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POLITICAL SCIENCE

AND

COMPARATIVE CONSTITUTIONAL LAW

VOLUME I

SOVEREIGNTY AND LIBERTY

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TO

the memory of my former friend and teacher,

Prof. Dr. Johann Gustav Droysen,

these volumes, as the first-fruits of a work begun many years ago under his guidance, are reverently and affectionately inscribed.

PREFACE.

When, a score of years ago, I first read Hegel's *Philosophie der Geschichte*, I resolved that, should I ever write a book, I would dispense with an introduction. I shall now keep, substantially, that self-made promise; and yet I feel myself necessitated to preface my work with a few words, in order that I may briefly explain to the public why I presume to ask its indulgent attention to another treatise upon an old subject, and in order that I may make due acknowledgment of my gratitude to two friends, who have rendered me invaluable service in the preparation of these volumes.

I believe it was Goethe who said that men should live before they write. It is, indeed, a serious thing to ask the world to read a book. It should never be done, unless the book answers a purpose not fulfilled, or not so well fulfilled, by some book already existing. The publication of a new book in the domain of Political Science is never justifiable unless it contains new facts; or a more rational interpretation, or a more scientific arrangement, of facts already known; or a new theory.

It is this consideration which has caused me to hesitate long before offering this work to the public, — so long that I have sometimes feared it would share the fate of Mr. Casaubon's Key. I cannot claim that it contains any facts before unknown. I believe that I advance, in some cases, a different interpretation of facts, and a different conclusion from facts, than have been, heretofore, presented. Whether that inter-

pretation be more rational than what has gone before, or that conclusion more logical, are questions whose decision must rest with my readers. If, however, my book has any peculiarity, it is its method. It is a comparative study. It is an attempt to apply the method, which has been found so productive in the domain of Natural Science, to Political Science and Jurisprudence. I do not claim to be the first author who has made this attempt. It is the method chiefly followed by the German publicists. In the French, English, and American literatures, it is, on the other hand, relatively new. Boutmy, Bryce, Dicey, Moses, and Wilson have, indeed, already broken the ground, but the field is capable of a much wider, and also a more minute, cultivation.

It is here that I have chosen to lay out my work, and I trust it will be found that some slight advance has been made in the development of the comparative method in the treatment of this domain of knowledge.

My most grateful acknowledgment for aid in the preparation of this work is due to my friend and colleague, Prof. Dr. Munroe Smith, who, in the midst of other arduous duties, has read the proof sheets of the entire text, and has made many most invaluable criticisms and suggestions upon it, which, almost without exception, have been accepted and incorporated in the work. My most sincere thanks are also due to my friend and former pupil, Dr. Robert Weil, who has, with great care and fidelity, verified all the references, and prepared the table of contents, the table of cases, and the index. His kindly aid has greatly lightened my labors, and his exactness has preserved me against many an error.

JOHN W. BURGESS.

WINOOSKI HIGHLANDS, MONTPELIER, VT.,
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Part I.

POLITICAL SCIENCE.

Book I.

THE NATION.

CHAPTER I.

THE IDEA OF THE NATION.

Primarily and properly the word nation is a term of ethnology, and the concept expressed by it is an ethnologic concept. It is derived from the Latin *nascor*, and has reference, therefore, primarily to the relations of birth and race-kinship. It has become, however, one of the commonest catchwords of modern political science. Especially is it so used and abused by French, English and American publicists. The Germans, on the other hand, are more exact and scientific in their political and legal nomenclature. They confine the word and the idea more nearly to their original and natural place, and find another term and concept for political and legal science. We shall do well to imitate their example; and we shall escape much confusion in thought and language by fixing clearly the meaning of this term in our own minds, and using it only with that meaning. As an abstract definition, I would offer this: A population of an ethnic unity, inhabiting a territory of a geographic unity, is a nation.

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

the geographic unity partially fail, or some of the elements of the ethnic unity are wanting.

Further, the definition requires explanation. By geographic unity I mean a territory separated from other territory by high mountain ranges, or broad bodies of water, or impenetrable forests and jungles, or climatic extremes, — such barriers as place, or did once place, great difficulties in the way of external intercourse and communication. By ethnic unity I mean a population having a common language and literature, a common tradition and history, a common custom and a common consciousness of rights and wrongs. Of these latter the most important element is that of a common speech. It is the basis of all the rest. Men must be able to understand each other before a common view and practice can be attained. It will be observed that I do not include common descent and sameness of race as qualities necessary to national existence. It is true that they contribute powerfully to the development of national unity; but a nation can be developed without them, and in spite of the resistance which a variety in this respect frequently offers. Undoubtedly, in earliest times, sameness of race was productive of a common language and a common order of life; but the early mixing of races by migration, conquest and intermarriage eliminated, in large degree, the influence of this force. Territorial neighborhood and intercourse soon became its substitutes. In the modern era, the political union of different races under the leadership of a dominant race results almost always in national assimilation. Thus, although the nation is primarily a product of nature and of history, yet political union may greatly advance its development, as political separation may greatly retard it. Sameness of religion was once a most potent power in national development, but the modern principle of the freedom of religion has greatly weakened its influence.

Where the geographic and ethnic unities coincide, or very

nearly coincide, the nation is almost sure to organize itself politically, — to become a state. There can, however, be political organization without this. The nation must pass through many preliminary stages in its development before it reaches the political, and meanwhile other forces will control in larger degree the formation of the state. Some forms of political organization are even based upon national hostility between different parts of the population subject to them. This is almost always the case in the despotic and absolute systems, as I shall point out a little more particularly further on. The Emperor Francis II of Austria is reported to have once said to the French ambassador at his court: "Mes peuples sont étrangers les uns aux autres et c'est tant mieux. Ils ne prennent pas les mêmes maladies en même temps. En France, quand la fièvre vient, elle vous prend tous le même jour. Je mets des Hongrois en Italie et des Italiens en Hongrie. Chacun garde son voisin; ils ne se comprennent pas et se detestent. De leurs antipathies nait l'ordre et de leur haine reciproque la paix générale."[1] It is only when the state reaches, in the course of its development, the popular or democratic form, that national unity exerts its greatest influence. In fact, as I shall endeavor to show further on, the existence of national unity is the indispensable condition for the development of that form.

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

Not all nations, however, are endowed with political capacity or great political impulse. Frequently the national genius

[1] Bluntschli, Lehre vom modernen Stat, B. I, S. 110, Anmerkung.

expends itself in the production of language, art or religion; frequently it shows itself too feeble to bring even these to any degree of perfection. The highest talent for political organization has been exhibited by the Aryan nations, and by these unequally. Those of them remaining in the Asiatic home have created no real states;[1] and the European branches manifest great differences of capacity in this respect. The Celt, for instance, has shown almost none, the Greek but little, while the Teuton really dominates the world by his superior political genius. It is therefore not to be assumed that every nation *must* become a state. The political subjection or attachment of the unpolitical nations to those possessing political endowment appears, if we may judge from history, to be as truly a part of the course of the world's civilization as is the national organization of states. I do not think that Asia and Africa can ever receive political organization in any other way. Of course, in such a state of things, the dominant nation should spare, as far as possible, the language, literature, art, religion and innocent customs of the subject nation; but in law and politics it is referred wholly to its own consciousness of justice and expedience.

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

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

[1] Bluntschli, Altasiatische Weltideen.

CHAPTER II.

THE PRESENT GEOGRAPHICAL DISTRIBUTION OF NATIONS AND NATIONALITIES.

I MAKE the distinction indicated in the heading of the chapter between the distribution of nations and of nationalities in order to emphasize a very important difference. When I speak of the distribution of nations, I refer to populations of different nationality occupying separate territories. When, on the other hand, I speak of the distribution of nationalities, I have in mind populations of different nationality scattered over the same territory. The political results of these two kinds of distribution are very different; and our political science will suffer confusion of thought unless we keep this distinction clearly in mind.

I will not treat this topic universally, but only in its application to the states of Europe and to the United States; because, as I have before remarked, only Europe and North America have succeeded in developing such *political* organizations as furnish the material for scientific treatment, and though the subject be not one directly of political science, yet it is entirely in its relation to political science that it has interest for us.

I.

If we regard exclusively the reasons of physical geography, we ought to find nine national unities upon the territory to which we give the name of Europe. I do not speak of the "continent" of Europe, because Europe is really the great northwestern peninsula of the continent of Asia, and because I wish to include in the territory of Europe the Brit-

ish Islands. These geographical unities are none of them perfect, and they vary greatly in distinctness of boundary and in superficial extent.

As the first and most perfect of these, I would designate the southwestern peninsula: bounded by the Mediterranean Sea on the east; by the same, the Strait of Gibraltar and the Atlantic Ocean on the south; by the Atlantic Ocean on the west, and by the Bay of Biscay and the Pyrenees on the north; lying, we may roughly say, between longitudes 2° east and 9° west, and between latitudes 36° and 44° north; forming thus very nearly a square, and having a superficial area of about 230,000 square miles.[1]

As second, and next in the perfection of natural boundaries, I would put the islands lying between the North Sea, the English Channel, and the Atlantic Ocean; filling up about two-thirds of the surface between longitudes 2° east and 10° west, and latitudes 50° and 59° north, and having a superficial area of 120,832 square miles.[2] The chief defect in the unity of this territory is the separation of the large western island from the others by a body of water from ten to sixty miles in breadth, — not a very serious break in itself considered, but one which, connected with other unfavorable conditions, is sufficient to throw many impediments in the way of an uniform and easy political development.

Third, and next in the order of distinct natural boundary, I would place the territory lying between the Mediterranean Sea and the Pyrenees on the scuth, the Atlantic Ocean on the west, the English Channel and the North Sea on the north, and the Maritime and Cottian Alps, the Jura, the Vosges and the Ardennes on the east. Roughly speaking, it is comprehended between longitudes 6° east and 2° west, and

[1] Encyclopædia Britannica, Vol. XXII, Plate 6; Statesman's Yearbook, 1889, pp. 395 and 477.

[2] Encyclopædia Britannica, Vol. VIII, Plate 9; Statesman's Yearbook, 1889, p. 253.

between latitudes 44° and 51° north, and has an area of about 220,000 square miles.[1] The chief defect in this boundary is on the northeast, where, from the present city of Liége to the North Sea, there is no physical separation of the territory east and west, unless we take the course of the river Meuse. I believe that the geographers, the historians and the political scientists are now about agreed upon the proposition that rivers are not, as a rule, to be regarded as proper boundaries of geographic unities. They are the diameters and radii of such unities rather than the circumference. We must therefore consider the line from Liége to the North Sea — whether following the line of longitude, or that of the shortest distance, or the curvatures of the Meuse — to be artificial. It is the open gateway between the lands of the south shore of the North Sea and the Baltic and those of the English Channel far to the south and west.

