and be sued in a legal process before a court of its own election. It is, in brief, a responsible being, and the human mind cannot, without a defect in its logical procedure or the sacrifice of a fundamental principle essential to the very conception of a State, plead its irresponsibility.

THE STATE AS A RESPONSIBLE ENTITY

All this cannot, of course, be said of the State regarded merely as "supreme power." With such a State goes the crude conception embodied in the old absolutist maxim, *"Princeps legibus solutus est";* a maxim which, unfortunately, has outlived the system of which it formed a part. If, in fact, the prince is exempt from obedience to the laws, then the State has no place in the sphere of jurisprudence; it is merely a force among other forces of a like kind. If it is the stronger, it may overwhelm and destroy without scruple everything that opposes it. If it is the weaker, it must submit to the iron law of conquest, and surrender to its physical superior.

Unhappily, this relic of the age of absolutism still survives, and even enjoys a place of honor in the thoughts of statesmen and even of jurists. Sovereignty, whether of a

monarch or of a republic, is still identified with "supreme power"; and the power of the State is still regarded as exempt from obedience to law. The alleged "right of conquest" still permits the stronger to impose an arbitrary and irresponsible will upon the conquered. The mere fact of war, which any sovereign State may at any time begin, is considered to signify the termination of all treaties. Of a modern State, of a constitutional State, even of a State founded upon the "sovereignty of the people," equally with the absolutist State, which no civilized people would longer tolerate, it may still be said, when its outward relations alone are considered, *"Legibus solutus est!"*

The indictment may appear severe, but no well-informed person will dispute it. Within our century, within the present decade, within the year not yet ended, all this has been illustrated upon a scale that fills

the human mind with a sense of horror. And there is no modern nation that can show clean hands; for there is none that would not invoke, as an excuse for not appearing before a tribunal of justice, the sovereign right of a State to determine its own conduct on the principle of *legibus solutus*. For the State there is no binding and authoritative law which, upon the plea of its own supremacy, it cannot openly violate.

What renders the reality most deplorable is that it is within the range of human determination to place the State frankly and unequivocally within the sphere of recognized juristic principles, binding it to observe the maxims of human conduct which within its own limits and upon its own members it regards itself as authorized to enforce; yet there is no direct, persistent, and general movement in this direction.

THE TRUE NATURE OF AUTHORITY

What, then, is the foundation of this authority which the State, as sovereign, assumes to exercise? Does it really extend to the unqualified claim of unlimited privilege implied in the idea of absolute supremacy? In brief, is absolute supremacy a *right*, or is it a mere assumption?

We shall struggle in vain to derive rightful supremacy from the idea of "supreme power," in which sovereignty is ordinarily assumed to consist, whether this be possessed by a monarch or by a people. The conception gains no moral increment from its source so long as it remains mere "power." The "people" can confer upon the State no right that is absolutely without limits, for the reason that they themselves possess no unlimited rights. So long as the discussion is kept within the bounds of jurisprudence, all rights are definite and limited. This re-

sults from their very nature. A right that cannot be defined is no right at all.

What is it, we may ask, in the nature of the "people," that gives them unlimited authority? The fact, it may be answered, that there is no authority superior to themselves. But is it true that there is no authority superior to themselves?

The problem presses itself upon us: What is the source of the alleged authority of the people? In what does it consist? Is it their unqualified will, their mere power, or their determination to do a certain thing, or to pursue a certain course? If the source of authority is mere power, or determination, or volition, then, certainly, authority is a measurable magnitude, a quantity that can be calculated, weighed, and placed in comparison with another quantity. It partakes then of the nature of force, and is, in fact, only another name for force. It becomes a mere problem in arithmetic.

But, in truth, authority, in any sense which a jurist can recognize, is not a quantity, it is a quality. It proceeds from a discrimination between what is right and what is wrong. That distinction cannot be created, and it cannot be destroyed, by mere volition. It cannot be reduced to terms of force. It cannot be expressed in terms of arithmetic. It is apprehended through none of the external senses; it is an affair of the human mind.

Are we dealing now with mere verbal refinements and metaphysical conceptions? On the contrary, we are dealing with one of the most immediate, universal, and indisputable of human intuitions—*the distinction between right and wrong.*

What is the validity of this intuition? It is the same as that of any axiom whatever, namely, that thought is impossible without it. Define them, classify them, or dispute about them as we may, it is impossible to

regard human relations without making a distinction between right and wrong; as impossible, in fact, as to fix the attention upon objects in space without being aware that the shortest distance between any two points is a straight line.

Authority, therefore, has its true source in the nature of intelligence, which discriminates between that which "ought" and that which "ought not" to be done. It proceeds from an apprehension of a mandatory rule of action; rationally mandatory, but not physically compulsory, for obedience and disobedience are matters of choice and volition. Corresponding to them, in the sphere of feeling, are the sense of innocence and the sense of guilt. Thus the whole nature of man responds to the voice of an authority higher than that of the human will as possessing a rightful claim to obedience.

THE IMPERSONALITY OF AUTHORITY

Thus conceived, authority does not primarily pertain in any sense to persons. It is no more an attribute of the people than it is of the prince. The doctrine of popular sovereignty teaches otherwise, but its foundation is as faulty and its logic is as defective as that involved in the theory of divine right.

It is of the highest importance that this should be understood; at least, that it should not be misunderstood, of which there is grave danger.

We are accustomed to think of the "will of the people" as the source of that form of authority which is expressed in the State, but this is inexact. The error owes its origin to the bodily transfer of a vague conception from monarchy to democracy, without even an attempt at analysis. If we are right in denying that the mere will of the prince is

the source of law, upon what principle can we claim that the mere will of the people is the source of law? The truth is that law, in any defensible sense, is not to be derived from *will*, but from *reason;* but reason is not a private and purely personal possession, it is a common and universal standard of judgment, a tribunal to which all men may appeal, because it is the final source of authority by which rational intelligence must be guided.

While we properly employ the word "reason" to designate a faculty of the mind, we do not mean that it is in any sense an *arbitrary* faculty, capable of making its own independent determinations, or in any respect similar to the faculty of choice. We cannot by mere thinking make black white, or a whole greater or less than the sum of its parts. Subjectively, reason is a personal capacity for apprehending principles; but objectively, it is entirely impersonal, consti-

tuting the very framework of the universe. When men "reason" together they try to meet on this common, objective ground. They appeal from that which is individual to that which is common to them all; but which is, at the same time, *above* and *beyond* their individuality, or personal power of determination. It is before this superior tribunal that the human mind appears when it tries its cases in the highest court of appeal.

It is not, therefore, from volition, and it is not even from subjective reason, that authority is derived. It is, on the contrary, in *reason* as objective and impersonal—the common bond of all intelligence—that authority resides.

Can it be for a moment contended that this impersonal reason does not exist, or that it does not possess authority? What is it, then, that controls the operation of the human understanding, and decides between the

validity or invalidity of its processes of reflection? No man really doubts the immanence within himself of that which is *not* himself, but to which he constantly makes appeal to justify his judgments and opinions. He knows perfectly that his own interests, his appetites, his desires, and his sentiments—the phases of his consciousness which are strictly personal to himself—possess no inherent authority, and that no sophistry can make them authoritative. His will, in so far as it is made up of these purely subjective elements, possesses no claim above that of any other will; and there is nothing in its nature as mere volition that can be considered final and rightfully commanding. It is only when it is fortified by an appeal to principles which are not personal, and which have the quality of regulative standards or norms of judgment, that any man's will can possess authority. Whatever authority it ever does possess is

derived from its conformity to this impersonal source.

Such a doctrine, it may be said, will do very well for philosophers, but what does the common man know of these things?

It is precisely the common man whose mind is clearest on this subject. It is the sophisticated only who have their doubts. The authority of reason is not subject to any man's monopoly. It dwells in the cottage as well as in the palace. It needs no earthly throne to give it supremacy, for it is enthroned in every man's intelligence and speaks in every man's sense of obligation. Its language all may understand. When questions are asked, it replies imperatively: "You *ought*," or "You *ought not*." Doubt begins only when self-interest, in some form, refuses to accept the answer and hedges itself about with arguments.

THE FOUNDATION OF THE STATE

Whence, then, does the State derive its authority? Certainly not from the "will of the prince," and with equal certainty not from the "will of the people." It does not proceed from any mere will whatever.

If behind the mere phenomena of existence we place in our thought a supreme creative power whence all things proceed, and name it the Divine Will, that is a philosophical conception which we are not called upon here to discuss, much less to dispute; but, by the very terms of the conception, this *fons et origo* of power and authority is above and beyond mere human personality. It is objective and impersonal, in the sense here intended; that is, it is no quality of the human individual. The human individual has no attribute that he can transfer to the State which can give it rightful authority to command and enforce obedience.

The State, therefore, must base its authority upon some other foundation than the "will of the prince" or the "will of the people."

At first thought, there is a great difference between the "will of the prince" and the "will of the people." The former, it may be said, may be partial, arbitrary, and unjust; in any case it is purely individual. But may not the "will of the people" also, if it is based on interests, appetites, desires, and sentiments—and let us add class or sectional enmities—be equally partial, arbitrary and unjust? Not only so, but it also, in the last analysis, in addition to being even more effectual, is equally individual. How is it possible to derive from a mere numerical collection of private wills an authority that does not inhere in any one of them? What right is possessed by ten men that justifies them in imposing their private wills in any arbitrary sense on an eleventh man who does

not consent to obey them, and wishes to prove that their requirements are unjust?

It is evident, therefore, that the State, equally with the individual, must derive its authority from principles which can justify their existence before the bar of reason. The real problem is: Are there any principles so clear, so self-evident, and so imperative in their nature that men may justly be compelled to obey them, whether as individuals they consent to do so or not?

Can men agree upon any such principles? Is it possible to form any such conception of law as to give it, in all its applications, the quality of inherent authority? That is the fundamental question that underlies all legislation, and that must in the end determine the relation of the citizen to the State.

III

LAW AS A SOVEREIGN DECREE

III

LAW AS A SOVEREIGN DECREE

The State, as it exists, is neither exclusively the embodiment of force nor the perfect realization of a human ideal. It is, on the contrary, a compromise between inherited conditions on the one hand and successive social reforms on the other. It is, in part, the work of Nature, which has imposed upon men certain necessities from which, even by their united efforts, they cannot entirely free themselves; and, in part, the work of Reason, which has striven, with some success, to surmount the obstacles arising from the appetites, the enmities, and the ambitions of mankind.

Food, raiment, shelter, and other subsidiary commodities are essential to human

existence and well-being. To produce these, human activity is necessary; and, to divide and distribute them in a satisfactory manner, so that each may possess and enjoy his own and receive the just fruits of his labor, it has been needful to devise obligatory rules of action, imposing upon each individual in the community certain duties of performance and certain obligations of restraint.

To define and enforce these rules of action is the recognized function of the State. In the most primitive and rudimentary forms of society, in which the population was nearly homogeneous and the tasks of life were nearly uniform, the inherited customs of the community furnished, for the most part, the rules of conduct. Whatever else was necessary for the regulation of life was determined by the chief person or persons in the community, whose decisions had the force of law. With the growing com-

plexity of social relations, new rules were constantly required; and, in time, when the necessary level of culture was attained, each community, according to its form of organization, added to the customary usages and traditional precepts more definite prescriptions of conduct in the shape of written regulations.

Without entering upon the details of legal history, it is sufficient for our purpose to call attention to the fact, that, with the differentiation of the community into a "governing" and a "governed" class, the process of law-making assumed the form of legislation by decree. Whatever the specific type of the law-making power, whether that of popular assemblies or of individual autocrats, the power that made the laws gradually came to be regarded as possessing *unlimited* authority to do so. In this manner grew up the conception of an *imperium,* a *majestas,* or "sovereignty,"

charged with the function, and possessing the exclusive right, of determining the rules of action which the community must observe.

That such a delegation of power was necessary as well as convenient, is evident; for legislation *en masse* by any community of men in a complex condition of society is hardly conceivable. But the development, through centuries of time, of the idea that there exists somewhere an exclusive sovereign power, whose sphere is undefined, whose operation is incessant, whose decrees are materially irresistible, and whose authority is, therefore, not to be questioned, has introduced into the world a cause of disturbance which has profoundly affected not only the realm of thought but the field of action. It has sown the seeds of inconsequence in the theories of government, and of revolution in the minds of overburdened populations.

LAW CONCEIVED AS COMMANDMENT

Rightly understood and intelligently considered, law should evoke not only universal respect, but even the sincere reverence of those called upon to yield their obedience; but, in many instances, it is regarded as a burdensome restraint upon personal liberty which, whenever possible, it is permissible secretly to evade.

The reasons for this attitude of mind are manifold, but one of them at least is not without justification; for laws may be so arbitrary and so evidently unjust as to do violence to both reason and conscience. It then ceases to be a duty to obey them. It may even be a duty to resist them.

It has not infrequently happened that the requirements of the law and the dictates of reason and conscience have been in such violent opposition that those in power have esteemed it desirable to silence and sup-

press altogether the free exercise of intelligence, and to demand unhesitating compliance with the mandates issued by the State. Force has then taken the place of argument; and law has, therefore, been made to seem even more arbitrary, unjust, and odious than before.

In substituting a purely factitious form of authority for that which might be acceptable to human intelligence, the State has done itself incalculable harm. Not the least part of the injury inflicted is the apparent justification of the idea that the State is the enemy, rather than the friend, of the common man. Thus has been built up along with the artificial distinction between "rulers" and "subjects" a certain antagonism between them; the former possessing the unlimited right to command, and the latter being bound, against their will, by the necessity of unquestioning obedience.

So completely has this antithesis become

ingrained into the thoughts of men, that even great and independent thinkers have made it the foundation of their philosophy of jurisprudence. Thus, for example, the celebrated English jurist, John Austin, defines "law" as *"the commandments imposed by a supreme authority upon persons wholly subordinate to it."*

Whatever does not fall within this definition, declares the learned jurist, is not law. As a consequence, there is not, and cannot be, such a thing as "law international"; for, since there is no "supreme authority "capable of issuing "commandments" to independent sovereign nations, there is not, and there cannot be, any law for them. Being sovereign, they are, by definition, *above* the law; and, therefore, cannot be subject to it. *Legibus solutus* must, of necessity, be applied to every sovereign power thus conceived.

To the student of comparative juris-

prudence, especially when regarded from the historical point of view, such a definition, entirely apart from the absurdity of its consequences, is evidently insufficient; and the attempt to fit customary law and judicial decisions to this procrustean standard makes it still clearer how inadequate this conception is. To give it the appearance of validity, it is necessary to reason in a circle, attempting alternately to prove the existence of a sovereign from the existence of law, and the existence of law from the existence of a sovereign.

There is, in truth, no proof whatever that law is essentially and exclusively a "commandment." It may be merely a traditional usage, a tacit agreement, or a public convention. We may, indeed, speak of the "commandments" of the law; but the idea that the law emanates from a power having authority to impose it upon persons entirely subordinate to it must at least be qualified

by the statement that the subjects of law and the makers of law, in the modern State, may be identically the same.