Fourth, following still the order of geographic perfection, I would reckon the middle peninsula: bounded on the north, northeast and northwest, by the Alps; and on the east, south and west, by the branches of the Mediterranean. It lies obliquely across longitudes 7° and 18° east, and latitudes 37° and 47° north, and measures in square miles about 116,000.[2] The principal defects in this territory as a geographic unity are, first, its great length as compared with its mean breadth, — it is more than seven hundred miles long, with an average width of about one hundred miles, — second, the fact that the shoulder of the peninsula is almost cut from the arm by a range of mountains, the Apennines, having a mean elevation of about five thousand feet; and, third, the fact that the whole length of the peninsula is separated into a distinct east and west side by this same mountain range. These are

[1] Encyclopædia Britannica, Vol. VIII, Plate 9; Statesman's Yearbook, 1889, pp. 43 and 86.

[2] Encyclopædia Britannica, Vol. VIII, Plate 9; Statesman's Yearbook, 1889, pp. 356 and 521.

serious defects. They have always exercised, and do still exercise, unfavorable influences upon the national development of the population inhabiting this, in many respects, highly favored land.

Fifth, and next in the order of completeness in demarcation, I would place the eastern peninsula. It has a marine boundary on all sides except the north. On the north the line of the Balkans, running almost parallel with the latitude, furnishes a natural separation for about four-fifths of the distance from east to west. At the latter point it is lost in the transverse coast ranges. On the east, also, the narrowness of the straits separating it from Asia Minor is a great defect. The great topographical irregularity of this territory makes it impossible to fix upon any one or upon a few geographic centres. Its contour and formation are favorable to the development of numerous petty differences in nationality It is very difficult to fix its longitudinal and latitudinal position in general terms. We may help ourselves a little in the fixing of our conceptions by the general statement that it lies between 19° and 27° east longitude, and 37° and 42° north latitude.[1] It has a superficial area of about 100,000 square miles.[2]

Sixth. The great northern peninsula has geographic isolation, if not geographic unity. Its boundary is one of nature upon all sides, except across its neck. Here an artificial line must be taken. It lies obliquely across the longitudes 5° and 25° east, and the latitudes 55° and 70° north.[3] Its superficial area is about 300,000 square miles.[4] It has no geographic centre. A long mountain range on the west coast, descending gradually into a long strip of low land on the east coast, is its general topographic feature.

[1] Encyclopædia Britannica, Vol. VIII, Plate 9.
[2] Statesman's Yearbook, 1889, pp. 325 and 538.
[3] Encyclopædia Britannica, Vol. VIII, Plate 9.
[4] Statesman's Yearbook 1889, pp. 496 and 507.

Seventh. Next in the order of the principle which we have been following, I think we should designate the territory bounded by the Ardennes, Vosges and Jura on the west, by the Alps and Western Carpathians on the south and southeast, and by the North Sea and the south coast of the Baltic on the north. On the east the line of nature fails. From the district about the present city of Cracow we must reach the Baltic, either upon the line of longitude, or that of shortest distance, or by the curvatures of the river Vistula, — all of which are artificial, from our standpoint. The line of shortest distance measures about three hundred miles. Here, then, is a very great defect in boundary. Here is the broad and open way from the far east into the middle and north of Europe. Moreover, the demarcation of this territory is not perfect upon the west. From the northern extremity of the Ardennes to the North Sea is only a surveyor's line, or, at best, only the line of a narrow river (the Meuse). This territory is therefore exposed, both upon the east and the west; and what nature has withheld from it must be made good by art. Its configuration is not bad. It is almost a square; lying between 6° and 19° east longitude, and 46° and 54° north latitude,[1] and having a superficial area of about 300,000 square miles.[2] Its topography is not inharmonious, though presenting much variety.

Eighth. The territory bounded on the north, northwest and northeast by the Noric Alps and the Carpathians, on the east by the Black Sea, on the south by the Balkans, and on the south and southwest by the Carnic and Dinaric Alps, forms a fair geographical unity. It is the valley of the Danube, from the point where this greatest of European rivers breaks through the mountain gate, just above Vienna, to its mouth. Its configuration is rather irregular. It lies, for the most part, between longitudes 12° and 27° east and lati-

[1] Encyclopædia Britannica, Vol. VIII, Plate 9.

[2] Statesman's Yearbook, 1889, pp. 23, 58, 117, 378, 440, 521.

tudes 42° and 49° north,[1] and measures in square miles about 280,000.[2] It has several very serious defects in natural boundary. The first and chiefest is on the east, where the Carpathians, after approaching to within one hundred and fifty miles of the Black Sea, suddenly swing around to the west, forming an acute angle about the district of the present city of Kronstadt, and run for one hundred and fifty miles almost due west, then, turning southerly, cross the Danube, forming the celebrated Iron Gate, and, trending southeastward again, reach almost to the Balkans. In fact, this part of the boundary is so very faulty that it appears to me possibly more scientific to exclude the district south and east of the lower Carpathians from this territory, and connect it with the ninth division. In the southwest, between the Dinaric Alps and the western end of the Balkans, is an open way; also in the northwest, between the Noric Alps and the western Carpathians. On the other hand, the topography is more uniform than that of any of the divisions before described.

Ninth, and lastly. The territory bounded on the southwest by the Carpathians, on the west by the Baltic Sea, on the north by the Arctic Ocean, on the east by the Obdorsk and Ural Mountains and the Caspian Sea, and on the south by the mountains of the Caucasus and the Black Sea, has some of the qualities of a geographical unity, connected with several serious defects. In configuration it is a parallelogram not much removed from the square. It lies, for the most part, between longitudes 22° and 60° east, and latitudes 45° and and 70° north,[3] having a superficial area of more than 2,000,000 square miles.[4] Its topography is not only uniform, but positively monotonous. Its natural boundaries, however, break down upon almost every side; in the west, as against both

[1] Encyclopædia Britannica, Vol. VIII, Plate 9.
[2] Statesman's Yearbook, 1889, pp. 23, 463, 538.
[3] Encyclopædia Britannica, Vol. VIII, Plate 9.
[4] Statesman's Yearbook, 1889, p. 440.

divisions six and seven; in the southwest, against division eight, — unless, as I have before suggested, the valley of the Danube below the Iron Gate be connected with this division, which would then make its southwestern boundary the southern Carpathians and the Balkans. This is, however, a greatly mooted question, and one pregnant with great political results. If we look exclusively to the reasons of physical geography, however, I cannot see why it would not be the more scientific disposition. It seems to me that ethnological and political considerations have been allowed to warp the judgments of many of the geographers in regard to this point. Another most serious defect is upon the eastern boundary, where, for six hundred miles, nothing but the Ural River separates this territory from the continent of Asia.

Although the continent of North America is between three and four times as large as all Europe, yet we do not find here the geographic variety which exists there. Regarding only natural geographic boundaries, we can hardly make out more than three geographic unities, *viz;* the territory lying between the Appalachian range and the Atlantic seaboard; that bounded by the Appalachian range and the North Atlantic on the east, the Arctic Sea on the north, the Gulf of Mexico on the south, and the Rocky Mountains on the west and southwest; and that lying between the Rocky Mountains and the Pacific Ocean. It will be seen at a glance that the physical features of North America differ wholly from those of Europe in one respect, *viz;* the great mountain ranges of North America cut the territory always longitudinally. Consequently we are referred to climatic differences here, in higher degree than in Europe, for national boundaries. Taking into account these climatic differences, we can enumerate six tolerably well defined territorial unities. The first is the table-land lying between the Gulf of Mexico and the Caribbean Sea on the east and the Pacific Ocean on the west, stretching obliquely across the parallels of longitude from 82° to 115°

west, and the parallels of latitude from 10° to 30° north,[1] and measuring in superficial area about 875,000 square miles.[2] The second is the territory lying between the Appalachian range and the Atlantic coast, stretching obliquely across the longitudinal lines from 60° to 85° west, and the lines of latitude from 25° to about 50° north,[3] and measuring in superficial area about 400,000 square miles.[4] The third is the region lying between the 30th and 50th degrees of north latitude, bounded by the Rocky Mountains on the east and the Pacific Ocean on the west, stretching obliquely across longitudes 110° to 125° west,[5] and having a superficial area of about 865,000 square miles.[6] The fourth is the continuation of the same region toward the north, between the same eastern and western boundaries, and stretching obliquely across the lines of longitude from 110° to 165° west, and the lines of latitude from 50° to 70° north.[7] The area of this territory must be something like 800,000 square miles.[8] The fifth is the vast basin of the Mississippi and Missouri rivers, bounded by the Appalachian Mountains on the east; by the Rocky Mountains on the west; by the Gulf of Mexico on the south; and on the north by the Great Lakes, and, west of these, by the water-shed between the Mississippi and Missouri rivers and the Saskatchewan, Lake Winnipeg, and Lake Superior. It lies, for the most part, between latitudes 29° and 48° north, and between longitudes 75° to 110° west at the northern boundary; at the south the territory narrows, lying between 85° and 100° west.[9] It has a superficial area of

[1] Encyclopædia Britannica, Vol. I, Plate 10.
[2] Statesman's Yearbook, 1889, pp. 620, 628, 637, 645, 651, 669.
[3] Encyclopædia Britannica, Vol. I, Plate 10.
[4] Statesman's Yearbook, 1889, pp. 593, 691.
[5] Encyclopædia Britannica, Vol. I, Plate 10.
[6] Statesman's Yearbook, 1889, pp. 593, 691.
[7] Encyclopædia Britannica, Vol. I, p. 10.
[8] Statesman's Yearbook, 1889, pp. 593, 691.
[9] Encyclopædia Britannica, Vol. I, Plate 10.

nearly 1,750,000 square miles.[1] The sixth and last territorial unity is the almost immeasurable region lying north of the fifth division and east of the Rocky Mountains, between latitudes 49° and 80° north, and longitudes 60° and 115° to 140° west. Its area can be stated only approximately at about 3,000,000 square miles.[2]

II.