If this be true, Austin's denial of the possibility of international law is purely dogmatic, and has no foundation in the essential nature of law. Rules of action laid down by the voluntary agreement of sovereign states possess all the qualities and all the authority of law, even though they are not imposed by any superior power; for law is not essentially a decree, it is a rule which it is agreed shall be accepted and obeyed.

In truth, decrees become law only where there exists a self-sufficient and unlimited form of authority that is passively accepted as final and supreme. In the modern constitutional State such a form of authority does not exist. With us in the United States, for example, we choose representatives to formulate, interpret, and execute certain rules of action which we believe will

be for the benefit of the community. Our statutes, as well as our traditional usages and judicial decisions, which have the force of law, are not "commandments" so much as they are agreements. Our legislators agree upon what shall become legislation, our judges declare what the laws thus enacted are, and our executives see that the decisions thus reached are executed. With us the antithesis between the "ruler" and the "ruled" has disappeared, and with it the notion of law as mere "commandment."

Although the conception of law has changed with the process of law-making, the idea that it is in effect a command issuing from absolute sovereignty lingers on in our legal classics, our political theories, our forms of speech, and even in our professional arguments. But, considered in the light of actuality in the United States, and many other countries, John Austin's definition of law would never be suggested to

the mind as an induction from existing facts. Based on a particular artificial order of things that has almost entirely passed away, it is at present an anachronism in juristic science which may very well be finally dismissed.

THE MYTH OF ABSOLUTE SOVEREIGNTY

And what has just been said with regard to the notion of law as a decree may be said with equal truth of the idea of absolute sovereignty, upon which it is founded. The conception is, in fact, a mere generalization from a condition created by a passing assumption of authority that has no logical justification. Along with the supreme and unlimited authority of the prince goes the whole foundation of arbitrary power. And yet there lingers in many minds a craving for government by decree, if only what is commanded is in accordance with precon-

ceived ideas of what the law should be. Our time shows a marked revival of this tendency. Originally, the American people, having thrown off the yoke of royal authority, and even the supremacy of a foreign parliament, were deeply interested in preserving individual liberty. Today, very largely owing to the influence of foreign example and theory, introduced into our country partly through the addition to our population of elements with less mature political experience and partly through academic ideas borrowed from foreign teachers, many persons are ready to abolish the guarantees of personal freedom, if thereby they may exercise their will upon their fellow-citizens.

Equality before the law does not seem to them quite satisfactory. They would not only redistribute the wealth of the nation; they would lay down sumptuary laws for the regulation of the whole of life. They

do not like our system of legislation by agreement on the basis of accepted principles of justice. Power, they contend, is thus so divided and distributed that "commands" cannot be imposed upon those whom they would render "entirely subordinate to them." All this ill befits a people that has struggled successfully to throw off the yoke of absolute sovereignty. It is the old story of egoism and autocratic ambition in a new guise. If the legislative body is too slow to enact the particular legislation desired, if the judiciary finds it when thus enacted not in harmony with the guarantees of personal liberty already agreed upon, this tendency to rule by "commandments" manifests itself in urging upon the executive the duty of compelling these other branches of government to obey his will.

It is not always perceived, that this is a return to a baseless conception of the true nature of law, namely, that it is a mere de-

cree of sovereign power. Sovereign power is, indeed, essential to the very existence of the State; but it is not an *unlimited* sovereignty, capable of issuing purely arbitrary commandments. The "citizen," equally with the "subject," must obey the law, when it is once declared to be law; but the question before us now is: What *is* law, in accordance with the conception of the State as a moral organism, as distinguished from arbitrary power?

Technically, no doubt, from the point of view of the practical lawyer, the citizen is bound to obey *any* law, whatever it may be, if it can be enforced upon him, whether it be just or unjust; but we are regarding the question at this time from a higher point of view. There are commandments which can never be made law without subverting the true conception of the State, which is not merely an embodiment of power but an organ of human justice.

To be a science, jurisprudence must maintain that even the State cannot be permitted to be unjust, or to impose unjust commandments. It must stand for that which is defensible in the realm of thought, and must be consistent with clear principles of justice. The law, in this sense, cannot issue from mere arbitrary will, no matter whose will it is. If it is to be considered as an expression of will at all, it must be a determination of will emanating from reason; for reason is to will what the united evidence of our senses is to our personal sensations and emotions—the objective standard by which error is to be corrected and the truth determined. But reason does not deal with the unlimited and the absolute, which are not comprised in any individual experience. Its province is to define limits, to set bounds, and to establish relations which are just. Neither in the nature of the prince nor in the nature of the people is there any right

of absolute or *unlimited* command. Absolutism is essentially *un*reasonable. It is a usurpation of authority, and can be sustained only by force. *Absolute sovereignty,* no matter by whom it is claimed, *is a myth.*

THE GENESIS OF POPULAR SOVEREIGNTY

We often hear it dogmatically stated that the "will of the people" is the ultimate source of public authority, the true *fons et origo* of law.

It is of the highest importance to examine this assumption, to trace its development, and to ask in what sense it is true.

It is sometimes asserted that the doctrine which declares law to be merely the expression of the "will of the people" is a doctrine of the American Revolution; and, therefore, necessarily forms a part of the American conception of the State. This is an error.

The American Revolution, on its nega-

tive side, was a revolt against absolutism in every form; and, on its positive side, it was a defense of the inalienable rights of the individual. It was an appeal to general principles of justice to be universally applied, and as much opposed to the arbitrary will of a parliamentary body as to the arbitrary will of a royal person. Its whole character was determined by that fact. The French Revolution, on the contrary, was neither of these. It was a transfer of despotism from one depository to another, but not a revolt against despotism as such; and it was not, in any true sense, a defense of the rights of the individual, but an assertion of the authority of the mass. All the power formerly possessed by the king was in that revolt taken over by the people, undiminished in amount, and untempered in quality. The despotism of the Paris mob was more fierce, more arbitrary, and more sanguinary than that of any French monarch had ever

been. The philosophy of the State adopted by the Revolution was virtually unaltered. The only substantial change consisted in a substitution of the absolute power of the people for the absolute power of the prince, and its motto in effect was: *"Populus, non princeps, legibus solutus est."*

The correctness of this statement is recognized and affirmed by the most impartial and authoritative living writers of France. Speaking of the true nature of the Revolution, Emile Faguet, of the French Academy, in the preface to a recent work, asserts that "the French Revolution neither enthroned individualism nor suppressed absolutism. It did precisely the contrary. It displaced absolutism, at the same time reënforcing it; it displaced despotism only to exercise it more forcibly; and it did nothing else. It put the sovereignty of the people in the place of the sovereignty of the king, and it did nothing else. The omnipotence

of the people in place of the omnipotence of the king; the omniscience of the people in place of the omniscience of the king; the unlimited property-right of the people in place of the unlimited property-right of the king; absolute effacement of the individual by the majority of his compatriots in place of the absolute effacement of the individual by the royal authority; *Votre Majorité* in place of *Votre Majesté*—that is, without qualification, the sum and substance of the French Revolution."

No language could more truly or more clearly lay bare the inner motives of that great political upheaval. Between the conception of the State entertained by Louis XIV and that of the leaders of the French Revolution there was not the slightest difference. *L'état c'est moi* could be said as truly by the one as by the other. Take up one after another the successive administrations, and it becomes evident that power,

unlimited and irresponsible power, was in the minds of all the salient attribute of the State. The Bastille had fallen; but the more deadly guillotine was established as a permanent institution, beneath whose glittering knife the royalists, and even those suspected of sympathy with them, were driven *en masse,* without distinction of age or sex. The taint of "superiority" in name, or blood, or fortune was a sufficient death-warrant. It is interesting to note the constant crescendo in the number of public assassinations. From November, 1793, to March, 1794, it was only sixty-five victims per month; but in the full tide of popular fury the number increased. In the month *Ventose* of the year II, it was 116; in *Germinal,* 155; in *Floréal* it was 354; in the first three weeks of *Prairial* it was 381; and after the new law of that month it was 1,366 in forty-seven days!

This is not the place in which to speak in

detail of the indecency, the cruelty, and the sanguinary rage of those who, by the will of the majority, in succession possessed the power of the State, and in their turn became its victims. "Are ceremonies necessary to reduce those whom the people have already judged as criminals?" cried the infamous Hébert; and, as a result, the Convention decreed that the formalities of a trial might be dispensed with, and that those who were popularly condemned should perish without an opportunity to plead in their defense. In one day twenty-one deputies of a protesting minority were sent to the scaffold.

It is no extenuation of these horrors to believe that the perpetrators of them were perfectly sincere. "We shall be able to be human when we are assured that we are the victors," wrote a member of the Comité du Salut Publique. "It is our purpose," wrote another, "by the destruction of certain individuals to secure the happiness of poster-

ity." "The sight of two thousand bloody corpses thrown into the Rhone," wrote Fouché from Lyons, "impresses upon the beholders on its two shores . . . *the image of the omnipotence of the People!*"

"The omnipotence of the People!" And how long has any people, unrestrained by fixed principles, ever remained omnipotent? What are the fruits of undirected popular omnipotence, the omnipotence of a majority swept onward by a tide of passion? Today it is Robespierre who speaks, saying: "The Republic is to be constituted by the destruction of everything which is opposed to it. He is culpable who does not approve the 'Terror' "; whereupon twenty protesting members of the Assembly are led out to the guillotine. Tomorrow—Robespierre dead, in turn the victim of the popular rage—it is Malet who writes: "The mass of the people, indifferent to the Republic as to the royalty, seek only the local and civil advan-

tages of the Revolution; they will receive the law from any master who will know how to enslave them by appealing to their fears and hopes." Thus Napoleon Bonaparte erects his empire upon the grave of the Terrorists. The world, governed by its interests, prefers its safety to its liberty; and the people's will, a flickering flame, is extinguished by the breath of the dictator who can restore to them the security of life and property.

What, then, shall be said of the famous "Declaration of the Rights of Man and of the Citizen"?

The first thing to be said of it is, that it was a French paraphrase of an American document, proposed by Lafayette, and soon forgotten. The next thing to be said is, that, according to a contemporary formula, it was by its nature not "the law for the citizen, but the law for the legislator." It was, as it has been expressed, "The *light*

which should *precede* the law, but *not the law itself.*" It is interesting to observe that the Declaration of Rights has never been embodied in any constitution of France. Immediately after its adoption, Monier declared: "The National Assembly has now issued from the vast region of abstractions of the intellectual world, of which it has so painfully traced the metaphysical legislation. It has come back to the real world, and has set itself to frame the Constitution of France." Used only to serve as "the condemnation of the *ancien régime,*" as a recent French writer has expressed it, the Declaration was not made the basis of the new political order. It never became in any sense the law of France. On the contrary, under the Republic no restraint was placed upon the "will of the people." Each citizen was conceived as possessing a fractional part of the sovereignty, and sovereignty continued to mean unlimited

authority. The majority, unrestrained by any principle whatever, was, therefore, able to express the sovereign will of the people and to represent its undisputed power.

ABSOLUTE SOVEREIGNTY A DENIAL OF HUMAN RIGHTS

It is not difficult to perceive that this transfer of unlimited power from the prince to the people adds to it no increment of rightful authority; for the simple reason that, if there exists in the individual any inherent and inalienable rights, no power whatever, no matter how constituted, may rightly take them away. How is it possible to ascribe to a mass of individuals an unlimited right which no one of them possesses? Can it, then, be contended, that absolute sovereignty—that is, entire freedom from the restraint of law—is a defensible juridical conception? Is it not, on the contrary, plainly and in terms, a denial of

subjection to law; and, in effect, therefore, a denial of the authority of law altogether?

It would seem to be an axiom, that a mere aggregate of similar units cannot contain any qualities which no one of them contains. How, then, can a collection of mere private wills, considered as so many personal expressions of desire, or interest, or determination, possess rightful authority over any individual? If no one of them, regarded singly, possesses such authority, all of them together do not possess it. If there is nothing absolute in the individual, there is nothing absolute in the mass. *A fortiori,* there is no absolute authority in mere numerical preponderance. *Votre Majorité* is as devoid of *unlimited* authority as *Votre Majesté.*

Certainly, this will not be disputed by anyone who accepts the doctrine that the individual possesses "inalienable rights," whatever they may mean; for, if such rights

are "inalienable," no collection of persons, no matter how numerous, may justly take them away. If it be merely a question of force, even a minority, if possessing superior power, may impose its absolute will upon the individual, and may even reduce him to complete servitude. In that case, those possessing the preponderance may logically go to the limit of their force and deprive him of everything he possesses, even of life itself; but, if it be a question of *rightful* authority, the least infraction of a right is, in principle, as reprehensible as entire spoliation.

We are here, of course, speaking only in the name of jurisprudence, which deals exclusively with rights and obligations; and superiority of force is not at all in question. All the power in the world cannot make wrong right. To say that the State may arbitrarily issue commandments, even at the behest of the people, and enforce them, re-

gardless of individual rights, because it has the power to do so, is to abandon entirely the ground of juridical discussion, and pass without logical warrant from the domain of *right* to the domain of *might.*

If we take our stand solidly upon the ground of *right,* we perceive that no form of absolutism is defensible. If any form of it could be tolerated, it would be that which was the farthest removed from personal interest and the temptation to obtain personal advantage; but there is, in fact, no form of it which is free from this temptation. "A king," it has been well said, *"could* be liberal and impartial, and *ought* to be; *but he never is."* His omnipotence renders him arbitrary. He will, of necessity, impose his own views, his own force, his own will, or he will virtually cease to be a king. He will even think it his *duty* to impose them. Is it not precisely for this that he *is* a king? But his views and his

will are, after all, only those of an individual.

What, then, shall be said of absolutism in a group of individuals? Who among them is devoid of personal interest? Who among them is fitted for absolute rule? What is to be gained by this multiplex royalty, in which irresponsible will is to dominate? What is the guarantee that *populus* will be wiser or more just than *princeps,* if placed above the law?

It may be said, each one of the individuals constituting the group exercising power possesses "rights," and a decision in which the majority is represented will, therefore, be a right decision. But what of the minority rights that are not represented? And what is the ground of assurance that they will even be considered, if they are opposed to the will of the majority? But are these not equally valid, and are they not equally worthy of respect? What "right," then, can a portion of the community

have to disregard or overrule those rights?

Let it be admitted, therefore, once for all, that it is upon a voluntary and universal respect for rights that public authority must be founded. There is no other ground upon which true sovereignty can be based. Unlimited sovereignty has as little justification in the people as in the prince. The maxim, *"legibus solutus"* has no application in the sphere of jurisprudence. It is the denial of its existence. Every man, every community, every so-called sovereign state is bound to limit the range of action, and must either recognize the obligation to observe the principles of justice or confess to open disregard of them.

THE TRUE FOUNDATION OF THE STATE

What, then, is the true foundation of the State, and of its authority to regulate the conduct of men?

Sovereignty, in some sense, the State must possess, but it is a derived and not an inherent authority; and it is subject to the limitations of its source. That source is the community and correlation of rights possessed by the persons who compose its citizenship.

This form of statement is designed to mark the distinction between the interests, desires, and volitions of men on the one hand, and their mutual obligations on the other; for "rights" are not to be identified with any of the former, and are to be defined only in terms of the latter. It may be my interest, my desire, or my volition to possess what is already rightfully possessed by another; but it is not my right to claim it. My right, whatever it may be, is only another name for your, and all other men's, "duties" toward me.

This, then, is what is meant by the "community" of rights. If only one man existed

in the world, he could, no doubt, without restraint appropriate everything he found useful; but he could not be said to possess any "rights." The conception of rights would be impossible. Rights exist only in a community. The conception arises from the idea of mutual obligation.

We perceive here also what is meant by the "correlation" of rights. Rights are always relative. There exists no unlimited right, in any definable or conceivable sense; for, where there is no limit to a pretension, there is no means of stating what right exists. An unlimited right is, therefore, in effect, mentally inconceivable. Rights are correlative, because the objects which they concern are con-terminous. My field is bounded by your field. Neither you nor I can rightly possess the whole earth, so long as either of us has any just claim upon it. In relation to your right is set my duty to respect it, and in relation to my right your

duty is equally evident. Neither the "right" nor the "duty" exists by itself. Both arise from a mutual obligation.

THE RELATION OF RIGHTS TO LAW

All this, it may be said, is entirely true in the sphere of ethics, but it is not a clear statement of the nature of "rights" as understood in law.

In law, only that is regarded as a "right" which can be enforced by public authority. In this sense, rights are not "inherent," they are usually the results of a *status* somehow acquired; frequently by some exercise of force, or by concessions made in view of the possible employment of force. In law, men possess only such rights as they have been able to make respected.

It is not to be denied that, for the practical lawyer and his client, there might as well not exist any so-called "inherent," "in-

alienable," or "natural" rights; since these, if they exist at all, can be enforced only in so far as they have secured some outward form of guarantee. It is customary to describe these "rights" as merely "subjective"; and, therefore, practically non-existent.

It is precisely this distinction between "inherent" and "legal" rights that renders important a study of the authority of the law-making power; for, when the matter is looked at historically, we see that rights have generally been treated as if they were not inherent but the gracious gift of governments. Historical jurisprudence busies itself with showing how legal rights have actually been acquired, either by the grace of sovereigns or the successful urgency of subjects. But, since the historic State was originally a mere embodiment of force, it is not in the history of the State, but in the history of thought about the State that we must seek the evidence that there are inher-

ent rights; which, although long unrecognized and left without guarantees, are nevertheless as real as any part of human experience.

If we turn from the history of the State to the history of human thought, with which the mere legalist may consider he has nothing to do, we find that the growth of law is nothing else than the progressive embodiment of principles of justice inherent in human reason.

Without the State, men would not be secure in the enjoyment of any rights; for life, liberty, and property would have no protection, and the individual would be exposed to violence, pillage, and slavery. The State takes possession of him; and, in return for tribute as the price of its protection and obedience to its unquestioned authority, rescues him from these evils.

As it has become more intelligent, the State has recognized more and more fully

the inherent rights of its subjects. At first the conqueror who dictated the law slew the vanquished and carried their wives and children into captivity. Then came one who, with greater wisdom and foresight, encamped his nomad horde upon the soil of the conquered territory; and, instead of murdering and robbing the inhabitants, set them to work as serfs upon the land, claiming only a portion of their products for his superior vassals, who in turn paid tribute to him, and waited upon him at his court, where the privileges granted could, if opposed, be vindicated. In time the serfs were emancipated, the larger landowners were granted the right of assembly, and thus the "commons" came at last to participate even in the making of laws, subject to the approval of the king and the lords.

This happened in England at a comparatively early date; but, even in that advanced political system, the "inherent" and "in-

alienable" rights of man as an individual were never explicitly guaranteed.

And yet, whatever learned jurists may say about it, it is certain that legislation can never cease until the human conscience is satisfied. There are certain fundamental human rights that are so clear, so urgent, and so indisputable in their outcry for security, that the undertone of their pleading runs through all the free expressions of the human mind since thought has been recorded. Our fathers of the colonial period in this country felt the moral pressure of this aspiration for legalized security. Rightly or wrongly, as measured by other systems of legislation, our system was founded by men who believed in certain "natural rights" as firmly as any Roman Stoic ever did. Life, liberty, and property, in their opinion, required guarantees that they would not be exposed to the hazards of any mere decree, or of any unequal law;

and any sovereign act that had that effect, even though sustained by a majority of the people, they intended to make, *ipso facto,* null and void.

And what is the significance of this? It signifies that, in the United States, the conception of "inalienable rights" lies back of our whole system of legislation. It signifies that there is no power recognized under our government that can legislate by decree. It signifies that there *are* "natural rights" inherent in the individual which all lawmakers must respect. It signifies that, whatever may be true in other countries and, therefore, taught as true in our country, there is one country in the world where, until the present at least, the individual possesses guarantees which no power—not even that of popular majorities—can take away. And this is not a theory or an inference; *it is the law.*

THE SUPREMACY OF LAW

It may be said, and with perfect truth, that, having been embodied in the organic law of the land, the so-called "inherent" and "inalienable" rights of the individual have, in fact, become objective.

That which it is here important to note is, that legislation can no longer be legally arbitrary. It is limited to a prescribed channel beyond which its flood-tide cannot pass. It may flow on, and on, without cessation, until every subjective right is rendered objective; that is, until the law becomes the embodiment of perfect justice. As intelligence becomes more keen and more comprehensive, the law will become more specific, and both its positive and its negative phases may be greatly enlarged; but, so long as the conception of our system remains fundamentally unaltered, there will be no legitimate place for absolutism. There

will be in the whole wide field of public authority no person, no party, no class, and no section which can arbitrarily issue its decrees, or, as a "supreme authority," impose its "commandments" upon "persons wholly subordinate to it." There will continue to be not only laws for the people—equal and just laws for *all* the people—but law for the law-makers also.

Is it possible to maintain against the strong tide of absolutist theory and absolutist interests the undiminished supremacy of law? That is the gravest question which can be addressed to a nation composed of free and law-respecting citizens. To answer it, we must thoroughly comprehend not only what the law is not, but what in its essence, as understood by us, it is and should remain.

The present is a time peculiarly fitting for reflection upon this subject. Old forms of absolutism are visibly perishing. Shall

new forms of absolutism take their place, or shall we be able to repress it altogether? If we are to do so, it is necessary to reëxamine not only the foundations of the State, but the nature of its authority in relation to the individual. There is no safety in the increased power of the people, unless the people are prepared to use their power in a spirit of perfect justice.

IV

LAW AS MUTUAL OBLIGATION

IV

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If, from the point of view of jurisprudence, there exists in human society no unlimited right of legislation, either by the prince or by the people, it is necessary to determine where the proper limit of legislative authority is to be found.

Without doubt, the State, in order to realize the purpose for which it exists—namely, to establish order, and to afford security to the rights of the individuals who compose it—must possess some power of restraint; that is, it must be, in some sense, sovereign. The legitimate source of this sovereignty, in the light of what has been said, is evident. It is the same as that from which all individual rights are derived—the

mutual obligations of the individuals who compose the community.

It is essential at this point to comprehend the significance of this statement. What is the precise meaning of a "right?" What do we have in mind when we speak of a right as "inherent," and "inalienable"?

There are those who would reply that these terms "inherent" and "inalienable" are, in fact, meaningless. There are in the real world, they contend, only concrete forces and their relations. When men have obtained possession of certain material things, or control certain forces, or have established certain social conditions which they can maintain, they may be said to have certain "rights"; that is, "rights" are only such relations between persons as, if questioned, can be maintained by force. The rules of action which grow out of such enforced relations constitute the law.

This theory of "rights" is, in truth, a

denial of all essential rightfulness; and is only another way of declaring that, in the last analysis, *might* is *right.* If it were correct, we might with propriety eliminate the word *right* and its equivalents from our vocabulary, and confine ourselves to the categories of *success* and *failure.* There would then be for jurisprudence no place in the realm of thought. We should be compelled to confess that *force* is the legitimate ruler of the world, and that *right* is a mere fiction of the mind.

THE INTUITION OF OBLIGATION

If the conception of "rights" as inherent and inalienable were a merely personal and transient phase of thought, it might be necessary to accept this conclusion, and to speak of so-called "inherent rights" as mere individual aspirations. In view of the whole history of thought, however, we cannot ad-

mit that position. Whatever the changing dispositions of force may have been, the idea that human personality, as such, is entitled to some consideration is as universal as human consciousness. Various as may be the personal estimates of what is intrinsically right or wrong in human relations, there has never existed a tribe of savages so low in intelligence as not to recognize the existence of some rights and duties, entirely apart from every form of physical compulsion. Not only so, but if there be any standard by which degrees of superiority in human intelligence can be determined, it is to be found precisely in the development of the faculty which distinguishes between what "ought" and what "ought not" to be done, or to be endured.

It is, then, from this intuition of mutual obligation that, under the guidance of reason, all human authority is to be derived; and, *per contra,* it cannot possibly exceed

the limits of the source from which it springs.

It is true, that such an intuition, giving rise to the idea of "rights" on the one hand and of "duties" on the other—the essential correlates of the idea of obligation—is merely a form of intelligence, without concrete content, until it is applied to the materials of experience. It is analogous to the mathematical intuitions which furnish the regulative norms of all exact science.

What is here most important to consider is, that in such an intuition there is no element of will, or interest, or sensibility. There is in it no element of personal determination. Its whole purport is, that something *is seen to be true,* namely, that in any organized community of men there must be mutuality of obligation. Each has his sphere of private interests which all others are in justice bound to respect. If they do respect them, that is right; if they do not

respect them, that is wrong. Thus far speaks the intuition; but the specific application of it depends upon a process of reasoning. Reason furnishes us with self-evident principles, but it is necessary for us concretely to apply them. We do not create them, and we cannot alter them. *We simply see that they are true and fit for guidance.*

THE APPLICATION TO EXPERIENCE

It was just stated that each person has a sphere of private interests which all others ought to respect. Here, then, are the concrete contents of experience to which the form of intelligence must be applied. This realm of interests, desires, and volitions is, of course, strictly personal; for it relates to the realm of material things, where the question of personal claims and the definite limitation of rights are to be decided. What, then, are the rules of action that are

to be applied in this sphere of conflicting wills, where opposing forces, animated by contrary purposes, are engaged in partitioning the desiderata of existence?

It is at this point that mutual obligation assumes the form of particular laws; and the law, from this point of view, consists in the specific formulas in which mutual obligation is expressed. It is here that inherent or subjective rights are transformed into objective rights.

Before we proceed to examine the process of law-making more closely, it may be useful to consider briefly the contents of the sphere of personal interests, desires, and volitions. They are, in fact, as varied as the circumstances of human experience; for they include the whole volume of it. Life, liberty, property—all that men possess or aspire to possess, all that they may do or be precluded from doing—fall within its scope; and yet there is one capital exception; the

law cannot reach the inner shrine of personal consciousness, cannot compel and cannot hinder the silent operation of the mind, the free play of the affections, and the intuitions of the moral sense. It can only deal with things external, with forms of expression and modes of action. Its domain is exclusively the outward relations of men. When it would go farther, it discovers that there is in the world something other than force, something which force cannot reach and cannot alter. When it has done its utmost, the law reaches limits which it cannot pass. There is something always reserved to the human soul, which, within its own sphere, is answerable only to its Creator.

THE RIGHT TO LIFE

There remains, however, an extended realm in which the law is operative. It includes all that is outward and tangible; and

thus, at least so far as the body is concerned, may affect our very existence. The law, even when based on mutual obligation, may go so far as to deny a man's right to exist. If he will not respect the lives of others, he may be condemned to death.

It is here, perhaps, that we may most conveniently explain the meaning of a right as "natural" and "inherent." It cannot be contended, even by the most strenuous opponent of the idea of so-called "natural" rights, that the right to live is acquired through the enactment of some positive law by which this privilege is accorded. If it be not inherent, if it be not natural, then it is no right at all. It is true that a natural right may be forfeited; because, resting upon mutual obligation as its ground principle, where that is repudiated the right can no longer be said to exist. It is evident, however, that such a right cannot be forfeited except by the person him-

self. Not having been accorded by the community, the community cannot arbitrarily take it away; for, arising from the principle of mutual obligation, the right of the individual is as incontestable as the right of existence on the part of the community itself.

Such a right, it may be replied, is, after all, only metaphysical; and this is true. Physically, no man's life is secure, unless he possesses guarantees that it will be protected. It is precisely to supply these guarantees that the State exists; and it, therefore, becomes the duty of the State to afford this protection. But what shall be said of a State that does not assume this duty, or does not even recognize this right? And what shall be said of a form of sovereignty so absolute that it possesses the authority to take or to sacrifice life where it pleases, and for whatever reason may suit its convenience?

What shall be said of the right of a government, first, to declare war for the purpose of conquest; and, second, by conscription to force men to leave their business and their families, to take up arms, and to fight in an aggressive war for the purpose of increasing the resources of the State?

Undoubtedly, from the point of view of absolute sovereignty, a government may do these things, and may pass laws for this purpose; but the moment we stop to reflect upon it, is it not apparent that such a right can never be deduced from the principle of mutual obligation?

For a defensive war, however, or for a war rendered necessary to secure the evident rights of the State which cannot be secured in any other way, the decision would be different. In that case, does it not become the plain duty of every able-bodied citizen to aid in the defense of his country, or in the protection of the indisputable rights of

his country, if it is necessary, even though this may involve the sacrifice of his life?

And here we are able to see the profound difference between the conception of the State which is based upon the idea of sovereignty as absolute, and that which is based upon the idea of sovereignty as the expression of inherent rights and mutual obligation. In the one case we have a conception that accords to a government the right of war for any purpose, in the other a conception that limits the right of war to the defense of rights that cannot otherwise be vindicated.

THE RIGHT TO LIBERTY

Much that has been said of life may also be said of liberty. But here we enter directly upon the concrete contents of experience, and the question at once arises: How much liberty shall the individual be granted?

There is a certain sphere within which free activity must be permitted; but it cannot be unlimited; for, if it were, it would inevitably encroach upon the liberty of others, and thus by setting no bounds to liberty, it would virtually cease to exist.

At this point an important distinction becomes apparent. The right to live is inherent and natural, but it is distinctly metaphysical. When it emerges into the world of reality, when it confronts the actual contents of experience, the right to live turns out to be a poor prerogative, unless it is supplemented with another right, the right to earn a living. This right also is natural and inherent, but it is not a merely metaphysical right. It requires outward liberty. It demands a sphere of free activity, in which the energies of the individual may be put forth in the form of industry and enterprise, for the purpose of acquiring the means of subsistence. Here, again, the State be-

comes necessary. Other individuals may concede to a person the right to live, but deny or obstruct his freedom in employing his faculties for the purpose of obtaining a living. At this point, the law must speak. Its source is evident and its authority is unquestionable. It is mutual obligation. No man and no group of men can rightly prevent the free activity of a member of the community in prosecuting his chosen industry or enterprise, so long as it does not interfere with the equal liberty of all others to do the same.