Let us next examine if the ethnographical lines coincide with the boundaries of these geographical unities. Beginning with Europe, we find that the first of its physical divisions is inhabited by three ethnically distinct populations, *viz;* Spaniards, Portuguese, and Basques, in about the proportion of 19,000,000, 6,000,000 and 500,000.[3] These three populations occupy different parts of this territorial division. The first spreads over the main body of it. The second occupies a narrow strip upon the western coast, and the third inhabits a small area upon the northern boundary about midway between its extremities. There are, moreover, about 70,000 Morescoes and 10,000 Jews scattered over the southern half of this territory, and some 55,000 gypsies rove through it. In the west some 3000 or 4000 negroes are to be found. Of the three chief varieties, only the third is an original race. The first is an amalgamation of Iberians, Celts, Romans, Goths, Alani, Suevi, Vandals, Moors, Arabs and Jews;[4] and the second of Romans, Suevi and Moors, influenced later by Jewish and French elements.[5]

We find the second of our geographic unities inhabited by two well defined ethnical varieties, *viz;* the English and the

[1] Statesman's Yearbook, 1889, p. 691 ff.

[2] Statesman's Yearbook, 1889, p. 593; Encyclopædia Britannica, Vol. I, Plate 10.

[3] Spruner-Menke, Handatlas für die Geschichte, No. 13. Statesman's Yearbook, 1910, pp. 1109, 1219.

[4] Andree, Geographisches Handbuch, S. 644.

[5] *Ibid.* S. 637.

Celts. Here again these different populations occupy different parts of this territorial division. Most of the western island and the extreme western and extreme northern parts of the eastern island are inhabited chiefly by Celts. The English chiefly occupy all the rest; but each variety is scattered in greater or less degree over the territory principally occupied by the other. Of these two only the Celtic is an original race. The English nationality is Teutonic, with a slight Celtic and a very slight Roman admixture. The English manifests the inclination and the power to absorb more and more the Celtic element. At present they stand in the numerical proportion of about 40,000,000 English to about 5,000,000 Celts.[1] I reckon the number of Celts at a designedly generous figure.

In the geographical division which I have numbered as third are found no less than six ethnical varieties of population inhabiting different parts of this territory, *viz;* French, Walloons, Italians, Teutons, Celts and Basques[2]—to say nothing of the unamalgamated elements scattered through the whole. The French occupy by far the greater part of this division. The other varieties inhabit districts lying close upon the boundaries: the Basques are along the Pyrenees; the Celts occupy the outer half of the western peninsula; the Walloons and Teutons are upon the northeast, and the Italians upon the extreme southeast. In numerical strength we may reckon the French in round numbers at about 37,700,000, the Walloons at about 5,500,000, the Teutons at about 3,800,000, the Celts at about 1,250,000, the Basques at about 150,000, and the Italians at about 125,000.[3] Of these, the Basques, Celts and Teutons (Flemings) may be regarded as probably simple races; the rest are amalgamated populations. The French blood con-

[1] Statesman's Yearbook, 1910, pp. 11 ff.
[2] Spruner-Menke, Handatlas, No. 13.
[3] Statesman's Yearbook, 1910, pp. 632, 749.

tains Iberian, Celtic, Roman and Teutonic (Frankish, Burgundian and Norman) elements.[1] The Walloons are a mixture of Celt, Teuton and Roman, and the Italians in this division have the same ethnical composition.

In our fourth division of the European territory we find the lines of physical geography and ethnography most nearly coincident. The population is so nearly pure Italian that the variation is not worth the mention in a treatise upon political science. The Italian is an amalgamated population, and it is of great importance that we observe the fact that, in the different parts of this territory, different elements enter into the compound, and the same elements in far different degree. In the north, Celt, Roman and Teuton make it up, with the latter as the preponderating component; in the middle, we have the same elements, but with the Roman in the ascendency; while in the south, Greek and Saracen, and later, French and Spaniard, have contributed to the ethnic constitution of the population. The numerical strength of the entire Italian nation is now about 35,000,000.[2]

On the other hand, great ethnical variety is to be found in the fifth division, the eastern peninsula of Europe. The entire extremity of the peninsula, the eastern half of it and the coasts of the Ægean Sea, of the Sea of Marmora and of the Black Sea, are inhabited by an exclusively or a mainly Greek population. The western half of the peninsula, excluding the extremity but reaching up to the northern boundary of the division, is occupied by the Albanians. The middle lands above the extremity of the peninsula are inhabited by South Slavs; and between these and the Greeks upon the coasts of the Sea of Marmora and the Black Sea, a Turkish population resides. The numerical strength of these ethnically different populations may be roughly estimated at 3,800,000 Greeks, 1,800,000 Turks,

[1] Andree, Geographisches Handbuch, S. 684.

[2] Statesman's Yearbook, 1910, pp. 947–8.

1,700,000 Slavs and 2,000,000 Albanians.[1] Of these four populations, only two can be regarded as simple and original races, *viz;* the Turks and the Slavs. The Greeks are a mixture of Hellenic, Slavic and Turkish elements, with the former greatly preponderant; and the Albanians are probably compounded from Greek, Epirotic and Illyrian elements. Even the Slavs in this division have a little Teutonic admixture.

Our sixth geographic division shows again a greater ethnical harmony in the population. The great mass are Teutons, of the northern or Scandinavian branch, numbering about 8,500,000; but a wedge-shaped bit of territory reaching from the neck almost to the crotch of the peninsula, inhabited by about 25,000 Finns and Lapps, separates the Teutons, as to their places of abode, into an eastern and a western branch.[2] The influence of this separation upon the politics of the peninsula has been very great, as we shall see further on.

In the seventh division, on the other hand, the lines of geography and ethnography again separate. The great mass of the population are, indeed, Teutons, of the Germanic branch, to the number of nearly 70,000,000; but upon the southwest boundary exists a French-Walloonish element, to the number of about 4,000,000; and a very large block of this territory, upon the east, is occupied by Slavs, to the number of more than 12,000,000 souls. Moreover, the 3,000,000 Teutons inhabiting the peninsula on the north of this division must be reckoned with the Scandinavian branch of the Teutonic stock.[3] The dominant race in this division is also scattered

[1] Spruner-Menke, Handatlas, No. 13; Statesman's Yearbook, 1904, pp. 789, 1195; Andree, Geographisches Handbuch, S. 790.

[2] Spruner-Menke, Handatlas, No. 13; Statesman's Yearbook, 1910, pp. 1062, 1234.

[3] Spruner-Menke, Handatlas, No. 13; Statesman's Yearbook, 1904, pp. 419, 557, 578, 664, 913, 1030, 1177; and 1910, pp. 725, 825.

throughout those parts chiefly inhabited by the other ethnical elements; and upon the northeast, Slavic components are to be found in the parts occupied chiefly by the Germans.

The eighth geographic division presents us with a population of decided ethnical variety. Some of the other divisions, indeed, offer as great variety in this respect, but in none are the different elements so evenly balanced numerically as in this. In the west and northwest are the 3,000,000 Teutons; in the north, south and southeast, the 13,000,000 Slavs; in the centre the 15,000,000 Hungarians; in the east the 2,500,000 Rumans.[1] If we connect the valley of the Danube from the Iron Gate to its mouth with this division, then we have 3,000,000 more Rumans, 1,500,000 more Slavs and about 550,000 Turks; but from a geographic standpoint, as I have before indicated, I think it questionable if we should do this. Of these populations, the Hungarians and Rumans are mixed races. The predominant simple element in the Hungarian compound is the Magyar, originally a Turanian branch. The other elements are Teuton, Slav and Ruman. In the Rumanic compound the predominant element is Roman. The Rumans are the descendants of the Roman colony planted by Trajan during the second century in the province of Dacia. They have become somewhat modified in their pure Romanism by contact and amalgamation with Slavic elements.

The ninth geographic division of Europe presents the greatest ethnical variety in its population, but contains a decidedly dominant race. It is calculated that about one hundred and twenty different race-branches inhabit this territory, speaking at least forty different languages or linguistic dialects.[2] I shall enumerate only the different races, and not descend into the details of tribes and idioms. First, the

[1] Spruner-Menke, Handatlas, No. 13; Statesman's Yearbook, 1904, pp. 419, 664, 1013; and 1910, pp. 596, 612.

[2] Andree, Geographisches Handbuch, S. 764.

great Slavic race, numbering about 110,000,000 souls, occupies the centre and reaches out nearly to the circumference upon all sides. On the western limits are about 3,000,000 Teutons, 3,000,000 Jews, 3,500,000 Lithuanians and 1,000,000 Tschuds; on the northern, about 2,500,000 Finns; on the eastern, about 1,500,000 Finns, 2,000,000 Tartars and 100,000 Kalmucks; and on the southern, about 2,000,000 Caucasians, about 2,000,000 Jews, about 1,000,000 Tartars and about 700,000 Rumans.[1] If we connect with this division the valley of the Danube below the Iron Gate, as appears to me more scientific geographically, then we must add to the population about 3,000,000 more Rumans, 1,400,000 more Slavs and 550,000 Turks.[2] It should be remarked that the Slavic element in the northern part of this division is by no means so pure as in the middle and southern parts. In the north it is considerably amalgamated with both the Germanic and Scandinavian branches of the Teutonic race, and also with Finnish elements. This ethnical fact has had immense influence upon the political conditions within this territory, as will become apparent in our further considerations.

We come now to the continent of North America. For the purposes of this work it will be necessary to analyze only that population which inhabits the territory lying between the thirtieth and fiftieth degrees of north latitude and stretching from sea to sea. It will be seen by referring to pages 11 and 12 that this territory comprehends the second, third and fifth geographic unities. In ethnic character there is no very sharp distinction between the populations occupying these different divisions. In all of them an amalgamated Teutonic race is the dominant factor. But there are many qualifications to be noted in regard to this progressing amalgamation and domination. In the first place, the different branches of the Teutonic race are not yet fully amalgamated.

[1] Statesman's Yearbook, 1904, pp. 1030 ff.; and 1910, pp. 1148 ff.
[2] *Ibid.* 1910, pp. 1013, 1216.

The Anglo-Americans, Germans and Scandinavians do not yet mingle their blood completely. They do not, however, inhabit separate portions of either of these territorial divisions, and the Anglo-American element is still so greatly in numerical ascendency that no ethnical conflict need be feared between them. There is little doubt but that the Anglo-American element will absorb the other Teutonic elements. It has already, however, suffered some modification thereby, and will undoubtedly suffer more. In the second place, many other ethnical varieties are strongly represented in all three of these divisions. The first in the order of strength is undoubtedly the negro race, which must now number between 10,000,000 and 12,000,000 of souls, seven-eighths of whom reside in the territory of our second and fifth divisions below the thirty-seventh parallel of north latitude, and make up about one-third of its entire population. They do not intermarry with the other elements of the population to any degree worth mention. There is, therefore, little prospect of physical amalgamation between them. Next in order of numerical strength is the Celtic race, not inhabiting any distinctly separate portion of territory but scattered for the most part through the cities and larger towns of the division east of the Appalachian range. There are at least 2,500,000 of foreign-born Celts within this territory, to say nothing of those born therein of pure Celtic parentage. The Celt and the Teuton, again, do not amalgamate very readily, though of course far more readily than the negro and the white races. There are, moreover, about 125,000 Mongols throughout these three divisions, nineteen-twentieths of them in the territory of the third division. The white races show about as little tendency to amalgamate with them as with the negro race. There are also about 60,000 Indians scattered through the three divisions as regular elements of the population, and about 240,000 as exceptional elements, having distinct tribal organizations. These latter are to be found in the third

division and the western part of the fifth division of this territory. Finally, there is a considerable Romanic element in the southern part of all three of these divisions. It is not, however, foreign-born. It is the indigenous progeny of the original Spanish and French settlers in these parts. It amalgamates easily with the Teutonic element. Its influence, however, in the development of opinion and institutions is unmistakable.

In these three divisions there must be nearly 93,000,000 inhabitants. If now we should say that all white persons resident within this territory before 1820, and their pure descendants, are Americans, we could hardly figure more than 40,000,000 of these at present (1911) from any known percentages of excess of births over deaths.[1] We know, on the other hand, that about 25,000,000 white persons have immigrated into this territory since 1820. The other 40,000,000, then, of the present white population must be the living remainder of these 25,000,000, together with their pure descendants and the issue of marriages contracted between these new-comers and those whom I have termed Americans. We know also that the present foreign-born population resident within this territory numbers between 9,000,000 and 10,000,000 souls, mostly Teutons and Celts. About one-half are Teutons, and about one-third are Celts. This has been about the proportion throughout this whole period of immigration. It will thus be seen that the ethnic character of the population of this territory is very cosmopolitan. It is, as to the greater part of it, a compound of many elements, mostly congenial and not difficult of amalgamation, having for its base the English branch of the Teutonic race; but it is conglomerated, so to speak, with other elements, numerically quite strong, with which it shows no tendency, or little tendency, to amalgamate. The influence of this ethnical

[1] Richmond M. Smith, Emigration and Immigration, p. 60.

character upon the political and legal civilization of this population has been and is still very great, as we shall see again and again in our further considerations.

III.

Let us now examine the political divisions of Europe and North America, and see how nearly they coincide with these divisions of physical geography, on the one side, and of ethnography, on the other. Where the three exactly correspond, there we have a completely national state, the strongest and most perfect form of modern political organization. In the degree that they diverge from this relation, they depart from this condition of strength and perfection. Almost every question concerning the governmental system and organization of a state springs out of these relations. A clear and minute understanding in regard to them is therefore absolutely necessary to the student of political science and constitutional law.

The first geographic division which we have made of the European territory is occupied by two states, Spain and Portugal. The latter occupies a strip about one hundred miles in breadth stretching along the Atlantic coast from the southern extremity to the mouth of the river Minho and measuring about 33,000 square miles. The part occupied by Spain measures about 198,000 square miles.[1] There is no natural geographic boundary between the two states. On the other hand, the ethnographic lines are tolerably distinct, and correspond with the lines of political geography. The Spanish and Portuguese nations are, however, so nearly akin that ethnic considerations do not seem to demand the complete political separation of the two countries. The ethnic difference justifies nothing more than a federal organization of government; and when the absence of any geographic

[1] Statesman's Yearbook, 1889, pp. 395, 477.

boundary is taken into account, it seems that a single state with a federal system of government would best satisfy all the conditions. It must not be overlooked in this connection that the ethnographic unity of Spain suffers a slight break in the northern part of its territory by the existence of the nation of Basques. These, however, number only about 500,000 souls, while the population of Portugal is about 6,000,000, and that of Spain about 20,000,000.[1]

In our second geographic division the lines of physical and political geography may be said to coincide, although the geographic coherence between England, Scotland and Ireland is not perfect. This imperfection is not sufficient to amount to division, and yet it is sufficient to amount to distinction. The superficial area of the kingdom is 120,832 square miles. On the other hand, there are two nationalities in the kingdom of Great Britain, *viz;* the English and the Celtic, occupying tolerably distinct parts of the territory of the state and standing in the numerical relation of about 40,000,000 to 5,000,000.[2] Some of the knottiest questions of British politics have arisen from this relation.

The third geographic division of Europe is occupied by two states, *viz;* France and Belgium, and by a portion of Holland, in the proportion of 204,092 square miles by France, 11,373 by Belgium, and the remainder, about 4,600, by Holland.[3] Between these states, therefore, the lines of physical geography fail. Neither do the ethnographic lines coincide exactly with those of political geography. The French nationality is predominant south and southwest of Brussels, while to the north, northwest and northeast of Brussels the German nationality predominates in an ever-increasing degree of purity as we advance in these directions. On the other hand, the French state includes in its population a Walloonish element along the eastern border, some 1,250,000

[1] Statesman's Yearbook, 1910, pp. 1109, 1219.
[2] *Ibid.* pp. 11 ff., 27. [3] *Ibid.* pp. 465, 580, 913.

Celts in the northwestern peninsula, about 115,000 Basques on the spurs and in the northern valleys of the Pyrenees and about 125,000 Italians in the southeast corner. We may call its population about 40,000,000.[1] The population of the Belgian state may be reckoned at about 8,000,000 souls,[2] one half French, and the other half German, — unless, indeed, we call the whole population Walloonish, and say simply that the Germanic element predominates on the one side, and the French upon the other.

It is in our fourth geographic division that the lines of political geography are most nearly coincident with those of natural physical division on the one hand and of ethnography on the other. It is only on the north that the Italian state is not quite coincident with geographic and ethnographic Italy. The latter reaches to the crest of the Alps, while the former stops in some points at the foothills; as, for instance, in the district about Lugano. I would roughly estimate that Italy occupies 114,500 square miles of the 115,000 in this fourth division, and that there are about 600,000 members of the Italian nation subject to France, Switzerland and Austria.

Regarded wholly from the standpoint of physical geography and ethnography, it appears somewhat strange that an Italian national state has been so long in coming to its development. Reasons of ecclesiastical and external politics must be looked to for the explanation.

The fifth division of the European territory is occupied by two states, *viz;* Greece and Turkey in Europe. Greece covers 25,000 square miles and Turkey about 75,000. It must also be remembered that about 50,000 square miles of the territory in the eighth physical division belong nominally to Turkey.[3] The line of physical geography between Greece and Turkey is therefore wanting. Neither do the lines of

[1] Statesman's Yearbook, 1910, p. 749.
[2] *Ibid.* p. 632. [3] Statesman's Yearbook, 1904, pp. 789, 1195.

ethnography and those of political geography coincide. The Greek state does not include the whole of the Greek nation, but it does include a considerable Albanian population in the western half of its territory north of the Morea. The whole population of Greece is about 3,000,000.[1] The Albanian population on the northwest probably numbers 175,000 souls. On the other hand, the Turkish state in Europe contains part of the Greek nation, part of the South Slavic nation, and part of the Albanian nation; the Greeks in the territory on the east and south, the Slavs in the middle, the Albanians in the west, and the Turks thrown in between the Greeks and the Slavs. The proportion is, in the rough, 1,250,000 Greeks to 1,700,000 Slavs, 1,500,000 Turks, and 1,500,000 Albanians.[2] Moreover, the Turkish state in Europe maintains a nominal suzerainty over a territory and population north of the natural boundary of this geographic division. This population is for the most part Slavic, and numbers nearly 4,000,000 of souls.[3] It needs no argument to show that this state is in a very precarious condition by reason of its ethnical status, and that its political dissolution is only a question of a little time.

In our sixth division exist now two independent states. The kingdoms of Sweden and Norway are separated from other states by broad bodies of water on all sides except across the neck of the peninsula, where they are separated from Russia, for the most part, only by the insignificant streams of the Tornea and the Tana. The superficial area of the two kingdoms is 297,005 square miles, of which 172,876 lie in Sweden and 124,129 in Norway.[4] The population of these states is almost exclusively North Teutonic or Scandinavian; but about 25,000 Finns and Lapps occupy a broad strip of this area, extending from the neck to the crotch of the peninsula, and separating the Teutonic

[1] Statesman's Yearbook, 1910, p. 920.
[2] *Ibid.* 1904, p. 1195; Andree, Geographisches Handbuch, S. 790.
[3] Statesman's Yearbook, 1904, p. 1195. [4] *Ibid.* pp. 1142, 1157.

population into an east and a west branch. So influential has this condition been in the political development of this people as finally to cause the separation of these states, or at least to aid in causing it. Moreover, not all the northern branch of the continental Teutons are resident within the kingdoms of Sweden and Norway. The Danes must, I think, be classed ethnologically with the Swedes and Norwegians. The population of Sweden is now 6,000,000 souls and that of Norway nearly 3,000,000.[1]

In our seventh division the lines both of political geography and of ethnography diverge from that of physical geography. The territory of the German Empire, measuring 211,135 square miles, covers the most of it; but the states of Denmark, Luxemburg and Switzerland, about three-fourths of Holland, about one-fourth of the Austrian Empire and some 15,000 or 20,000 square miles of Russian territory lie within it.[2] On the other hand, a part of the German Empire lies outside of this division, *viz;* East Prussia, *i.e.* Prussia beyond the Vistula, some 15,000 square miles in area. The ethnographic and politico-geographic lines diverge almost as widely. The German empire fails on the northwest, south and southeast to comprehend the entire German nation; while on the east and northeast it includes a considerable Slavic population. There are thus no natural boundaries between the German Empire and Denmark, Holland, Switzerland, Austria and Russia. The German Empire has now a population of nearly 70,000,000 of souls. Of these about 4,000,000 are Slavs, about 4,000,000 are Walloons and French, about 160,000 are Lithuanians, and about 150,000 are Scandinavian Teutons. About 60,000,000 therefore are Germans. Denmark has a

[1] Statesman's Yearbook, 1910, pp. 1062, 1234.