And what is true of industrial freedom is equally true of the liberty of expression, of instruction, of assembly, and of association. All the energies of men, and all the personal preferences of men, within the community, have an equal right to freedom, so long as they do not interfere with corresponding prerogatives on the part of others. But in this field of activity absolutism is peculiarly

tempted to assert itself. Class interests sometimes assume an attitude of arrogance, and endeavor to employ their preponderance of force to assert their supremacy by the dictation of special laws. It is needful, therefore, that personal liberty should receive sufficient guarantees; for it is by repression, as well as by compulsion, that natural rights are rendered nugatory.

THE RIGHT TO PROPERTY

It is when we arrive at the consideration of the results of industry and enterprise that we reach that form of the contents of experience which has been in the past, and promises to be in the future, one of the chief battlefields of legislation. To the man who finds himself in a condition of want, property may appear to be, as Proudhon said, a "crime." To the one who, by toil, thrift, sacrifice, and abstinence has acquired a com-

petence, it seems, on the contrary, to be a symbol of virtue.

It cannot, perhaps, be maintained that property is, in itself, a natural or inherent right; since it lies wholly outside of personality, and is something that has to be acquired. It may be regarded as, in some sense, a personal appropriation of a part of what from one point of view may be considered as common stock. A more intelligent way to put the question is, therefore, this: Is there any inherent or natural right *to acquire and enjoy property?*

Thus formulated, the question is equivalent to the inquiry: Is there a natural or inherent right to possess and enjoy the fruits of one's industry or enterprise?

Here, as in every other instance where the true nature of the law is in question, it is necessary to revert to the source of all rights, and hence of all public authority, namely, mutual obligation. Is it conceivable

that the industrious and the idle, the thrifty and the wasteful, the provident and the improvident should possess and enjoy the same desiderata of life?

The problem of the right of property is greatly simplified by treating the subject genetically rather than from a purely mathematical point of view. It is, when properly analyzed, seen to be only one particular aspect of the right to personal liberty. Shall the individual be permitted to produce by his industry and his enterprise such value as he can, without interfering with the equal right of others, and be allowed to enjoy the benefit of his endeavors? Or shall he be compelled to limit his powers of production on the one hand, or surrender a portion of the results on the other?

There is in the principle of mutual obligation nothing that justifies either the suppression of productive powers or the enforced surrender of the results of their ex-

ercise. The former would lead to compulsory poverty, and the latter to a condition of serfdom in which capacity would become the slave of incapacity. It is, therefore, impossible to organize human society upon any just principle without admitting the right of property as a consequence of the innocent exercise of individual powers of creating wealth.

THE PROBLEM OF PARTITION

But, even considering the right of property as merely a particular aspect of personal liberty, it must not be overlooked that most property is the result of joint effort. There arises, therefore, the problem of partition. As an aspect of liberty the right of property, when the result of joint effort, involves a limitation. There remains the question: How much to each producer?

This, however, does not seem to be a prob-

lem for solution by the authority of the State, unless the State may claim the right to divide the whole proceeds of industry and enterprise, for which it could show no warrant. Even if it were itself a participant, it could only claim its own share; and in this the inactive constituents of the State would have no part. The proportions of effort being of necessity variable, no law on this subject could be devised on the basis of mutual obligation. The units of efficiency contributed not being equal, it would be unreasonable to divide equally the rewards of production. These units not only have different values at different times, but they are essentially disparate in their nature and in their cost of maintenance.

It would appear, therefore, that the only manner in which mutual obligation can be recognized in the process of wealth production is by permitting the partners in this process freely to estimate the value of their

respective contributions by making specific contracts in each particular case.

THE INJUSTICE OF MONOPOLY

The just limit of the law in solving the problem of partitioning the results of joint-production would, therefore, seem to be the public guarantee of entire freedom in making private contractual engagements, so long as these do not infringe upon the liberty of others. There is, however, a practical difficulty in preventing this infringement; for it is possible, through association, for some of the participants in production to impose their will upon the others, thus interfering with real liberty of contract by taking advantage of their necessities. The case is illustrated when capitalists combine to obtain possession of the tools and materials of production to such an extent that they can arbitrarily impose the conditions

of the enterprise by controlling either the means of production or the price of the product to their private advantage. It is equally well illustrated when labor is so centrally controlled as to confine participation in the process of production to those persons only who are associated for this purpose, to the exclusion of others who, if permitted to act freely, would find employment, or would accept it upon less exacting terms. In both cases we have examples of monopoly in the proper sense of the term.

There is, no doubt, a difference between associated capital and associated labor in respect to the facilities for the creation of a monopoly; since capital can more readily endure a period of negotiation or a total cessation of operation. The isolated laborer may not be able to subsist for a long time, unless he can find employment; and he must, therefore, find it at some price without too long delay, while the capitalist is able to

wait. On the other hand, the capitalist cannot thrive without the active employment of his instruments of production and the use of his raw material. He must, if he would continue his operations, come to terms with the laborer. The practical question is, therefore, at what point can the agreement be made? If either partner in the process of production can arbitrarily dictate to the other, the result is a monopoly; and monopoly is the ruin of enterprise.

Whatever the laws relating to this subject may be, one thing is clear: they must recognize mutual obligation as their only basis, or they will eventually prove nugatory. No process of joint-production can long be continued unless the participants derive from it advantages satisfactory to themselves. If too poorly paid, laborers will either quit the employment or become practically useless in it. If subject to exactions and incertitude by the excessive de-

mands of their employees, men of affairs will not undertake the organization of great enterprises. The result of despotic methods on either side, no matter who is the immediate victor, will inevitably react unfavorably upon the other. The only path to prosperity lies in coöperation on the part of all the participants in obtaining the most favorable conditions for the enterprise, in which they have a common interest; and in a fair division of the results of their joint endeavors. The exercise of arbitrary power on either side, whether in the form of oppression or of violence, or in an attempt to enact *ex parte* laws, only retards the day of prosperity. The recognition of mutual obligation without the law, or the realization of mutual obligation through the law are the only roads to industrial welfare and economic peace.

THE RELATION OF MONOPOLY TO LAW

There may be not only monopolies of power in the control of the elements of production, but monopolies resulting from the overgrowth of forms of business in which the participants have become wholly reconciled to one another. Here the antagonism is not between the joint-producers, but between private interests and the public—between the producer and the consumer.

This is, perhaps, the most offensive form of monopoly and the most difficult to exterminate, because it possesses perfect solidarity within itself. All the participants are satisfied. It is the consumer who is robbed.

If mutual obligation be the true basis of the law, such monopolies cannot be tolerated. It might easily happen that, if these tendencies were left unchecked, most of the great interests of life would eventually become the domain of such powerful combina-

tions. A union between them would create in society a force more powerful than the State; a force that would soon control the State; and, in time, a condition of feudalism would exist before which the individual would be as powerless as a serf of the Middle Ages against the lord who dwelt in the castle at whose foot he toiled until his master needed him to fight his enemies.

While such a danger is not to be dismissed without consideration, it would be a gross injustice to assume that every great and successful enterprise has that character. It is easy to exaggerate the unknown; and where the imagination is the chief factor, it usually far exceeds the limits of reality. In making drastic laws against enterprises that are large, on the assumption that their magnitude alone is their condemnation, there is danger of so intimidating enterprise as to paralyze its efficiency. Nothing could be more futile than to attempt to quicken the

activity of the unenterprising by an assault upon enterprise. Men will not be made successful by the destruction of those who have achieved success.

If the law cannot proceed upon the assumption that success is a vice and failure a virtue, it cannot assume that class interests or economic differences should be made the basis of special legal rights. Such an assumption would be an admission that society is merely a balance of powers and not a moral organism. It would abolish the principle of mutual obligation as the basis of the law and substitute in its place the principle of conflict.

In some of the relations in the economic world, it may, perhaps, appear plausible to insist that the balance between classes needs to be adjusted by legal counterpoise. It is sometimes said that, men being unequal, equal laws are of no benefit to them. What they need is *un*equal laws; or, in other terms,

laws of equalization. The rich should support the poor; the strong should bear the burdens of the weak; the successful should render impossible the failures of the unsuccessful.

This doctrine may serve very well as an exhortation to voluntary private charity, and may well be remembered by all who are in a position to alleviate the lot of those who have been less fortunate; but to erect this counsel of perfection into a legal enactment, and to impose a penalty for not dividing one's earnings with the idle, the improvident, and the profligate, is a perversion of the principle of mutual obligation, which calls for equal laws but does not demand laws of equalization. Such compulsory partition of wealth would not have the merit of personal charity, and the motive that lies back of the proposal does not bear evidence of personal sacrifice on the part of those who commend it.

THE ALLEGED COMMUNITY OF PROPERTY

There is, no doubt, a whole scheme of social philosophy underlying the current demand for laws of equalization. Its starting-point is a new theory regarding the nature of wealth. The idea that the individual creates wealth and may rightly possess it, it is asserted, is an outworn eighteenth century illusion that should be dismissed to the limbo of inalienable individual rights. It was, indeed, entertained by the founders of the American Republic, and has been a persistent American doctrine; but it is no longer worthy of consideration. Wealth, according to the new theory, is a social product; and, therefore, a rightful social possession. The property of a nation belongs to the people as a whole. It is for them to express their will as to how it shall be divided.

Plausible as the doctrine may seem, it is founded upon a perversion of obvious facts.

Society as a whole never yet initiated, conducted, or brought to a successful achievement any industrial process or any wealth-producing activity. It is always an individual, or a group of individuals, that does these things. It is, therefore, a wholly unwarranted assumption to affirm that the totality of wealth rightfully belongs to society as a whole. It belongs to those who by their industry, their enterprise, and their skill have produced it, or who by their abstinence from consuming it have kept it in existence. The only exceptions to this are the natural resources of the national domain, which will in future be turned into wealth, in which the nation, as such, has an eminent right of property.

The theory that the totality of wealth belongs to the totality of the people has a very simple historical origin. Private property, in this conception of it, is based only on public permission. All rights and all public

powers inhere in the ruler. When the ruler was a prince, the formula was, "The will of the prince is law." Now that the people have become the rulers, the formula has become, "The will of the people is law." In both cases, so long as authority remains merely the "good pleasure" of the ultimate power in the State, the doctrine upon which it rests is simply the old dogma of absolute sovereignty in a new guise.

THE NECESSITY OF A FUNDAMENTAL LAW

Democracy, if it be true to itself, will not base its claims upon such a weak foundation. Its true basic principle is the mutuality of obligation. There should be no absolute power in the State as respects life, liberty, and property. Whatever sovereignty the State may rightly claim to possess is based upon the inherent rights of individuals; and it cannot, therefore, be logically extended to

such a point as to permit the violation of those rights by any power whatever.

Accordingly, the law must recognize its own limitations. This it does by the formulation of a fundamental law, which has for its object not only the creation and coördination of the powers of government, but the guarantee of the inherent rights upon which a rightly constituted State must be founded. Whatever functions it may incidentally assume for the welfare of the community, the basic principle of the State is the protection of the rights of its citizens. We say its "citizens," for the State, as here conceived, does not deal with "subjects," unless the word is used in such a sense as to deprive it of its original meaning.

Of paramount interest to the citizen, therefore, is the fundamental law; for in it is found the sole guarantee of those individual rights which the citizen must conserve. Such a law is not an infringement of

liberty; it is, on the contrary, the only means of organizing liberty. Its purpose is to secure to the citizen immunity from the despotism of the law-maker, whoever the law-maker may be, and from those interests and designs which inspire despotic laws. It consists in a division and limitation of public powers, with such a balance of legislative, judicial, and executive functions that it is impossible for any one of them to encroach upon the inherent rights of the citizen. A fundamental law is, in effect, a reservation, and at the same time a renunciation, on the part of the citizens who constitute the State. As a reservation, it forbids the invasion of the personal rights of the individual by any or all of the public powers; and, as a renunciation, it is a voluntary ordinance of self-denial, on the part of the citizen, by which he pledges himself not to invade, or permit others to invade, the domain of individual rights. It is, in brief, a compact made by

the people, in which they surrender their private wills to the rule of law.

THE NATURE OF A FUNDAMENTAL LAW

Such a compact, serving as an organic law, does not extend to the various details concerning which public opinion may vary. It draws a sharp line of distinction between two different fields of legislation. In the first are included those matters upon which all good citizens can agree without debate, such as the inherent sanctity of life; the free play of the individual faculties, so long as their action is not injurious to others; and the possession and enjoyment of the results of industry, enterprise, economy, and foresight. Within this field the law should be definitive. The disturbance of these rights should be prohibited. Their perpetuity should be guaranteed. This should be the law for the legislator. It should also be the

law for the judge and for the executive. Their first duty is to protect these rights and to defend these guarantees. In the second field there must be freedom of legislation. Here public opinion, in all its mutability, may justly rule. Here the "will of the people" may assert itself and have free play, restrained only by the fundamental law.

Regarded broadly, it may be said, that the first field serves as an intrenchment of rights intended to be kept inviolable, while the second is the field of experiment in social expediency.

It is evident that there is an impassable line of demarcation between these two domains. It would be ridiculous to surcharge the fundamental law with all kinds of detailed provisions of a nature to be frequently reconsidered and modified with every social transformation. On the other hand, to break down the barriers of the fundamental law and sweep away all its guarantees would

open the road to many kinds of absolutism. In every class conflict the whole structure of government would then be subject to change, and it is quite impossible to foresee what the result of the change might be. That would depend upon who chanced to be the victor in the struggle. If all legislation were left to the prevailing passions of the moment, "*Votre Majorité*" would soon, no doubt, become "*Votre Majesté.*" The door to demagogism and to revolution would be thrown wide open.

THE CONSTITUTION AS A GUARANTEE OF RIGHTS

It is one of the fortunate circumstances in the historical development of our country, that in framing our Federal Constitution this danger was foreseen. Not only were guarantees that mutual obligation should be respected written into that document, but it was made legally impossible to

break down the distinction between laws permitted and laws prohibited. The Constitution is, and was designed to be, as no other constitutions ever have been, a *law for legislators.* It is not only a frame of government, it is a Bill of Rights; and it is not only a bill of inviolable rights, it is a Bill of Rights placed under the protection of the judiciary. Individual rights—"natural" rights, if one chooses to call them so—are not only recognized in the Constitution; the Constitution is their organized defense.

In this, as has been already intimated, the Constitution of the United States and some of the State constitutions stand alone. They have been much imitated, but their unique, distinctive, and original feature has not been adopted in other countries. The reason is not far to seek: the founders of our constitutional system were the first, and they have thus far been the only people who were determined to put an end to absolu-

tism in every form, voluntarily limiting *their own* sovereignty, in the sense of placing themselves and all their organs of government under the dominion of law. In doing this, thirteen independent communities renounced for all time their own arbitrary will, in order to produce an accord based upon principles of justice. Not only so, but they granted the same privilege to other communities formed upon territories which, according to the legal conception of the time, they might have ruled forever as arbitrarily as any absolute sovereign ever ruled a conquered colony.