[2] Denmark has an area of 14,124 square miles; Luxemburg, of 998; Holland, 12,648, about one-fourth of which lies in our third physical division; Switzerland, 15,892, about 500 square miles of which lies in our fourth physical division. Statesman's Yearbook, 1889, pp. 23, 58, 117, 377, 378, 439, 521.

population of something over 3,000,000, nearly all North Teutonic. That part of Holland included within this division is inhabited by about 4,000,000 persons, nearly all Germans. That part of Switzerland included in this division has a population of 2,700,000, four-fifths German and the other one-fifth French. Lastly, about 16,000,000 of the subjects of the Austrian Empire and about 3,500,000 of the subjects of the Russian Empire are resident within this seventh division of Europe's physical geography.[1]

In our eighth division the lines of political geography are again greatly divergent from those of physical geography and ethnography. About two-thirds of the Austrian Empire, the whole of Servia, and those Turkish provinces assigned by the Treaty of Berlin of 1878 to Austrian administration, and lately incorporated into the Austro-Hungarian state, *viz;* Bosnia, Hertzegovina and Novi Bazar, lie within it. If we should make the parallel of latitude from Kronstadt in the eastern angle of the Carpathians to the Black Sea a part of the boundary of this division instead of following the curves of the Carpathians, which I hardly think so correct scientifically, then would this division contain also that part of Rumania originally named Wallachia and Bulgaria. On the other hand, about one-third of the Austrian Empire lies outside of this division. That is to say, the larger part of the Austrian Empire — all of it lying to the south of the Noric Alps and the Carpathians — is geographically united with Servia, Bosnia and Hertzegovina, and geographically separated from that part of its territory lying to the north, northwest and northeast of these ranges. The Austrian Empire has an area of 240,942 square miles, of which about 51,695 lie in our seventh physical division, and about 30,307 in the ninth. Servia has an area of 18,750; Bosnia, 16,417; Hertzegovina, 4,308; Novi Bazar, 3,522; Bulgaria, 24,360; Wallachia, 27,500.[2] In the second place, the

[1] Statesman's Yearbook, 1904, pp. 419, 557, 664, 913, 1031, 1177; and 1910, pp. 596–1148. [2] *Ibid.*, 1889, pp. 23, 407, 463, 538, 546.

political boundaries within this division do not correspond any more nearly with those of ethnography. The western and northwestern parts of the Austrian Empire are inhabited by Germans, to the number of about 10,000,000 souls; the northern, northeastern and southwestern parts by Slavs, to the number of about 15,000,000; the eastern by Rumans and Magyars, to the number of about 5,000,000; and the middle and southern parts by Hungarians, to the number of about 17,000,000. About 3,000,000 or 4,000,000 more of these different nationalities are scattered throughout these different parts so as to make a mixture of all these elements in greater or less degree in each of these parts. Servia, Bosnia, Hertzegovina and Novi Bazar are pretty thoroughly South Slavic. The population of Servia must number at this date about 2,500,000; that of Bosnia, Hertzegovina and Novi Bazar about the same. The South Slavic race also makes up about two-thirds of the population of Bulgaria; the other one-third is for the most part Turkish. Taken together, we may count them, at present, for about 2,000,000 souls. Finally, the state of Rumania in both of its original parts, *viz;* Moldavia and Wallachia, is mostly national Rumanian, with a Turkish population on the southeast border.[1]

Our ninth physical division is covered almost entirely by the territory of the great Russian Empire in Europe, to the vast extent of 2,095,504 square miles. Only about 15,000 or 20,000 square miles of this immense territory lie outside of this division, *viz;* a strip on the western boundary, which must be reckoned in the seventh division. On the other hand, I think the state of Rumania, about 48,000 square miles in area, the principality of Bulgaria, 24,360 square miles in area and about 15,000 square miles of the territory of Prussia, and about the same amount of Austrian territory, should fall within this division.[2] The lines of political geography and ethnography are still more divergent. Russia in

[1] Statesman's Yearbook, 1904, pp. 421, 438, 1013, 1103; *Ibid.*, 1910, pp. 596, 612.
[2] *Ibid.* 1889, pp. 117, 407, 440, 546.

Europe has a population of more than 130,000,000 souls. About 110,000,000 or more of these belong to the Slavic race or nation. They inhabit the centre of the Empire, and reach nearly to the circumference on all sides; but on the western limit there are about 3,000,000 Teutons, 3,000,000 Jews, 2,500,000 Lithuanians and 1,000,000 Tschuds; on the northern about 2,000,000 Finns; on the eastern about 1,500,000 Finns, 2,000,000 Tartars and 100,000 Kalmucks; and on the southern about 2,000,000 Caucasians, 2,000,000 Jews, 1,000,000 Tartars and 700,000 Rumans. The population of Rumania is almost wholly national Ruman, and numbers about 7,000,000 souls; that of Bulgaria is about 4,500,000 souls, of whom two-thirds are South Slavs, and the remainder for the most part Turks.

Finally, when we turn to North America again, we find a very different set of relations between political and physical geography and ethnography from those obtaining in Europe. In the first place, the United States occupies about all of this territory that is well fitted for the geographical basis of a great state. Its area, excluding Alaska, is about 3,000,000 square miles. It stretches over the second, third and fifth physical division of the continent, ignoring the natural separation of its domain into three parts by the Appalachian and the Rocky Mountains, and recognizing the boundaries of climate rather than those of mountain ranges. In the second place, the population of the United States, numbering some 92,000,000 souls, is far more cosmopolitan than that of any European state. As I have already indicated under Div. II of this chapter, its base is English; but it has become amalgamated in more or less degree with German and Celtic elements, so that of the 92,000,000 hardly more than 40,000,000 can be regarded as pure American, as I have elsewhere shown.[1] Moreover, Romanic elements have entered into the

[1] See page 18.

amalgamation in some degree, — in the extreme southern parts of the United States in large degree. At least three-fourths of the 10,000,000 or 12,000,000 of negroes inhabiting the United States reside in the commonwealths lying south of the Ohio and east of the Mississippi rivers, and make up about one-third of the population of this section. As I have already remarked, they do not amalgamate with the white races; or more correctly, the white races do not amalgamate with them. They seem destined to maintain a separate race existence. On the other hand, the 9,000,000 or 10,000,000 of foreign-born inhabitants of the United States — in large majority Germans and Celts — are scattered, for the most part, over that part of the territory of the United States lying north of the thirty-seventh degree of north latitude; and while they do not amalgamate as freely with the Anglo-Americans as these latter do among themselves, still there are no such insurmountable impediments in the way of the same as manifest themselves when the white races are brought into contact with negroes and Mongols. Finally, there are a few Indians and Chinese, hardly to the number of half a million, resident within the territory of the United States. Their presence would scarcely be felt except for the fact that about 240,000 of the Indians inhabit a separate part of this territory and live under tribal organizations, and three-fourths of the Chinese reside in a single commonwealth, *viz;* California.

CHAPTER III.

NATIONAL POLITICAL CHARACTER.

THIS is a very difficult and, in some cases, a very puzzling subject. Some nations manifest apparently contradictory traits at different periods of their development. I think we should take this fact as evidence that such traits should be excluded from our estimate of national character. Only such traits as perdure through all the periods of a nation's life should be regarded as peculiar to that nation. If we adopt this rule, I think we shall be delivered from much confusion of thought.[1]

The great races from which the nations of modern Europe and North America have sprung are the Greek, the Latin, the Celt, the Teuton and the Slav. I shall therefore confine my treatment of political psychology to these races. I shall not trouble my readers with an enumeration of the political traits ascribed to these different nations by the long list of writers upon this subject. I shall simply take the peculiar political institution which each of these races has produced and to which it has clung, as expressive of its innermost political life in all the periods of its development; and from this I shall attempt to lead up to a recognition of the political ideals peculiar to each race. It seems to me that in this manner we shall gain a surer foothold and shall be less likely to substitute fancy for fact.

[1] Waitz, Anthropologie der Naturvölker; Vollgraff, Erster Versuch einer wissenschaftlichen Begründung, sowohl der allgemeinen Ethnologie durch die Anthropologie wie auch der Stats- und Rechtsphilosophie durch die Ethnologie oder Nationalität der Völker.

First. The Greeks and Slavs. To my mind the political institution in which the political life of the Greeks incorporated and still incorporates itself is the community. In this the Greek and the Slav agree, and for this reason I treat of them under the same heading. In the organization of the community, the narrowest circle of political life, the political genius of the Greek and Slavonic natures has been chiefly occupied and almost exhausted.[1] According to their political psychology the whole power of the state must be in the community; *i.e.* the sovereignty must be in the community. Any wider organization could be regarded only as an interstate league, exercising delegated and very limited powers, while the rights of individuals as against the community could have no existence. In this form of political organization the way lies open for a development, in richest variety, of other qualities of genius, such as music, poetry, art, eloquence, philosophy and religion, provided the germs of the same exist in the psychologic character of the nation; but the race that clings to this form of political organization manifests a low order of political genius. Its failings must quickly reveal themselves in political history in three general directions, *viz;* in the poverty and insecurity of individual rights, in the inability to regulate the relations between different communities, and in weakness against external attack. All three of these failings point in the same direction. They make it absolutely necessary that the political organization, in highest instance, of the Greek and Slav nations should be undertaken by a foreign political power. It is no play of chance nor contradiction in character that Greece has been obliged to receive its general constitution from the Roman,

[1] Laurent, Études sur l'histoire de l'humanité, Tome II, pp. 1–26; Curtius, Griechische Geschichte, Bk. I, S. 1–32, 175; Bluntschli, Lehre vom modernen Stat, Bd. I, S. 37, 40; Leroy-Beaulieu, L'Empire des Tsars et les Russes; Wallace, Russia; Foulke, Slav or Saxon, p. 64. Freeman, Federal Government, c. 2.