THE OPPOSITION TO FUNDAMENTAL LAW

It cannot with historical truth be said that this movement was unopposed, or that it was an act of pure and disinterested generosity. Nor, on the other hand, can it be said that the motives which actuated it were

merely private and wholly selfish. Not as much, however, can be said in favor of those who in the critical moment of decision opposed this compact. There was, in truth, at the time when the Federal Constitution was adopted, a large amount of indifference, arising from unreflecting satisfaction with a condition of independence already gained and from a failure to grasp intelligently the momentous significance of the agreement. This, however, is a negligible quantity, for the reason that it represented no quality of real public opinion. There always have been, and it is possible that there may always be, persons who pay little attention to the legal security of their personal rights, so long as they consider that they are not definitely challenged. All the more credit, therefore, to those who apprehend a danger, and upon a timely occasion endeavor to avert it.

But the fundamental law was, it must be

conceded, actively opposed, not indeed by a majority, or by any considerable body of opponents. It is interesting, therefore, to inquire what their principles and motives were.

There was, in our early history as a country, and in our public life there has since frequently appeared, a group of persons who, as debtors, repudiators, and advocates of fiat money, were unfavorable to the rights of property and to the principle of mutual obligation as a basis of law. It is not surprising, therefore, that these persons, actuated by their personal interests, or by the hope of constituting themselves leaders by appealing to such interests, should have opposed the guarantees of inherent rights in the organic law; and it is to be expected that this opposition will not end, so long as the motives for sustaining it endure.

This was clearly seen, and the danger it occasions was admirably stated by James

Madison, when engaged in defending the Constitution and urging its adoption. "The diversity in the faculties of men, from which the rights of property originate," he says, "is an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of unequal faculties of acquiring property, the possession of different degrees and kinds of property results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of society into different interests and parties. . . . The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government."

There are, then, interests to be defended, because there are interests likely to be attacked. If these interests are grounded in

inherent rights, the principle of mutual obligation fully justifies this defense; but at the same time it condemns the disposition to attack them. It is evident, therefore, that a constitution that defends them from depredation is a necessary safeguard of liberty, by establishing equality before the law. It is not the origin of private rights, which exist before it. It merely declares and guarantees them. Its voice is not for one class or another. It knows nothing of different interests, and does not stand for them. It merely says that no preponderant power in the State shall destroy the rights upon which the conception of the State is founded and which it exists to protect. It is the friend and the defender of every honest man.

Will it be said that, in a free democracy, no rights will be in danger, and that the majority will always respect them? Then why not make it the law that they must be

respected? And if it be the intention to respect them, why should anyone object to such a fundamental guarantee?

Is it true that majorities, and the law-making bodies which represent majorities, are always just? Have legislative bodies, even in republics, always set their faces sternly against plunder, extortion, and repudiation? "Wherever the real power of government lies," Madison declared, "there is danger of oppression." There is always reason to fear irresponsible power, simply because it *is* power. The design of constitutional government is so to restrain power that it shall be always under the dominion of the law.

"In our government," as Madison points out, "the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended not from acts of government contrary to the sense of the constituents, but from acts in which

the government is the mere instrument of the major number of constituents. . . . Where there is an interest and a power to do wrong, wrong will generally be done, and not the less readily by a powerful and interested party than by a powerful and interested prince."

What, then, should be the attitude of the citizen? That is the all-absorbing question, for it is upon him that rests the grave responsibility of deciding whether or not constitutional government shall survive.

V

THE CITIZEN AS A LAW-MAKER

V

THE CITIZEN AS A LAW-MAKER

If the United States has ever possessed a great citizen, it was Abraham Lincoln; and if ever a citizen felt the restraints of the Federal Constitution, it was he. Believing slavery to be a heinous crime, he perceived its supporters taking refuge behind the provisions of the Constitution, not only for the maintenance of that institution in the States where it had originally existed, but for its extension into the free territories of the West.

The Dred Scott decision, by which in 1857 the Supreme Court of the United States appeared to have established forever the right of a slaveholder to reclaim possession of a liberated slave wherever the laws of

the United States extended, was based upon the following interpretation of the Constitution:

> If the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and any other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the government.

Since the existence of slavery as a fact was recognized in the Constitution, the Court drew the inference that the act of Congress known as the "Missouri Compromise" was not constitutional, and was, therefore, null and void; and that the former

slave, Dred Scott, was not made free by his presence in territory where Congress had prohibited slavery, and would not be even though taken there by his owner with the intention of permanent residence.

This denial of the right of Congress to exempt any portion of the territories of the United States where slavery did not exist from the recognition of property in human life, was to Lincoln intolerable. Against it his reason and his conscience were in revolt. So strongly was he moved by what he esteemed a monstrous injustice, that he might easily have felt constrained to condemn the Constitution as responsible for the wrong; but this seems never to have occurred to him. The decision itself he denounced on what he believed to be legal as well as moral grounds, but he proposed no amendment of the Constitution. With calm and unshaken faith in the essential soundness of the fundamental law, he awaited the

day when the *right* would triumph, not through a modification of the Constitution —which was not responsible for the existence of slavery—or by disputing the independence of the judiciary—which is the keystone of the entire constitutional system —but by the force of public opinion upon a great moral question which would, he believed, in the end result in a reversal of the decision so far as the extension of slavery into free territory was concerned. With the clearness of vision and the patience of a great statesman, he saw that the fault was not in the Constitution, and not in the freedom of the judiciary, but in treating a human being as property in territories where slavery as an institution had been prohibited by law. In his debate with Stephen A. Douglas, he declared: "We oppose the Dred Scott decision in a certain way. . . . We do not propose that when Dred Scott has been decided to be a slave by the court, we

as a mob, will decide him to be free; . . . but we nevertheless do oppose that decision as a political rule which shall be binding on the voter to vote for nobody who thinks it wrong. . . . We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject."

In brief, Lincoln regarded the decision as part of an organized conspiracy to extend slavery into free territory. When charged with resisting the decision of the Supreme Court by which Dred Scott was decided to be a slave, and thereby attempting to rob his master of his property, Lincoln replied: "All that I am doing is refusing to obey it *as a political rule*. . . . If I were in Congress and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of the Dred Scott decision, I would vote that it should."

There is in Lincoln's speeches, made un-

der the most trying circumstances, no denial of the binding nature of a court decision as regards the particular case to which the decision applies. What he objected to was neither the constitutional prerogative of the court to declare an act of Congress unconstitutional nor the immediate effect of the particular decision, but the right of the court to fix for all time the policy of the government on the question of slavery. On this point he expressly states: "Nor is there in this view any assault upon the court or the judges. It is a duty, from which they may not shrink, to decide cases properly brought before them; and it is no fault of theirs if others seek to turn their decisions to political purposes."

RESPECT FOR THE CONSTITUTION AS THE GUARANTOR OF LIBERTY

Strong as the temptation was, in the great moral crisis which an *ex parte* interpretation

of the Constitution had forced upon the country, to criticize the provisions of the organic law itself, no note of censure and no proposal of change came from the statesman who most lamented the construction put upon it. No one can doubt that, as a man of the people, Lincoln had supreme confidence in the wisdom and virtue of his fellow-citizens; yet he fully realized the value of the restraints imposed by the fundamental law, and there is in his voluminous utterances no appeal to their undirected will to correct by an extra-judicial act the wrong which he sought to remedy. In his first inaugural as President of the United States, delivered at a moment when the passions and interests of the Nation were stirred as they had never been before, he expressed in a single sentence his confidence in the deliberate and balanced judgment of the people, but at the same time his conviction of the necessity of constitutional restraints.

"A majority," he says, "held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinion and sentiment, is the only true sovereign of the people." "Whoever rejects it," he adds, "does of necessity fly to anarchy or despotism."

It is well to ponder these weighty words. The majority, under our system, must ultimately rule; but, in Lincoln's view, it should be a majority acting under two conditions: (1) the restraint of constitutional principles, which set definite limits to the will even of the majority; and (2) it must not be a fixed majority, acting solely in its own interest, but one that changes easily with deliberate changes of popular opinion. Constitutional limitations and deliberate consideration—these are the two landmarks which indicate the safe channel for the onflow of progressive action by the people. The alternatives are, as Lincoln said, anar-

chy on the one hand, and despotism on the other.

As a law-maker—and every citizen is a law-maker—a recognition of these conditions is the first duty of the citizen. If the laws are to be respected, it is necessary that they should contain nothing arbitrary, nothing which springs from the mere unreasoning volition of the law-maker. Every enactment should be based upon the principle of mutual obligation.

It is here that the substantial value of a fundamental law becomes apparent, for it contains the only guarantee that unequal legislation will not be enacted. It is the effectual barrier to the triumph of mere class and sectional designs. It is not unnatural, therefore, that these should endeavor to break it down. All attempts to do so should be regarded with suspicion, for an assault upon it is an attempt to destroy the compact upon which the existing order

is based. The anarchist who wishes to destroy the system of legal right and the despot who wishes to impose his arbitrary will are powerless so long as this basic law exists. It is the bulwark of human rights and of personal liberty, erected against absolutism in every form.

So evident is this that the enemies of constitutional government rarely oppose it by direct attack. Their method is rather to undermine it by insidious changes. These they intend to make progressive rather than immediate, for they may thus the more easily develop and mature their ultimate designs. Thus, for example, previous to 1848, Louis Napoleon was the most advanced advocate of democratic ideas in France. His most important writings were on the extinction of pauperism and the neglected rights of the working classes. His principal theme was "authoritative democracy," to be organized in the interest of the

oppressed. On December tenth, of that year, as the protagonist of the people, he was elected President of the Republic. His first request was, that he be intrusted to remodel the constitution of France, in order to embody in it his conception of authoritative democracy. The answer of the *plébiscite* that followed was 7,439,216 yeas, and 640,737 noes. Four years later, when these changes had been made, the people of France were invited to vote on the question of reestablishing the imperial office, with Louis Napoleon as sole candidate. In response, 7,824,189 Frenchmen voted "Yes"; and only 253,145 ventured to vote "No." Such was the result of substituting personality for principles—the subordination of a nation to one man.

THE SURCHARGING OF FUNDAMENTAL LAW

There is a recurrent disposition not only to alter the fundamental law, but to over-

load it with numerous irrelevant details, thus destroying its permanent character and transforming it into a general code of statutory legislation. This process, from which our Federal Constitution has thus far been happily spared, has been carried on to an alarming extent in many of the state constitutions; which have, therefore, become mere temporary—and to a great extent purely experimental—digests of what for the moment is fancied to be ideal legislation.

It is apparent that such attempts to embody ultimate ideals, especially when based upon extemporaneous theories and a large infusion of adventurous initiative, miss entirely the purpose of a fundamental law—which is not to codify all the rights and duties of the community, but to define and limit the public powers, and to mark out the boundaries beyond which the process of law-making may not justly go, thus furnishing

to the citizen a substantial guarantee of his inherent rights and liberties.

If we take up our Federal Constitution and carefully analyze its contents, we realize how admirably the founders of the Nation adhered to the idea of embodying in it only purely constituent formulas.

The purpose is stated in the Preamble:

> *We the people* of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this CONSTITUTION for the United States of America.

It is interesting to note that nothing in the entire document oversteps this general purpose, set forth with such dignity and simplicity. First, comes the frame of government, based upon the separation and co-

ordination of the public powers, thus providing the organism by which the ends enumerated in the Preamble are to be attained. Distinct provision is made for confining each branch of the government to its own assigned sphere, thus preventing a usurpation of power by any one of them without a violation of the law. Limited terms of office, of comparatively short duration, are ordained, and the Chief Executive and other civil officers are rendered liable to impeachment in case they overstep the bounds.

Interspersed with the powers accorded to public officers are reservations of personal rights which set a limit to public authority in the interest of personal liberty, such as the prohibition against preventing migration from State to State, suspending the writ of *habeas corpus*, the passing of bills of attainder or *ex post facto* laws, the unequal imposition of direct taxes (recently changed

by amendment), the levying of import taxes by the States, etc.

Although the reaction from absolutism and the distrust of arbitrary power are clearly marked in the Constitution as it came forth from the hands of its framers, the distinct reservation to the States and to the people of all powers not explicitly accorded to the Federal Government was at that time deemed by many an insufficient safeguard of local and personal liberty, and further guarantees were demanded. In the first ten amendments, therefore—practically coeval with the Constitution itself—we find a detailed Bill of Rights in which certain liberties of the people are expressly guaranteed.

THE EXTENSION OF GUARANTEES TO EMANCIPATED SLAVES

Until a very recent period great value was placed upon these guarantees, and the Constitution constantly grew in public esteem.

The whole drift of popular sentiment was in the direction of augmenting and strengthening them. After the first twelve amendments, no further alteration or addition was, however, considered necessary until the results of the Civil War in 1865 led to the thirteenth amendment, declaring that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Three years later, as a necessary step in the reconstruction of the States that had been in rebellion, the fourteenth amendment was passed, by which it is declared, that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The immediate purpose of this new guarantee was to secure to the enfranchised slaves

the constitutional right of citizenship, but this would have been illusory without securing to them immunity from the invasion of their civil rights by the enactment of discriminating local laws. Accordingly, a clause was added, in which it is declared, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Thus, at last, with the abolition of slavery —an institution to which the spirit of the Constitution had always been opposed—all persons born or naturalized in the United States were declared to be citizens, equal before the law, and afforded the benefit of equal guarantees of life, liberty, and property.

In thus making the principle of universal mutual obligation the formal basis of the law, by prohibiting unequal legislation, the Federal Constitution, so long as the fundamental law remains unaltered and is fairly interpreted, places the citizen in a position of security from the arbitrary action of the State, and also from that of class interests through control of the State. It is a heritage with which the citizen may well be content, but it is one which he must always defend; for the forces which have in the past opposed and hindered its creation will probably never cease to plan its destruction.

Within the fixed limits of the basic compact, public opinion has free scope; and public opinion is a force which will never cease to act. There is, therefore, in the nature of the constitutional system of government nothing to obstruct indefinite progress

toward the highest ideals of the community, whenever these become sufficiently clear and accepted by a sufficient number of citizens to influence public opinion and cause it to be effectual. What the constitutional system does is not to obstruct progress, but simply to provide a safe and well-defined channel through which progressive social ideas may freely flow.

It is, of course, conceivable that, by writing into the basic law itself *ex parte* restrictions upon personal liberty or exactions inspired by private interests or misconceptions of the public good, the constitutional system might be made the instrument of the grossest tyrannies. It is, therefore, of the highest importance that the citizen, in his capacity of law-maker, should consider it his first duty to guard against such alterations of the fundamental law. While the system of constitutional guarantees continues to exist, it will be only through the perversion of it that

individual rights and liberties can be seriously affected; but it must not be forgotten that the perversion of it is always possible. It is, therefore, of supreme importance to watch over and preserve inviolate that guarantee of guarantees, deliberation in the process of amendment. "The Congress," runs the amending clause, "whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments"; but these, when accepted, must be ratified by the Legislatures of three-fourths of the States, or by conventions of three-fourths of them called for this purpose.

ATTACKS UPON FUNDAMENTAL LAW

From the moment when the Federal Constitution was framed until the present time,

there have been persons who have either failed to distinguish between fundamental law and current legislation or have opposed the distinction. For them, the only governing authority is *the unqualified will of the majority;* and they are, therefore, opposed to any guarantees against the operation of that will.

The defects of this theory of government are obvious. There is no ground of assurance that, upon every question, the will of the majority will respect the inherent rights of the minority; and a majority of votes is frequently only an apparent and not a real expression of the deliberate will of the community. Every attempt, therefore, to abolish or weaken the guarantees afforded by the fundamental law must be regarded with suspicion. The burden of proof plainly rests upon the person who proposes to abolish or weaken those guarantees, and the thesis he is called upon to establish is, that

the community as a whole, and not a mere majority, will be benefited by a change. It is reasonable, therefore, that the community as a whole, and not merely an apparent or even a real majority, should decide the question. It is precisely this for which the amending clause of the Federal Constitution provides, and it is against this guarantee *par excellence* that the attack is principally leveled.

So feeble and so indefensible are some of the proposals of change in the organic law, that it is impossible to commend them on their own account; and the position, therefore, is taken that the process of amending it is too difficult, and that it should be made comparatively easy. Thus, instead of discussing specific changes, the usual attack on the Constitution takes the form of opening wide the door to *any* change whatever which a class, a section, or an interest may wish to promote.

One writer, having invented a "Plan for the Democratization of the Federal Constitution," advocates greater facility of amendment, on the ground that this is necessary "in order to render successful the movement of the past few years for the democratization of government in this country, resulting in experiments with the initiative, the referendum, the recall, direct nominations, and so forth;" and remarks naïvely, that "it is singular that the undemocratic nature of the Federal Constitution has not received more attention." The proposal is, then, to sweep away the constitutional guarantees, and thereby to give place to political experiments; if happily through a liberal employment of the initiative, the referendum, and the recall, some social advantage to the majority may be produced at the minority's expense. That such supposed advantages would prove to be real, is admitted to be uncertain. The only sure thing is, that

they would probably be unconstitutional. "Should the experiments referred to," continues the writer, "prove successful, much of the social legislation secured by their aid would ultimately come before the Supreme Court of the United States"; which would, no doubt, declare it to be unconstitutional, and thus all these social "experiments" would come to naught! To avoid this calamity, the Constitution must be made so readily alterable that nothing desired by the majority would be contrary to it in its amended form.

THE NATURE OF THE OPPOSITION TO THE CONSTITUTION

What, then, is the social legislation which it is so important to render possible? The complaints made against the Constitution as it is sufficiently reveal its character:

The Constitution of the United States

was framed by and in the interests of a property-possessing class.

Property is rightfully the possession of society as a whole; when detained in private hands it becomes a permanent reward for a temporary service, or for no service at all.

The pretended right to transmit property from one generation to another is not a natural right.

Corporate properties should be valued according to their present cost of physical reproduction, and may rightly be taken over by the people upon that valuation.

The remuneration of the worker will be determined either by deeds or by needs, as may hereafter be decided; *but most certainly not* upon the basis of allowing him a reward according to the importance of his industrial product.

Employers, as such, have no right to exist. The aim of the employed should be a practice that will enable workers to assume, as the return for their labor,

the full control of the various industries.

The idea of inalienable natural rights is an erroneous eighteenth-century conception. Men have *no rights,* except what society concedes to them by law.

No court should be permitted to nullify any act of a legislative body on the ground that it is unconstitutional.

If these propositions were merely academic theses, they might well be passed over in silence; but, on the contrary, they are all of a pragmatic nature, involve the future status and interests of our fellow-citizens, and contemplate legal changes through public action. They supply precisely the kind of materials for disturbing the equanimity of unreflecting minds and for promoting the designs of a demagogue aiming at personal advancement by the creation of a numerous popular following. They are the kind of material we may expect to be employed in those "experiments

in social legislation" which the initiative and the referendum are designed to promote.

ALLEGED CONSTITUTIONAL BARRIERS TO REFORM

Unfortunately some of these proposals assume a close connection with the aims of a pure and high-minded philanthropy, which serves to conceal their sordid side and imparts to them a glamour of righteousness which they do not really possess. Our sympathies with poverty and suffering and our antipathy to cruelty and extortion are appealed to, and we are led to believe that nothing can be wrong which brings to terms those who have revolted our consciences by their avarice or inhumanity. We are not, in fact, called upon to spare the feelings of those who themselves spare neither manhood nor womanhood nor childhood in their expedients for extortion.

But, on the other hand, we should be very untrue to the cause of humanity, as well as to the cause of justice, if, in our zeal to lift up the downtrodden and to support the weak, we should sweep away the basic guarantees upon which the whole edifice of justice is erected. Loyalty to humanity lays upon us a larger duty than the immediate destruction of some single evil, however monstrous it may seem to us. To cleanse and purify the temple, we do not need to create a conflagration; for, so far as just and needed social reforms are concerned, there is probably not a single one that requires for its accomplishment any radical change in a system of government by which we have progressively exterminated so many evils.

Nor can it be fairly asserted that constitutional government, as understood by our fathers, is of interest chiefly to the property-possessing class, particularly the large property-possessing portion of society. It

has never been its aim to protect any particular class to the disadvantage of another; but, on the contrary, to see to it that there be no insurmountable barriers to block the way of human aspiration, with the result that there are few fortunes in our country the foundations of which were not laid by men who once worked for wages. As for the excessively great fortunes, their possessors are the least likely to be affected by any radical legislation, for they will always find a safe asylum in which to meditate upon their woes. It is the wage-earner, and the organizer and administrator of wealth-producing enterprises, whose hopes are threatened by encroachments upon our constitutional guarantees; for the prosperity of the great mass of our population is dependent upon a mutual confidence that industry will be suitably rewarded and enterprise enabled to prosper. Nothing could so effectively check and permanently embar-

rass the creative forces of the country as the thought that the results of industry and enterprise will be exposed to future expropriation.

THE RELATION OF REFORM TO PUBLIC OPINION

It is of supreme importance for the citizen as a law-maker to form a just conception of the true relation between constitutional guarantees and public opinion. There is no constitutional provision that could long remain effective if opposed by public opinion in any real sense; for the process of constitutional amendment, although impossible to a mere majority, presents an open path for the forward movement of a serious public determination when it has been deliberately taken on defensible grounds.

It is, however, necessary to distinguish between public opinion and a mere majority decision when the latter is evidenced only

by the counting of affirmative and negative votes.

A *plébiscite*—including under this term the initiative and the referendum—is usually not an expression of opinion in any real sense. It is usually merely an opportunity for a choice between alternatives so ingeniously presented as to facilitate decision, without analysis and without reflection. Most popular votes are of this character.

Let us take, for example, the *plébiscite* by which Louis Napoleon was authorized personally to prepare a constitution for France. In this there was expressed no "opinion," public or private, as to what the constitution should be; for it was not known what it was designed to be. The vote was, therefore, not an expression of "opinion" in any proper sense, but only an expression of confidence in a particular person, to whom all the authority of the people in this matter was bodily transferred. If we take as an-

other example the *plébiscite* by which the President of the French Republic was accorded the title and functions of emperor, the same may be said; only, in this case, since the President had evidently resolved to absorb most of the public powers, the question presented was merely one of choice between the acceptance of an emperor or a revolution. There was, therefore, in reality—leaving aside all doubt regarding the regularity and actual numerical result of the vote—no expression of public opinion in a proper sense; that is, of definite conclusions deliberately arrived at by a balance of considerations.

The truth is, that, without specific discussion and reference to general principles, public opinion does not exist. Popular demonstrations of mere feeling, whether of sympathy or antipathy, do not constitute public opinion, no matter how extensive they may be, even though they include the par-

ticipation of the entire population. Without a definite proposal, comprising not only some precise end to be attained but a definite means of attaining it and some consideration of its effect if successful, public opinion does not exist. Mere popular unrest and vague social aspirations do not of themselves constitute public opinion. The pressure resulting from these may lead to the formation of opinions; and these, if they become general through discussion, may ultimately take on a public character, but not unless they assume the form of definite propositions.

It is evident, therefore, that reforms, to become effectual, must await the growth of intelligent appreciation. The only way to promote them is to fix attention upon them by debate and by appealing to the reasoning powers. Until this is done, even though legislation be enacted, it will not be respected. It is useless, therefore, to force it

prematurely upon society. Merely to experiment is worse than useless; it is dangerous. It incurs the risk of inducing the general belief that all legislation and all the social arrangements resulting from it are merely empirical; that everything is purely arbitrary; and that nothing is to be depended upon. Such a régime would substitute imagination for reason and emotion for experience. In short, government by impulse is only another name for anarchy.

THE CONFLICT OF CONSTITUTIONALISM WITH IMPERIALISM

Are these conclusions in any respect a condemnation of democracy? By no means. The error of many political speculations lies in representing that human progress, especially in legislation, consists merely in the triumph of democracy over monarchy, of the will of many over the will of one. A little reflection is sufficient to show that this

is not the case. The real struggle is not between democracy and monarchy, it is between constitutionalism and imperialism; between the effort to guarantee to every individual his inherent rights and the disposition to override, to ignore, or to deny them, no matter by whom it is entertained.

Democracy, as well as monarchy, may be imperial and unconstitutional. The will of many may be as arbitrary, as absolute, as unjust, and even as cruel as the will of one. Progress toward the recognition and the guarantee of all inherent rights can be made only by opposing imperialism in whatever guise it may appear, and by sustaining constitutionalism as a system of public guarantees.

If we ask ourselves in what form imperialism presents itself to us, in this age and in this country, we at once perceive that our dangers do not arise from monarchy but from "authoritative democracy." Wher-

ever the power of government approaches omnipotence, *there* lies the danger of oppression. The eternal battle of right against might is not merely between forms of government, but against absolutism in any form of government; for in every form of government there exists a power to legislate, and the power to legislate affects the lives, the liberties, and the property of all.

The question for democracy to answer is, therefore: What does it intend to do in the field of legislation? Will it renounce the passion for omnipotence? Will it restrain and limit its undoubted powers? Will it respect the inherent rights of all, even of a small and otherwise helpless minority? Will it freely and gladly guarantee those rights by a solemn compact? Or, on the other hand, will it glory in its strength, consult only the interest of a controlling group, ignore the politically powerless, and withdraw or remodel, to suit its pleasure, the

guarantees that have been freely accorded by a nobler theory of authority?

These are questions which the citizen must answer; and, in answering them, he will determine whether we live in an era of progress or an era of retrogression. The starting-point of legislation in modern times was law-making by arbitrary decree, based upon the conception of the absolute nature of the State. The goal toward which political progress has hitherto tended has been legislation on the basis of mutual obligation, with the primary guarantee of inherent rights. Imperialism and constitutionalism—these are the great landmarks. It is upon this frontier that the battle must be waged. What is the answer of democracy?

PRINCIPLES AND PERSONALITIES

Regarded concretely, this conflict may be reduced to very simple terms. On the one

hand are principles capable of clear statement and universal application—the immutable principles of justice based on mutual obligation. On the other hand are human personalities—often highly intelligent, plausible, eloquent, and sometimes personally attractive—who, in exchange for power, promise to those who follow them rich rewards. Trust them, they pledge themselves, and they will so undo the work of the past, they will so reapportion the wealth of the world, they will so reconstruct society, that those who have felt themselves outstripped in the race of life shall wear its laurels, shall rejoice in plenty, and shall rule where they have served.

Delightful and fascinating prospect! But is it possible that these urgent protagonists of change will in the hour of triumph forget themselves, or permit themselves to be forgotten? For what purpose have they wrought out their theories of social recon-

struction? What new energies of productivity have they brought to light? What means of making two blades of grass grow where only one grew before have they invented? What new resources have they discovered? On what, then, do they base their promises?

Alas, when their proposals are carefully examined, they usually disclose no profound economic discovery, no new method of creating anything of value that did not exist before. It is simply a new process of dividing what the industry and enterprise of others have created, or what their prudence and abstinence have prevented from being consumed. Now it is the repudiation of previous obligations; now it is the depreciation of the coinage; now it is the issue of paper promises to pay in place of actual payment; now it is obtaining something for nothing from the public treasury for local use; now it is to throw the burden of taxa-

tion upon this section or upon that class; now it is to appropriate to public use that which has been built up by private enterprise; now it is to expropriate this industry for the benefit of that political clientele! And what does the honest citizen think of such proposals? Does he imagine that appeals to his pride as a partisan, to his interest as a member of a guild, to his sympathy as belonging to a class or a section will in the end be of any substantial benefit to him? But, even if they were, what, as an honest man, does he think of such methods of procedure? What will ultimately become of society, if laws of arbitrary redistribution are substituted for equal laws? And what security is there against such laws, if constitutional guarantees are swept away?

THE DANGER OF AUTHORITATIVE DEMOCRACY

Against the constitutional guarantees it

is often urged that the people are the sovereigns, and that they have the right to exercise their sovereign will in any way they please.

That is the theory of authoritative democracy as distinguished from constitutional democracy. The one returns to the doctrine of absolutism and declares, *Populus legibus solutus est*—the people are above the law; their will is the source of law. The other replies, "The people are sovereign, but there exists no such thing as absolute sovereignty; the sovereign also is subject to law." He is not a true sovereign, in any sense that democracy can accept, who is not willing to set limits to his powers, and to recognize his own subordination to a fundamental law.

The basic question underlying the whole subject of the citizen's relation to legislation is this: Are we to have a government of laws, or a government of men? Shall we

place the emphasis upon principles, or upon personal volitions? Shall we base government upon what we can previously agree upon as in accord with mutual obligation, or shall we base it upon the fluctuating wishes of an interested majority?

Authoritative democracy, the Napoleonic type of democracy, the type which formerly prevailed in France, places its confidence in *persons*. It results in a government of *men*. Constitutional democracy, the Washingtonian type of democracy, the type which has hitherto prevailed in the United States, places its confidence in *principles*. It results in a government of *laws*.

Constitutional democracy takes into account the continuity of national existence and the essential unity of the nation in the past, the present, and the future, as expressed in its deliberately organized institutions. Authoritative democracy takes no account of the unity or the continuity of the

national life. It neither respects the past, nor considers the future; it acts for the present only, impelled by volitions that are dominant today but may not exist tomorrow.

But the real danger of authoritative democracy is that it opens the door to imperialism. It proposes to rule, not by discussion and deliberation, but by *plébiscite.* The nominal proposal is that the people are to rule; but the people are occupied with their own affairs. They are, therefore, invited to choose *uninstructed plenipotentiaries;* and it is *these* who in reality will decide everything. To the people will then remain nothing but the doubtful prerogative of assent.

GOVERNMENT BY OFFICIAL OLIGARCHY

How readily, and in a sense unconsciously, and yet inevitably, authoritative democracy deserts its own primary idea and

substitutes personalities for principles, is illustrated by a proposal recently made by its recognized chief in the United States, for whose eminent ability and high official position it is our duty to entertain a profound respect. This does not, however, exempt us from the further duty of subjecting to examination the suggestion, officially offered, that legislation and public policies, which hitherto have been proposed and advocated by public representative assemblies of the people, convoked for this purpose, should henceforth be confided solely to a *junta* of office-holders and office-seekers, the people retaining no other privilege than that of giving or withholding their subsequent assent.