and then the Turk, and now the Teuton; nor that the Slavs are subject to the autocratic government of the Osmanli and the Teutonic dynasties of Rumanoff and Hapsburg. This is the natural result of their want of any comprehensive political genius, and of the exhaustion of their political powers of production in the creation of the lowest forms of political organization. Whether they will ever become educated up to higher degrees of political capacity or are destined permanently to work upon the development of other lines of culture than the political is, I think, still a question. I do not believe that a consciousness of the political principles which we call modern has been awakened in any considerable number of the Greeks or Slavs, and I do not think that these few more enlightened minds are aware how totally unpolitical their national genius is. They are constantly being disappointed by the want of support from the masses in projects of general political reform. I remember that some eight years ago a distinguished professor of the University of Moscow, one of the best lawyers and publicists of the Slavic race in Russia, said to me that he expected the Russian revolution to be an accomplished fact before his return to Moscow, which was to be in about six months from the date of this conversation. Time has shown that he was wofully mistaken, and his mistake was in the assumption that the imperial government appeared as unnatural and tyrannic to the mass of the Russian subjects as to himself. I do not suppose there is an American schoolboy fifteen years of age, who has not wept bitter tears over the fate of Poland, and who does not think he could reform the government of Russia; and I have no doubt he would begin by dethroning the Czar, abolishing the army and disestablishing the Church; and I am sure that the practical result of the procedure would be that in less than twenty-five years there would be little left of the civilization of Russia and possibly of the civilization of Europe. Let the Cæsarism of Russia be made as honest

and benevolent as possible, but Cæsarism must be the general system of its political organization so long as the political psychology of the Slav is what it is and what it has been. Let the Danish monarchy in Greece educate its subjects politically with patience and probity, but the Teutonic power must remain there if Greece would be preserved in the future from the political barbarism of her past. The same is true in regard to the Slavs of Austria and the Danubian principalities. Foreign genius and power must continue to make for them their political organizations of highest instance as it has done in the past and does now; for in all of these cases the incapacity is not one of degree simply, but one of kind. There is a diversity of gifts among nations as among individuals, and political genius seems no more to have been bestowed equally than other kinds of genius. The dispensation of history seems rather to be and to have been that some nations shall lead the world in religion, others in art, science and philosophy, and still others in politics and law.

Second. The psychology of the Celt is, if anything, still more unpolitical than that of the Greek and the Slav. This is somewhat singular, since the Celts were further removed, territorially, from the influences of Asia than the Greeks and Slavs. The Asiatic ideals, customs and traditions are all unpolitical, as I have elsewhere shown, and it might naturally be expected that when the branches of the Aryan stock migrated into Europe, those going farther westward would be under better conditions for curing this failing in the Asiatic character. However that may be, the Celts made nothing of it. On the other hand, while they produced and elaborated a great religion, and developed a learned and powerful priesthood, they have never created anything in the political world, which they can call distinctively their own, higher than the personal clanship. Personal attachment in small bodies to a chosen chief is the peculiar political trait of the Celtic

nations.[1] This has appeared in all places occupied by them and throughout all the periods of their history. The effect of such a political character has always been the organization of the Celtic nations into numberless petty military states; in each of which individual rights have been always ignored; between all of which civil war has been the permanent status; and against all of which foreign force has been continually successful. Neither in highest nor lowest instance have they created, or can they create, political institutions of a superior order. Many examples of reckless courage and touching personal devotion are to be met with in their history, but they have never manifested any consciousness of political principles or developed any constancy in political purpose. Government has always been to them a personal affair, and they have never appeared to be conscious of committing any political wrong in using its powers for personal advantage. Violence and corruption have always marked the politics of Celtic nations. These are failings, on their part, rather than positive vices. They spring from the want of political genius rather than from vicious political character. The Celtic nations have always been compelled finally to suffer political organization by foreign talent, and have therefore become subject nations. It would be irrational to dismiss this fact with a phrase of indignation concerning unrighteous spoliation. The Celtic nations were more warlike than either the Roman or the German. Had they possessed fair talent for political organization, they would have been irresistible: Italy, France and Britain would to-day be subject to them. Whatever their gift may be, it certainly is not, and never has been, political, and their subjection to politically endowed nations in state organization is both natural and necessary. Any other order of things would confound distinctions which are implanted in the psychologic character of nations.

[1] Martin, Histoire de France, Vol. I, p. 45 ff.; Prichard, History of Mankind, Vol. III, p. 175.

Third. On the other hand, the Roman or Latin nations have shown from the earliest beginnings of their history great political and legal genius. The organization of government and the legal formulation of rights were the problems for the solution of which they seemed peculiarly called. But the juristic and political faculties are themselves not simple, but compound. In any particular nation some of their elements may exist in much higher degree than others, and *vice versa*. The Teutons are also nations of high political and legal endowment, as we shall see further on, but differing widely from the Romans in the composition of their genius, as will appear in the organizations created by them. A further discrimination is therefore necessary. What part of the great problem of legal and political organization has been worked out by the genius of the Roman, and what other part by that of the Teuton? I cannot answer the first part of this question better than Professor Rudolph von Ihering has done in the introduction to his brilliant and suggestive work, *Geist des römischen Rechts*. "Three times," he writes, "has Rome dictated the order of the world; three times has she bound the nations in unity together: the first time, when the Roman people were still in the fulness of their power, in the unity of the state; the second time, after they had fallen into decline, in the unity of the church; the third time, in consequence of the reception of the civil law in the middle ages, in the unity of rights, — the first time by the force of arms, but the second and third times by the power of ideas. The world-historic significance and mission of Rome, expressed in a single word, is the triumph of the principle of universality over national diversity."[1] The universal empire is the institution peculiar to the Roman political genius. Its creation is a majestic work of political capacity and power.

[1] Von Ihering, Geist des römischen Rechts, Bd. I, S. 1; Bluntschli, Lehre vom modernen Stat, Bd. I, S.S. 29, 41.

Theoretically, at least, it solves the question of defence of the state against the external foe; in fact, the complete realization of its principle would leave no external foe. It would comprehend mankind within its organization. It also solves the question of the relation of all local organizations within the state; in fact, in the complete realization of its principle there can be no local organization, except in the form of an imperial agency. On the other hand, it has its failings; and so soon as its mission has been fulfilled — the mission of diffusing political civilization, of making it universal — these failings appear unendurable. But these failings are the necessary result of the imperial ideal itself. In the first place, it must sacrifice in large degree the liberty of the individual. Uniformity is its deepest law; and therefore its rule of individual conduct must be that what is not expressly permitted is forbidden. In the second place, it cannot popularize its government. Unity and fixedness of purpose must reign always and everywhere. In the long run this will stifle and destroy the capacity of the individual subject. His education and development must not only be neglected, but hindered and prevented, in order that his unquestioned obedience may be secured and preserved. In the third place, the empire must suppress all local autonomy. Law and ordinance must be one and the same in every district and for every part of the population. In the fourth place, it must ignore and destroy all ethnical differences, for that, above all things, is its mission and its significance. It is of course possible that if the seat of the Roman Empire had remained in Rome instead of having been removed to Constantinople, and if the German invasion had been successfully repelled, the strong political genius of the Romans might in practice have found the remedy for these failings, and been able to reconcile uniformity with variety, sovereignty with liberty; but I do not think it probable. This was not the mission of the Romans in the civilization of the world, if history is to be taken as indis-

putable evidence of the missions of nations. This was the work reserved to the Teutonic nations.

Fourth and last, we come to consider the political psychology of those nations which may be termed the political nations *par excellence, viz;* the Teutonic; and if the peculiar creations of these nations may be expressed in a single phrase, it must be this: that they are the founders of national states.[1] It is not possible to divine whether this great work could have been accomplished by them without the training in Roman ideas received by them in the Carolingian Empire and the Roman Christian Church. The Teutons strove most earnestly and determinedly, during the earlier, pre-Frankish period of their political history, against even the necessary organization of the state, and came to the consciousness of their mission as the founders of national states, only after half a century of life in the European Empire of the great Charles; but education can only develop what already exists in seed and germ, and we may therefore conclude that no amount of Roman discipline, which was distinctly anti-national in its universality, could have evolved the national idea unless this had been an original principle of Teutonic political genius. Even before their union with each other and with Romanic populations in the Frankish Empire, the continental Teutons showed this national tendency, in that their political organizations were co-extensive, generally, with the lines of dialect and custom. Their restlessness under, and resistance to, the system of the European Empire sprang from their feeling of its unnational character; and since the division of the Empire in 843 they have pursued, with a gradually but continually growing consciousness of their political mission, their work of establishing states upon the principle of national union and independence. Almost every state of modern Europe owes its organization to the Teutons.

[1] Laurent, Études sur l'histoire de l'humanité, Tome X, p. 43.

The Visigoths in Spain, the Suevi in Portugal, the Lombards in Italy, the Franks in France and Belgium, the Anglo-Saxons and Normans in England, the Scandinavian Teutons in Denmark, Norway and Sweden, and the Germans in Germany, Holland, Switzerland and Austria have been the dominant elements in the creation of these modern national states; and to-day Teutonic houses are organizing Greece, Rumania, and the principalities along the Danube, and even Russia. The United States also must be regarded as a Teutonic national state. In the light of history and of present fact, our propositions cannot be successfully disputed, that the significant production of the Teutonic political genius is the national state; that only the Teutonic nations have produced national states; and that they have proved their intense positive force in this direction by creating national states upon the basis of populations belonging to other races, even upon the basis of a population belonging to a race of so high political endowment as the Roman.

The national state is the most modern product of political history, political science and practical politics.[1] It comes nearer to solving all the problems of political organization than any other system as yet developed. In the first place, it rescues the world from the monotony of the universal empire. This is an indispensable condition of political progress. We advance politically, as well as individually, by contact, competition and antagonism. The universal empire suppresses all this in its universal reign of peace, which means, in the long run, stagnation and despotism. At the same time, the national state solves the problem of the relation between states by the evolution of the system of international law. Through this it preserves most of the advantages of the universal empire while discarding its one-sided and intolerant character. In the second place, the national

[1] Bluntschli, Lehre vom modernen Stat, Bd. I, S. 52 ff.

state solves the problem of the relation of sovereignty to liberty; so that while it is the most powerful political organization that the world has ever produced, it is still the freest. This is easy to comprehend. The national state permits the participation of the governed in the government. In a national state the population have a common language and a common understanding of the principles of rights and the character of wrongs. This common understanding is the strongest moral basis which a government can possibly have; and, at the same time, it secures the enactment and administration of laws whose righteousness must be acknowledged, and whose effect will be the realization of the truest liberty. In the third place, the national state solves the question of the relation of central to local government, in that it rests upon the principle of self-government in both domains. In the perfect national state there can thus be no jealousy between the respective spheres; and the principle will be universally recognized that, where uniformity is necessary, it must exist; but that where uniformity is not necessary, variety is to reign in order that through it a deeper and truer harmony may be discovered. The national state is thus the most modern and the most complete solution of the whole problem of political organization which the world has as yet produced; and the fact that it is the creation of Teutonic political genius stamps the Teutonic nations as the political nations *par excellence*, and authorizes them, in the economy of the world, to assume the leadership in the establishment and administration of states.

CHAPTER IV.

CONCLUSIONS OF PRACTICAL POLITICS FROM THE FOREGOING CONSIDERATIONS IN REGARD TO PHYSICAL, ETHNICAL AND POLITICAL GEOGRAPHY, AND NATIONAL CHARACTERISTICS.

We conclude, in the first place, that national unity is the determining force in the development of the modern constitutional states. The prime policy, therefore, of each of these states should be to attain proper physical boundaries and to render its population ethnically homogeneous. In other words, the policy in modern political organization should be to follow the indications of nature and aid the ethnical impulse to conscious development.

Where two or more independent states are situated in one and the same geographical unity, it is presumably a sound policy which seeks the union of these states in a more general political organization or the absorption by one — the most capable and powerful — of the others. Which one of these courses should be pursued depends upon the circumstances of each case. If the populations of the several states vary in their ethnical character and yet possess about equal political capacity, the united state with a federal system of government will be the more natural arrangement and the one more easy of attainment. If, one the other hand, the population of one of them far excels the populations of the others in political endowment and power of political organization, then annexation and absorption of the other states by the superior state will work the best results in the advancement of political civilization. If, finally, the ethnical character of these different states be the same, then it will make little difference, as a rule, whether their unity be

attained by federalization or by absorption. When a state insists upon the union with it of all states occupying the same geographic unity and attains this result in last resort by force, the morality of its action cannot be doubted in sound practical politics, especially if the ethnical composition of the populations of the different states is the same or nearly the same. What unprejudiced publicist or statesman questions to-day the morality of the policy of Prussia in the foundation of the German Empire, or of Sardinia in the political unification of Italy? And who does not see that the further rounding out of the European states to accord still more nearly with the boundaries which nature has indicated would be in the interest of the advancement of Europe's political civilization and of the preservation of the general peace? It would expel the Turk from Europe: it would put an end to Russian intrigue in the valley of the Danube: it would give Greece the vigor and the power to become a real state; and it would bring the petty states of Switzerland, Denmark, Holland, Luxemburg, Belgium, and Portugal into connections which would enable their populations to contribute, in far greater degree, to the political civilization of the world, and receive, in far greater degree, the benefits of that civilization, than their present conditions permit. Even then there would be weak places enough in the boundaries of each national state, but their number would be greatly decreased, and the temptation to invasion which they offer greatly lessened.

On the other hand, if a state organization extends over several geographic unities, then there is good ground, in sound public policy, to consider whether the political civilization of the world would not be advanced by its separation into several independent states, corresponding in political extent with the boundaries indicated by nature. Especially will this be true if the ethnical character of the populations of these several geographic unities be different. If, however, the ethnical character be the same, the geographical reason

for partition is, in this day of steam and electricity, by no means conclusive.

Again, where the population of a state is composed of several nationalities, we are forced to conclude that it will be sound policy in the state to strive to develop ethnical homogeneity. The morality of a policy which insists upon the use of a common language and upon the establishment of homogeneous institutions and laws cannot be successfully disputed. Under certain circumstances the exercise of force to secure these ends is not only justifiable, but commendable; and not only commendable, but morally obligatory. Take, for example, this condition of things. A state, we will say, has a naturally exposed boundary. It must rely, therefore, in extraordinary degree upon the loyalty of that part of its population resident along such boundary; in other words, the intensest national spirit must exist here; and if it does not, the state must create it at all costs. If now a portion of this frontier population be ethnically hostile, the state is then in perfect right and follows a sound policy when, after having made all reasonable efforts to nationalize them, it deports them, in order to make way for a population which will serve as necessary defence against the violence and the intrigue of the foreign neighbor. It should, however, make other provisions for them, if possible, or pay them a just compensation for the expropriation of their vested rights. Again, let us suppose the case of a great colonial empire. Its life will depend, of course, upon the intensest nationality in that part of its territory which is the nucleus of the entire organization. It cannot suffer national conflicts to make this their battle-ground. The reigning nationality is in perfect right and pursues, from a scientific point of view, an unassailable policy when it insists, with unflinching determination, upon ethnical homogeneity here.[1] It should realize this, of course, through the peaceable means of influence and education, if

[1] Bluntschli, Lehre vom modernen Stat, Bd. I, S. 305.

possible. When, however, these shall have been exhausted in vain, then force is justifiable. It may righteously deport the ethnically hostile element in order to shield the vitals of the state from the forces of dissolution, and in order to create the necessary room for a population sufficient in numbers, in loyalty, and capacity to administer the empire and protect it against foreign powers. It should, of course, make other provision, if possible, for the deported population in less important parts of its territory, or at least make just compensation for the expropriation of vested rights; but the state cannot safely or righteously give way, in such a case, to sentimental politics and the claim of an inalienable right to fatherland. This cry is but a mockery in the mouths of men whose presence in the fatherland threatens to render it incapable of fulfilling its mission or maintaining its own existence. In practical politics we cannot lose the great *morale* in the petty.

A fortiori, a state is not only following a sound public policy, but one which is ethnically obligatory upon it, when it protects its nationality against the deleterious influences of foreign immigration. Every state has, of course, a duty to the world. It must contribute its just share to the civilization of the world. In order to discharge this duty, it must open itself, as freely as is consistent with the maintenance of its own existence and just interests, to commerce and intercourse, ingress and egress; but it is under no obligation to the world to go beyond these limits. It cannot be demanded of a state that it sacrifice itself to some higher good. It cannot fulfil its mission in that way. It represents itself the highest good. It is the highest entity. The world has as yet no organization into which a state may merge its existence. The world is as yet only an idea. It can give no passports which a state is bound to accept. The duty of a state to the world is a duty of which the state itself is the highest interpreter. The highest duty of a state is to pre-

serve its own existence, its own healthful growth and development. So long as foreign immigration contributes to these, it is sound policy not only to permit, but to cultivate it. On the other hand, when the national language, customs, and institutions begin to be endangered by immigration, then the time has come for the state to close the gateways partly or wholly, as the case may require, and give itself time to educate the incomers into ethnical harmony with the fundamental principles of its own individual life. It is a most dangerous and reprehensible piece of demagogism to demand that a state shall suffer injury to its own national existence through an unlimited right of ingress; and it is an unendurable piece of deception, conscious or unconscious, when the claim is made from the standpoint of a superior humanity. Certainly the Providence which created the human race and presides over its development knows best what are the true claims of humanity; and if the history of the world is to be taken as the revelation of Providence in regard to this matter, we are forced to conclude that national states are intended by it as the prime organs of human development; and, therefore, that it is the highest duty of the state to preserve, strengthen, and develop its own national character.

My second conclusion from the facts considered in the previous chapter is that the Teutonic nations are particularly endowed with the capacity for establishing national states, and are especially called to that work; and, therefore, that they are intrusted, in the general economy of history, with the mission of conducting the political civilization of the modern world. The further conclusions of practical politics from this proposition must be, that in a state whose population is composed of a variety of nationalities the Teutonic element, when dominant, should never surrender the balance of political power, either in general or local organization, to the other elements. Under certain circumstances it should not even permit participation of the other elements in

political power. It should, of course, exercise all political power with justice and moderation — it is these very qualities of the Teutonic character which make it *par excellence* political. It should also, of course, secure individual liberty, or civil liberty, as we term it here, to all; but, under certain circumstances, some of which will readily suggest themselves to the mind of any observing American, the participation of other ethnical elements in the exercise of political power has resulted, and will result, in corruption and confusion most deleterious and dangerous to the rights of all, and to the civilization of society. The Teutonic nations can never regard the exercise of political power as a right of man. With them this power must be based upon capacity to discharge political duty, and they themselves are the best organs which have as yet appeared to determine when and where this capacity exists. In a state whose controlling nationality is Teutonic, but which contains other ethnical varieties, it will always be sound policy to confer upon these alien elements the privilege of participating in the exercise of political power only after the state shall have nationalized them politically. It must not, of course, seek to prevent or delay nationalization in order to be able to exercise oppression — that would be to deny its very calling; but, on the other hand, it must not hasten the enfranchisement of those not yet ethnically qualified for reasons outside of such qualification. Again, another conclusion from our proposition in reference to the mission of the Teutonic nations must be that they are called to carry the political civilization of the modern world into those parts of the world inhabited by unpolitical and barbaric races; *i.e.* they must have a colonial policy. It is difficult for North Americans to regard this duty in its true light, in spite of the fact they themselves owe their own existence to such a policy. They are far too much inclined to regard any policy of this character as unwarrantable interference in the affairs of other states. They do not appear to give due con-

sideration to the fact that by far the larger part of the surface of the globe is inhabited by populations which have not succeeded in establishing civilized states; which have, in fact, no capacity to accomplish such a work; and which must, therefore, remain in a state of barbarism or semi-barbarism, unless the political nations undertake the work of state organization for them. This condition of things authorizes the political nations not only to answer the call of the unpolitical populations for aid and direction, but also to force organization upon them by any means necessary, in their honest judgment, to accomplish this result. There is no human right to the status of barbarism. The civilized states have a claim upon the uncivilized populations, as well as a duty towards them, and that claim is that they shall become civilized; and if they cannot accomplish their own civilization, then must they submit to the powers that can do it for them. The civilized state may righteously go still further than the exercise of force in imposing organization. If the barbaric populations resist the same, *à l'outrance*, the civilized state may clear the territory of their presence and make it the abode of civilized man. The civilized state should, of course, exercise patience and forbearance toward the barbaric populations, and exhaust every means of influence and of force to reduce them to subjection to its jurisdiction before adopting this policy of expulsion; but it should not be troubled in its conscience about the morality of this policy when it becomes manifestly necessary. It violates thereby no rights of these populations which are not petty and trifling in comparison with its transcendent right and duty to establish political and legal order everywhere. There is a great deal of weak sentimentality abroad in the world concerning this subject. So far as it has any intellectual basis, it springs out of a misconception of the origin of rights to territory, and a lack of discrimination in regard to the capacities of races. It is not always kept in mind that there can be no dominion over territory or

property in land apart from state organization, — that the state is the source of all titles to land and of all powers over it. The fact that a politically unorganized population roves through a wilderness, or camps within it, does not create rights, either public or private, which a civilized state, pursuing its great world-mission, is under any obligations, legal or moral, to respect. It would be a petty morality indeed which would preserve a territory capable of sustaining millions of civilized men for the hunting-ground of a few thousand savages, or make its occupation depend upon contract and sale with and by them.