In a message to Congress, the President of the United States has suggested that a federal law be adopted, not only depriving the people of the privilege of meeting in party conventions for the nomination of

candidates for public office, but depriving the people of the right to choose their own delegates to such conventions for the purpose of framing a platform of party principles; that is, of issuing preliminary mandates to their candidates for office. "I suggest," runs this extraordinary communication—which was not called for by any popular interest in the subject or either preceded or followed by public discussion of the proposal—"I suggest that conventions for the purpose of adopting a platform should consist, not of delegates chosen for this single purpose, but of the nominees for Congress, the nominees for vacant seats in the Senate of the United States, the Senators whose terms have not yet closed, the national committees, and the candidates for the presidency themselves." [1]

What, then, is the purpose of this un-

[1] See President Wilson's address to Congress of December 2, 1913.

precedented concentration of power in a few official personalities? It is alleged to be, "that platforms may be framed by those responsible to the people for carrying them into effect"!

Are political platforms to be held more sacred in the eyes of those who are responsible for carrying them into effect because they are *their own,* and not the *people's,* platforms? This is the alleged reason for the President's suggestion. Why not, then, hand over to these select officials, prospective and actual, the whole conduct of government; since the people may not freely make their own platforms by choosing their own unofficial delegates? But why all this array of "nominees" and "national committees"? If "senators whose terms have not closed" are to be included in the official oligarchy, certainly a president whose term of office has not expired would have a dominant influence in this controlling body;

especially, if he also be a nominee to succeed himself. Who, in short, is so clearly "responsible to the people" as the actual head of the State? And who is likely to have so much influence in this indirectly chosen body? Why not, then, be done with it, and place all the power in the hands of the president? Of course, we could not call him "emperor," but we should in that case have a law-maker who could be held "responsible to the people." His problem would, moreover, be a very simple one, namely, to give to the people exactly what he thought the majority wanted!

This substitution of the Napoleonic for the Washingtonian theory of government would greatly simplify the task of the citizen. It would relieve him not only of all responsibility but from all discussion and reflection upon public questions. It is the logical consequence of authoritative democracy, which consists in practice in plac-

ing the public powers in the hands of a dominant personality to be used *ad libitum;* subject only to the assent of those who have ceased to examine public policies for themselves; who do not care to be represented by others, through whom they may deliberately and publicly discuss them; and who are content, by a simple act of will, to transfer authority to their uninstructed plenipotentiaries, to whose decisions they passively assent.

Are the American people desirous of adopting this oriental conception of public life, or will they continue to adhere to the representative system of constitutional democracy? This is a question which at this moment demands an answer. If it be answered in favor of the system we have inherited from our fathers, it will be necessary to stand firmly for that system, or the decision will be unavailing. Reversion to absolutism is the inevitable consequence of

public indifference. The whole burden of good government rests upon the vigilance of the citizen; first, in guarding his constitutional prerogatives, and then in seeing, through those whom he charges with the carrying-out of definite policies, that the principle of mutual obligation be made effective in legislation. To know and comprehend this principle requires neither learning, nor superior faculties, nor high social position. Such knowledge is the birthright of the common man, who knows that what is his does not belong to another, and that what belongs to another does not belong to him. It is to the plain citizen, who seeks no public office, envies no man's plunder, and is strong in his own manhood and in his respect for manhood's rights, that we must look for the permanence of the State and the rule of justice in the law. It will be not through numbers, but only through character, that democracy will endure.

VI

THE CITIZEN AS SUBJECT TO LAW

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THE CITIZEN AS SUBJECT TO LAW

Thus far our thoughts have been occupied with the nature of the State, the basis of the law, and the function of the citizen as a law-maker. It has been pointed out that the people, duly organized, are sovereign, in the only sense in which sovereignty has a rightful existence; and that every citizen shares in the exercise of this ultimate political authority. Within the limits of a rightful rule of the majority, he is a legitimate ruler. It is, perhaps, less flattering to human pride to be obliged to recall the fact that the citizen is also subject to the law, and, if he chance to belong to the minority, subject to forms of law which he has not favored and may not desire to obey. Is he,

as a citizen, prepared to stand this test? Will he yield a voluntary obedience to the law, simply because it *is* the law, when it does not suit his convenience to obey it, and even when in principle it does not receive his approval?

Upon the answer to this question turns the effective authority, and even the very existence, of the State. If the answer be negative, we are confronted with the spirit of revolution; and out of revolution, if that spirit continues, must come either a new and more acceptable State, or anarchy.

It is important to recall the fact that revolution is not an infrequent phenomenon, and that the greater number of modern States are the offspring of revolutionary action. These movements, however, are of quite different types and have produced quite different results. It is, perhaps, worth while to distinguish between them as regards their aims, the permanence of their

effects, and the degree in which they have secured stability to the principles of human justice.

THE CHARACTER OF THE AMERICAN REVOLUTION

The American Revolution, as we have already pointed out, was a revolt, not merely against royal authority, but against the laws of the British Parliament. The objection to these laws was that they were expressions of absolute sovereignty, assuming and enforcing the unqualified right of certain men to make laws for other men who were regarded as possessing no rights which their rulers did not accord to them.

The revolt of the thirteen American colonies was distinctly and exclusively against this doctrine of absolute sovereignty, to which it opposed the idea of government with the "consent of the governed."

This necessarily implied the existence of inherent rights on the part of the individual, which government is in principle bound to respect. In constituting a new government, therefore, these rights were jealously guarded. The idea of a strong central authority remote from local influence was looked upon with suspicion. Individual liberty having been secured, it was desirable that it be not carelessly sacrificed. In the State constitutions which were formed during the Revolution, individual rights and liberties were carefully guarded by the inclusion of bills of rights in the organic law; and when, after the failure of the defensive league created under the Articles of Confederation, the Federal Constitution was finally adopted, two provisions were embodied in that compact which had never before been united in any federal system: (1) the reservation by the people of certain rights which could not be legally taken away

by legislative action; and (2) the creation of a judicial tribunal with power to interpret the fundamental law, and thus to prevent legislative encroachment upon the inherent rights which had been placed beyond the danger of invasion by any power within the State.

By these two provisions, for the first time in the history of the world, the citizen was placed in a position of security and assured of the protection of equal laws. The result has been that during a period of a hundred and twenty-five years a nation then containing four or five million inhabitants has grown to be one of nearly a hundred millions, expanded over a territory many times more extensive than that occupied by the original colonies, and composed of more than three times as many States, without the occurrence of a successful revolution; and without a serious revolt of any kind, except an act of attempted separation for

the maintenance and extension of the institution of slavery.

THE CHARACTER OF THE FRENCH REVOLUTION

Quite different, as we have seen, was the character of the French Revolution. Inspired in a great degree by the example of the American colonies, the people of France revolted against royal authority; but not against the principle of absolute sovereignty. On the contrary, although the American Declaration of Independence was imitated in the French Declaration of the Rights of Man and of the Citizen, that declaration was, in reality, only a declamation against royalism, was not further considered by the revolutionary movement, and was never embodied in any French constitution. From the first one it was expressly excluded, on the ground that an organic law should be confined to the determination

of a form of government, and should not place restrictions upon the powers ordained.

As a consequence, the French Republic which succeeded the overthrow of the Bourbon dynasty did not repudiate the principle of absolute sovereignty, but tacitly adopted it as the foundation of the State; simply transferring it from the Crown to the people, and through the people to the legislative assembly, which retained all the powers that had previously been possessed and exercised by the king.

Since that time France has been a republic, an empire, a Bourbon kingdom, an Orleans kingdom, a second time a republic, again an empire, and is now for the third time a republic. During this period there have been in France eleven different constitutions, no one of which, except the present, has remained in force for more than twenty years. Under all these régimes France, although nominally a constitutional

State, has really been under an absolute sovereignty; that is, a sovereignty upon which there has been no constitutional restraint beyond a merely formal partition of authority, rendered more or less ineffectual by the actual predominance of some one governmental agency in which the people for the time being have placed their faith. Now it was the parliament, now the king, and now the emperor who possessed the chief power; but there was always somewhere in the State an overruling authority able to dictate the law *ad libitum*. When the parliament became offensive, there was nothing to do but for the king or the emperor to break it up, and either send its members home or put them in prison. When the king became intolerable, there was nothing to do but to dethrone him and supersede his rule by a more popular régime. Nowhere in this system—and least of all in a so-called "responsible govern-

ment" changing every few months—is there any element of stability. Nor can it be imagined to exist in any parliamentary system whatever, unless this be restricted by constitutional limitations under the protection of an independent judiciary. Without these restraints, there can be no security against the fluctuating decisions of popular majorities, which are frequently influenced by causes that have no connection with the general principles of human justice. Sometimes it has been the price of bread, sometimes official extravagance, sometimes an error in foreign policy, sometimes mere *ennui* with a too prosaic administration, and sometimes nothing at all but the declamation of an ambitious rhetorician that has upset the government.

THE CONSTITUTION A BAR TO REVOLUTION

When we compare our own system with that of other republics—especially with

those in Latin countries, where the traditions of absolutism in some form still linger —we find that the chief differences consist in two circumstances: (1) that, in the United States, while many foolish laws, and even some unequal laws, may be passed, these, while the Constitution remains unchanged, cannot be excessively oppressive, because of the explicit guarantees of individual rights and liberties; and (2) that the duty is imposed upon the judiciary by our fundamental law, when appeal is made to it, to declare illegal all legislation which violates these guarantees—a security which the Latin republics do not afford.

Aside from certain minor inconveniences, there is little in the demands made upon his obedience to which a citizen of the United States may not freely assent. His important rights, at least, have not in the past been greatly menaced. There is, therefore, no great incitement to the revolutionary

spirit on the part of those who in principle are disposed to recognize the supremacy of the law. The constitutional guarantees and the courts are always there to protect him from serious spoliation, and even the political administration is subject to the law.

This cannot be said of countries where absolute sovereignty, whether it be vested in the Crown, in the Parliament, or in the people, still prevails. Under such conditions there is always a basis for appeal to the revolutionary spirit and for finding revolutionary motives. The mere fact that a government *is* absolute, no matter in what mold it may be cast, is a reason for resistance, and sooner or later a concrete occasion is certain to be furnished; for, if unopposed, it is in the very nature of absolute power to commit excesses. It is only when the principle of absolute sovereignty is entirely abandoned, and the principle of mutual obligation is substituted in its place, that the

grounds for revolt are effectually removed. But such a guarantee cannot exist outside of a constitutional reservation of rights which majority legislation cannot invade; and, even if it existed, such a reservation would have no ultimate security unless the obligation to respect it could be sustained by a recognized judicial tribunal.

Under any system, no doubt, revolution would be conceivable; but, where individual rights and liberties are properly guaranteed, it would at least be unreasonable. Theoretically, although constitutionalism is an obvious obstruction to revolution, if there should be developed a general hostility to law as law, and if there should be a return to the supremacy of force exercised by the elements of discontent, the Constitution might itself be swept away. The whole of civilization as it exists among us would, in that case, be exposed to the peril of a like calamity. If there should ever come a time

when powerful interests, of whatever kind, should unite to annihilate the guarantees of the Federal Constitution, such a revolution would exist. If there were no resort to violence, it might be bloodless; but it would be none the less a revolution. It is, therefore, of supreme importance that the friends of law as law should never cease to stand guard over those guarantees of individual rights and liberties upon which our system of government is based. Taken by surprise, they might suddenly awaken to a state of fact of which at present many well-meaning citizens have no suspicion. They would then discover, too late, perhaps, that the noblest political conception that has ever yet entered into the mind of man had been rendered fruitless by private and class interests gradually undermining the guarantees which have hitherto secured the inherent rights of individuals and the stability of the State under equal laws.

THE ATTACK ON THE JUDICIAL AUTHORITY

It has been pointed out that the second distinctive characteristic of our political system is the place assigned in it to the judiciary. The Federal Constitution not only fixes limits beyond which legislation by Congress and by the States cannot go, but it subjects to the decision of the Supreme Court the questions of constitutionality that may arise through the errors or encroachments of legislative enactments.

The extent of this prerogative on the part of the judiciary, and even its reality, have more than once been made the subject of discussion; but that the Supreme Court of the United States has, and was intended to have, authority in determining the constitutionality of laws does not in the light of history admit of doubt.

At the time when the Federal Constitu-

tion was adopted, the necessity of placing limitations on the legislative bodies had already been keenly felt. "We had not only been sickened and disgusted for years with . . . the omnipotent power of the British Parliament," wrote James Iredell in 1786, "but had severely smarted under its effects. We felt in all its rigor the mischiefs of an absolute and unbounded authority, . . . and should have been guilty of the basest breach of trust, as well as the grossest folly, if . . . we had established a despotic power among ourselves. . . . We provided, or meant to provide (God grant our purpose may not be defeated), for the security of every individual, as well as a fluctuating majority of the people."

The means for obtaining this security were discussed in the Constitutional Convention in 1787, and the theory of judicial coöperation in the revision of the laws before they were adopted was debated and re-

jected. The alternative was the contention of Iredell, that "the Constitution, being a fundamental law, . . . the judicial power, in the exercise of their authority, must take notice of it as the groundwork of that as well as all other authority; and, as no article of the Constitution can be repealed by a legislature, which derives its whole power from it, it follows either that the fundamental unrepealable law must be obeyed, by the rejection of an act unwarranted by and inconsistent with it, or you must obey an act founded on an authority not given by the people, and to which, therefore, the people owe no obedience."

This was the doctrine distinctly supported by seventeen out of twenty-five of those who took an active part in the proceedings of the Constitutional Convention, and it was opposed by only five persons. In Article VI of the Constitution it is expressly provided that

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Section 2 of Article III further provides that

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution; the laws of the United States, and treaties made, or which shall be made, under their authority.

If these provisions do not specifically name the Supreme Court, "the judicial power" evidently refers to it, and it is certain that its authority was not intended to be less than that granted explicitly to the State courts. It is worthy of note that Luth-

er Martin, who proposed the original form of Article VI, but objected to its final form, wrote to his fellow-citizens of Maryland: "Whether, therefore, any laws or regulations of the Congress . . . are contrary to or not warranted by the Constitution rests only with the judges who are appointed by Congress to determine, by whose determination every State must be bound." James Wilson, of Pennsylvania, was if possible, even more explicit. "If," he says, "a law should be made inconsistent with the powers vested by this instrument [the Constitution] in Congress, the judges, as a consequence of their independence and the particular powers of government being defined [in the Constitution], will declare such law to be null and void; for the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto will not have the force of law." Hamilton and Ellsworth expressed

the same opinion in terms equally unequivocal and in more extended form.

ALLEGED USURPATION OF THE SUPREME COURT

This evidence should be sufficient to establish beyond question the authority of the Supreme Court to pass upon the constitutionality of legislative acts, and it should conclusively dispose of the insinuation that it was by the interpretation of the Constitution given by John Marshall, as Chief Justice of the United States, that power was usurped by the decision of the Court itself; but the accusation is further rebutted by the Judiciary Act of 1789, practically coeval with the Constitution, and approved by President Washington, who had presided over the Constitutional Convention. That Act explicitly recognized the right of a State court to declare void laws of a State as well as laws of the United States, subject to an appeal to the Supreme Court; which

therefore possesses the right to declare *any* law invalid, if it be contradictory to the provisions of the Constitution. It was, indeed, Chief Justice Marshall, who, by the irrefutable character of his reasoning, set at rest the question regarding the authority of the courts to declare a law of Congress unconstitutional; but, in 1795, eight years before the celebrated decision in the case of *Marbury vs. Madison,* to which the "usurpation" is credited, Justice Paterson, in the Circuit Court of the United States, delivered a charge to a jury in which he explicitly stated the supremacy of the Constitution and the authority of the judiciary in the United States, as contrasted with the omnipotence of Parliament and the absence of control over its acts by the judiciary in Great Britain. "The power of Parliament," he says, "is absolute and transcendent; it is omnipotent in the scale of political existence. . . . The validity of an Act of

Parliament cannot be drawn into question by the judicial department; it cannot be disputed, and must be obeyed. . . . In America the case is entirely different. Every State in the Union has its constitution reduced to written exactitude and precision. What is a constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land. . . . What are legislatures? Creatures of the Constitution; they owe their existence to the Constitution; it is their commission; and, therefore, all their acts must be conformable to it, or else they will be void. . . . Whatever may be the case in other countries, yet in this there can be no doubt that every Act of the Legislature repugnant to the Constitution is absolutely void."

With regard to the duty and authority of the Court, the learned Justice is equally clear and equally emphatic. "If a legislative act," he says, "impugns a constitutional principle, the former must give way, and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that, in such a case, it will be the duty of the Court to adhere to the Constitution, and to declare the act null and void. The Constitution is the basis of legislative authority; it lies at the foundation of all law, and is a rule and commission by which both legislator and judges are to proceed. . . . The judiciary in this country is not a subordinate, but a coördinate, branch of the government."

The extent of the authority accorded by the Constitution to the Supreme Court of the United States has at times been hotly debated, especially when the decisions rendered by it have aroused against them op-

posing interests; but it may be said without fear of refutation that every statement made in the passages just cited has been overwhelmingly sustained by public opinion in this country for more than a hundred years. Recently the debate has been reopened, and Chief Justice Marshall has been accused of being the originator of this doctrine; which, as stated by him in the case of *Marbury vs. Madison,* it is represented, was nothing less than usurpation of authority by the Court itself. Nothing could more clearly indicate opposition, not only to the Constitution itself, but to the primary purpose of a constitution, than such an accusation; for, if objection to the language of the Chief Justice has any significance whatever, it must be based on the distinction he draws between a "superior paramount law" and an "ordinary legislative act." "The Constitution," he writes, "is either a superior paramount law . . . or it is on a level with

ordinary legislative acts, and like other acts is alterable when the legislature shall please to alter it." If, he argues, the Constitution is a superior and paramount law, then it must be obeyed; and whatever is contrary to it is legally void. If, on the other hand, the Constitution is alterable at the will of the legislature, "written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable." "Certainly," he concludes, "all those who have framed written constitutions contemplated them as forming the fundamental and paramount law of the nation; and, consequently, the theory of every such government must be, that an act of the legislature repugnant to the Constitution is void. . . . It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each."

THE ALLEGED "JUDICIAL OLIGARCHY"

Obviously, the authority of a court to decide what the law is, even to the extent of declaring null and void the acts of a legislative body, places in the judiciary a power that might conceivably be made the subject of abuse. It is, therefore, important to note that the same high authority who is held responsible for judicially maintaining the duty of the Supreme Court of the United States to determine the constitutionality of laws has also, in the strongest terms, emphasized the responsibility of this authoritative body. "The question," says Chief Justice Marshall, "whether a law be void for its repugnancy to the Constitution is at times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. . . . The opposition between the Constitution and the law should be such that the judge feels a clear and

strong conviction of their incompatibility with each other."

This is a sound principle, and a violation of it in the form of a strained decision is, undoubtedly, itself an offense against the Constitution. That there have been occasional instances of it may, however, be freely admitted without warranting an assault upon the judiciary as such, and certainly without affording the slightest ground either for revising or for facilitating in general the future amendment of the Constitution.

When the worst has been said—and, undoubtedly, there is something to be said—against certain judicial decisions, especially against those which have been handed down by a bare majority of the Court against the exceptions taken by a minority, there is no just ground for speaking of a "judicial oligarchy"; as if the judges were, as a class, to be condemned as arbitrary rulers, overriding in their judicial capacity the desires

of the people as expressed by legislative acts. Without a doubt, if the whole body of legislative enactments and the whole body of judicial decisions were taken into account, it would be found that the decisions of the judges would approach much nearer to the public opinion of the time in which they were rendered as to what is just and right than the acts of legislatures they have annulled.

In this connection it must be borne in mind, as Mr. Lincoln pointed out in regard to the Dred Scott decision, that judicial judgments relate only to specific cases, and that such decisions may be rectified when they are demonstrably wrong. In no case do they irrevocably determine political principles in opposition to the verdict of deliberate public opinion. In truth—while certain legislative acts, if not judicially set aside as in conflict with the fundamental law, may lay the foundation for extended and irreparable encroachments upon private

rights, including the most infamous extortions—judicial decisions are mainly merely suspensory in their effect, simply declaring that in a particular case an act which the Court, for the reasons which it states, agrees to consider wrong may not be performed. If afterward these reasons are found to be erroneous, there is still room for a different interpretation of the law when such a different interpretation can be justified.

There is, therefore, under our system, no reasonable ground for a general assault upon the judiciary. Errors may have been committed, and judges may sometimes have been influenced by considerations which have perverted their judgment; but, in spite of these aberrations, the law as judicially interpreted has usually been sanctioned by mature public opinion. Certainly, it would not have been improved by the influence of immature public opinion. There is no doubt, in the domain of judicial decision, large op-

portunity for *ex parte* criticism. If the defeated contestant could always carry his case before the general public without having to meet his adversary, he would, undoubtedly, in many instances obtain a reversal of the decision; but appeal from an instructed to an uninstructed tribunal would offer no discernible advantage to the cause of justice. The public has, perhaps, a sufficient amount of spare time to indulge in sympathy for the apparently oppressed, but hardly enough to constitute itself a superior court of justice.

THE VALUE OF THE JUDICIAL FUNCTION

While it is of the highest importance to neglect no means of securing and maintaining the independence, the impartiality, and the responsibility of our judiciary, the really important matter is, that we should not fail to appreciate the value of the judicial func-

tion. If in any case human perfection could be assumed, we might, perhaps, improve our system of government by selecting the perfect man and charging him with all the duties and responsibilities of the State. But, until the perfect man is found, we must be reconciled to the necessity of maintaining a system which most nearly approximates perfection, even though it fall far short of it.

The fundamental problem of government is, and has always been, to obtain for each individual full security for his inherent rights against the aggression of the stronger. In brief, the problem is, to substitute for violent and forcible compulsion just judgments under equal laws.

The solution of this problem proposed by the founders of our political system was, as we have seen: (1) the creation of a form of government in which no public officer should be omnipotent, in which the powers of government should be divided and distributed,

and in which definite limits should be set even to the power of the State as a whole; and (2) the explicit statement of certain general principles of justice, in the equal interest of all, which under all circumstances would have to be respected by all classes and all sections, no matter how powerful in wealth, in numbers, or in any other attribute of power and influence, they might be.

Government, according to this conception of it, was no longer to consist in the exercise of power by those who for any reason might happen to possess it, but in the uniform application of principles freely accepted as rules of conduct.

Inevitably, as human nature is constituted, taking into account the unconscious as well as the conscious springs of action, and judging by all the experience of the past, it was distinctly foreseen that there would be in the community conflicts of interest and conflicts of opinion which, if unrestrained, would

lead to violence. To prevent that consequence, it would be necessary that these conflicts be adjudicated before the bar of reason, as reason was embodied in the law. The balance-wheel of the entire system, as conceived by its founders, was, therefore, the judiciary; to be composed of judges duly set apart and provided for in such a manner as to liberate them from the necessities, the interests, the prejudices, and the ambitions which might actuate other men, and thus render them impartial servants of the State, personally neutral as regards the contestants appealing to them for justice, and animated by no motive except the sentiments of honor and responsibility.

Such, then, in its nature and intention, is the judicial function, the adjudication of differences in the light of the law. Imperfect in performance it may always be, and probably will be, so long as human nature remains imperfect; but, if justice, and not

advantage, is to be considered the ideal toward which the State is to approximate, progress will consist, not in unsettling the judiciary, but in rendering it more expert, more independent of popular agitation, and more conscious of its high responsibility.

THE DOCTRINE OF "JUDICIAL SUPREMACY"

If there must be in human government any authority deserving to be characterized as "supreme," it is, assuredly, that which is charged with determining what, by the agreement of the people, constitutes the law.

The Supreme Court of the United States, writes Mr. Bryce, is "the guarantee of the minority, who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction."

There is in this comment no invidious

distinction between the "majority" and the "minority," as if the greater number were always wrong and the lesser number always right. Its true meaning is, that one man, standing alone if the case may be, and opposed by powerful interests that otherwise might completely crush him, may appeal to a tribunal which, despite these interests, whatever they are and whatever clamor they may raise, may demand, even against the combined opposition of the government itself, that justice be accorded him; and, if his cause be just, neither President nor Congress, though commanding armies and navies, can wring from him one of his inherent rights.

It is readily comprehensible, therefore, that the fathers of the Constitution believed they were inaugurating a new era in the history of the world. For the first time, they were, in reality, subjecting every branch and organ of government to the supremacy

of law as interpreted by impartial judges. In this unique achievement was accomplished all that past ages had striven to obtain—the basing of authority on fixed principles of justice rather than upon the will of an absolute sovereign; the elimination of brute force as an element of government; and the protection of individual rights against the encroachments of individuals, of powerful interests, and even of the State itself.

The passing years only strengthened the conviction of the founders of the nation, and Daniel Webster, the great expositor of the Constitution, voiced the opinion of his time when he said: "No conviction is deeper in my mind than that the maintenance of the judicial power is essential and indispensable to the very being of this government. . . . I am deeply sensible, too, and, as I think, every man must be whose eyes have been open to what has passed around him for the last twenty years, that the judicial power is

the protecting power of the whole government."

In this respect, the system adopted by the United States is far in advance of any other. From many of the European governments we have, no doubt, much to learn as regards most matters of administration, and especially in respect to the employment of trained experts permanently retained in the service; but no other country in the world possesses the guarantees of individual liberty and inherent rights that are accorded by the Constitution of the United States. Many other nations have borrowed much from the American Republic, in particular a written constitution; but none of them has embodied in its form of government the original feature which chiefly characterizes the American conception, namely, the supremacy of fundamental law over extemporaneous legislation, with the judicial guarantee afforded by the authority of the State and Federal courts.

Praise for our system has, nevertheless, not been wanting. Professor Dicey, the greatest, perhaps, of English writers on the subject, though a strong advocate of the British system, has expressed the conviction that the British Empire would be benefited if it possessed an analogue of our Supreme Court; and declares, that the "glory of the United States is, to have devised or adopted arrangements under which the Constitution became in reality the supreme law of the land."

OBSTACLES TO JUDICIAL SUPREMACY

Other nations, owing either to the perfection of their administration, the influence of their traditions, or the continuity of their institutions, or all of these combined, have dispensed with the distinctive features of the American Constitution; but the need of the elements characteristic of the American system has been distinctly felt by most of

them. This is especially true of their international relations. While the forty-eight States of the American Union, in spite of wide diversities, constitute a unit in which all parts are subject to one judicial control, the States of Europe, large and small, are, for the most part, from a judicial point of view, entirely separate entities, with no effective means of obtaining a juridical solution of the differences arising between them.

The efforts put forth in the international conferences at The Hague to develop at least an outline of written law for the conduct of sovereign States, and to organize an international tribunal of justice for the settlement of their disputes, attest the interest felt by several governments in an extension of law, in the sense of mutual obligation, even over wholly independent sovereign powers; but at the same time reveal the nature of the obstacles to that achievement.

Those obstacles are: (1) the indisposition of certain States, cherishing the idea of absolute sovereignty, to accept the principle of mutual obligation as the basis of the law of nations; and (2) their unwillingness to submit the differences between them to any kind of judicial decision.

If we were to look to the example of these nations alone for the principles of human government, we should inevitably draw the conclusion that force is still the essential basis of the State, and that it is the prerogative of the stronger to dictate the law. It seems at times as if this is the final conclusion which history compels us to reach; and that the destiny of man is, and will always be, to yield submission to the preponderance of purely arbitrary power, in such forms as it may be able to assume—now in the garb of absolute despotism, now in the shape of overwhelming national armaments, now in the guise of State control

through financial influence, now through the demand of potential classes in the community for obedience to their will, and now through popular misconceptions of equity promoted and rendered influential through the sophistries of ambitious disturbers of social order.

THE DANGER OF RECURRENT ABSOLUTISM

The important matter for the citizen to comprehend and constantly recall is that a battle of ideas is going on in which, consciously or unconsciously, he must take a part. Passivity and inertness simply class him with the party attached to absolutism; for the reason, that, under conditions of passivity and inertness, absolutism, in some form, inevitably resumes its sway. The moment men cease to appreciate their rights and liberties, the unconscious process of political decay proceeds; for, as we have previously seen, there exists no natural and

inherent law of human progress. If not persistently resisted, imperialism, in one or another of its many disguises, is certain to return. The law of the natural world is the survival and the triumph of the strong. It is necessary, therefore, to guard against arbitrary power, under whatever mask it may appear. There is a tendency, one may say even a fatality, in those who possess it to make it the source of law; and this it has always been until intelligence found a way to restrain it. Left to the free play of natural appetites, passions, and ambitions, uncontrolled by respect for the authority of law as mutual obligation—without regard to nominal forms of government, whether monarchical, oligarchic, or democratic—the State has always become absolute, inherent personal rights have been denied or overridden, and the will of the stronger has become the rule.

The only safe refuge from despotism is

the shelter created by human intelligence, applying to the problems of government the results of experience. The whole of civilization depends not merely upon obedience to law, but upon the renunciation by each individual of the temptation to make his own will the source of law. And this is true also of governments, in their relation to one another and to the citizen. It is certain that without power to punish disobedience to just laws and to repress violence, the State would be impotent to secure the rights and liberties of which it is the guarantor; and that measure of force, together with the means of defense against external aggression, must, therefore, be accorded to the State. But it is only when a State *itself* submits to law, irrespective of the extent of its power, that it can rightly claim the loyal allegiance of its citizens.

For a system of government which, in the very charter of its existence, has voluntarily

made this renunciation of arbitrary power, and which faithfully respects its pledges, a right-minded citizen may well entertain a sentiment of unqualified devotion. Such a birthright is not to be lightly regarded; but it is more than a birthright, it is a sacred trust. To maintain it may require no dangerous exposure and no cruel sacrifice, but only vigilant activity; but, if the call should come, it would be the duty of every citizen to offer freely upon the altar of its defense his possessions, his person, and his life.

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