Finally, we must conclude, from the manifest mission of the Teutonic nations, that interference in the affairs of populations not wholly barbaric, which have made some progress in state organization, but which manifest incapacity to solve the problem of political civilization with any degree of completeness, is a justifiable policy. No one can question that it is in the interest of the world's civilization that law and order and the true liberty consistent therewith shall reign everywhere upon the globe. A permanent inability on the part of any state or semi-state to secure this status is a threat to civilization everywhere. Both for the sake of the half-barbarous state and in the interest of the rest of the world, a state or states, endowed with the capacity for political organization, may righteously assume sovereignty over, and undertake to create state order for, such a politically incompetent population. The civilized states should not, of course, act with undue haste in seizing power, and they should never exercise the power, once assumed, for any other purpose than that for which the assumption may be righteously made, *viz;* for the civilization of the subjected population; but they are under no obligation to await invitation from those claiming power and government in the inefficient organization, nor from those subject to the same. The civilized states themselves are the best organs which have yet

appeared in the history of the world for determining the proper time and occasion for intervening in the affairs of unorganized or insufficiently organized populations, for the execution of their great world-duty. Indifference on the part of Teutonic states to the political civilization of the rest of the world is, then, not only mistaken policy, but disregard of duty, and mistaken policy because disregard of duty. In the study of general political science we must be able to find a standpoint from which the harmony of duty and policy may appear. History and ethnology offer us this elevated ground, and they teach us that the Teutonic nations are the political nations of the modern era; that, in the economy of history, the duty has fallen to them of organizing the world politically; and that if true to their mission, they must follow the line of this duty as one of their chief practical policies.

Book II.

THE STATE.

CHAPTER I.

THE IDEA AND THE CONCEPTION OF THE STATE.

Definitions of so comprehensive a term as the state are generally one-sided and always unsatisfactory. Nevertheless they are useful and helpful. This is primarily a question of political science. Not until the state has given itself a definite and regular form of organization, *i.e.* not until it has formed for itself a constitution, does it become a subject of public law. It may be said that a state cannot exist without a constitution. This is true in fact; but the state can be separated in idea from any particular form of organization, and the essential elements of its definition can be found in the principle or principles common to all forms. There are two ways of reaching the definition. The one is the process of pure philosophy, the other that of inductive logic. The one gives us an idea of the reason, the other a concept of the understanding. The two ought to coincide, but they more frequently differ. The sources of the difference are manifold. Either the speculation is colored by fancy, or the induction is not exhaustive. Either the idea is too abstract, or the concept too concrete. There is something deeper, too, than the intellectual character of the particular political scientist, which creates this disharmony between the idea and the concept of the state. The idea of the state is the state perfect and complete. The concept of the state is the state develop-

ing and approaching perfection. There is one thing, however, which modifies this divergence between the idea and the concept of the state, and that is the dependence, after all, of the speculative philosopher upon objective realities to awaken his consciousness of the idea. This brings the two nearer together. It makes the idea the pioneer of the concept, and the concept the stages in the realization of the idea. If we keep in mind the two processes followed in the formation of the definition, we shall be better able to reconcile the views of the different authors upon this subject. There is nothing more disheartening for the reader than to be dragged through a list of conflicting definitions at the beginning of a treatise, and to be required to select the principle before he knows the facts and details of the subject; still something of the sort must be done, briefly and tentatively at least, in order to give logical consistence to the work. The reader may take the preliminary definition upon trial at least, and accept it with a temporary faith.

From the standpoint of the idea the state is mankind viewed as an organized unit.[1] From the standpoint of the concept it is a particular portion of mankind viewed as an organized unit.[2] From the standpoint of the idea the territorial basis of the state is the world, and the principle of unity is humanity. From the standpoint of the concept, again, the territorial basis of the state is a particular portion of the earth's surface, and the principle of unity is that particular phase of human nature, and of human need, which, at any particular stage in the development of that nature, is predominant and commanding. The former is the real state of the perfect future. The latter is the real state of the past, the present, and the imperfect future. In a treatise, therefore,

[1] Bluntschli, Lehre vom modernen Stat, Bd. I, S. 34. "Der Stat ist die organizirte Menschheit. Der Stat ist der Mann."

[2] *Ibid.* S. 24. "Der Stat ist die politisch organisirte Volksperson eines bestimmten Landes."

upon public law, and upon political science only as connected with public law, we have to deal only with the latter. Our definition must, therefore, be that the state is a particular portion of mankind viewed as an organized unit. This definition requires a great deal of analysis and explanation.

I. What is the principle according to which the portions of mankind forming states are to be determined? No answer can be given to this question that will be valid for all times and conditions. In the ancient civilization the principle of common blood or a common faith, in the mediæval that of personal allegiance, and in the modern that of territorial citizenship, have chiefly determined the political divisions of the world. We must be careful, however, not to separate these principles, as to the time of their application, too exactly from each other. Each of them reaches out beyond its proper period and, so to speak, overlaps the next; creating that confusion in regard to citizenship and alienage which every public lawyer meets and dreads. But these answers are not wholly satisfactory. They resolve the problem in part, but they raise other and more difficult questions. How far will a bond of blood, or of faith, preserve sufficient strength to serve as the principle of political organization? What are the circumstances which direct personal allegiance towards this point or that? What are the conditions which make a particular territory the home of a state? With these questions, we have again entered the domains of geography, ethnology and the history of civilization. In so far as the modern state is concerned — *i.e.* in so far as the question is practical — I have attempted to show, in the previous book, what answer these sciences afford. As to the ancient and mediæval states, we can only say that their principles of organization left their political limits and boundaries uncertain and inexact, producing continual unrest and conflict.

II. What are the peculiar characteristics of the organization which we term the state?

First, I would say that the state is all-comprehensive. Its organization embraces all persons, natural or legal, and all associations of persons. Political science and public law do not recognize in principle the existence of any stateless persons within the territory of the state.[1]

Second, the state is exclusive. Political science and public law do not recognize the existence of an *imperium in imperio.* The state may constitute two or more governments; it may assign to each a distinct sphere of action; it may *then* require of its citizens or subjects obedience to each government thus constituted; but there cannot be two organizations of the state for the same population and within the same territory.[2]

Third, the state is permanent. It does not lie within the power of men to create it to-day and destroy it to-morrow, as caprice may move them. Human nature has two sides to it, — the one universal, the other particular; the one the state, the other the individual. Men can no more divest themselves of the one side than of the other; *i.e.* they cannot divest themselves of either. No great publicist since the days of Aristotle has dissented from this principle.[3] Anarchy is a permanent impossibility.

Fourth and last, the state is sovereign. This is its most essential principle. An organization may be conceived which would include every member of a given population, or every inhabitant of a given territory, and which might continue with great permanence, and yet it might not be the state. If, however, it possesses the sovereignty over the population, then it is the state. What now do we mean by this all-important term and principle, the sovereignty? I understand by it original, absolute, unlimited, universal power over the individual subject and over all associations of subjects. This is a proposition from which most of the publicists, down to the

[1] Bluntschli, Das moderne Völkerrecht, S. 216.
[2] Von Mohl, Encyklopädie der Staatswissenschaften, S. 72.
[3] *Ibid.* S. 71; Bluntschli, Lehre vom modernen Stat, Bd. I, S. 26.

most modern period, have labored hard to escape. It has appeared to them to contain the destruction of individual liberty and individual rights. The principle cannot, however, be logically or practically avoided, and it is not only not inimical to individual liberty and individual rights, but it is their only solid foundation and guaranty. A little earnest reflection will manifest the truth of this double statement.

First, power cannot be sovereign if it be limited; that which imposes the limitation is sovereign; and not until we reach the power which is unlimited, or only self-limited, have we attained the sovereignty. Those who hold to the idea of a limited sovereignty (which, I contend, is a *contradictio in adjecto*) do not, indeed, assert a real legal limitation, but a limitation by the laws of God, the laws of nature, the laws of reason, the laws between nations. But who is to interpret, in last instance, these principles, which are termed laws of God, laws of nature, laws of reason, and laws between nations, when they are invoked by anybody in justification of disobedience to a command of the state, or of the powers which the state authorizes? Is it not evident that this must be the state itself? It is conceivable, no doubt, that an individual may, upon some point or other, or at some time or other, interpret these principles more truly than does the state, but it is not at all probable, and not at all admissible in principle. It is conceivable, also, that a state may outgrow its form of organization, so that the old organization no longer contains the real sovereignty; and that an individual, or a number of individuals, may rouse the real sovereign to resist triumphantly the commands of the apparent sovereign as misinterpretations of the truths of God, nature, and reason. That would only prove that we had mistaken the point of sovereignty, and would teach the lesson that the state must always hold its form to accord with its substance. When the French National Assembly of 1789 disputed the commands of the King, it could find no ground to rest upon,

either in logic or in fact, until it declared the sovereignty to be in the nation — in the nation organized in the Assembly. The common consciousness is the purest light given to men by which to interpret truth in any direction; it is the safest adviser as to when principle shall take on the form of command; and the common consciousness is the state consciousness. In the modern national state we call it the national consciousness. The so-called laws of God, of nature, of reason, and between states are legally, and for the subject, what the state declares them to be; and these declarations and commands of the state are to be presumed to contain the most truthful interpretations of these principles, which a fallible and developing human view can, at the given moment, discover. It is begging the question to appeal to the consciousness of the world or of humanity against the consciousness of the state; for the world has no form of organization for making such interpretation, or for intervening between the state and its citizens to nullify the state's interpretation. I do not ignore the fact that some great publicists think they see in the body of general agreements, positive and customary, between states, called international law, the postulates of a consciousness wider than that of a single state. This may be true; but we must not forget that these agreements and customs are not law between a state and its own subjects unless the state recognizes them as such. For instance, it is a firmly established principle of our own constitutional law that our own governmental organs, authorized thereto by the state, are the interpreters, in last instance, of international law for all persons subject to their jurisdiction.[1] At the present stage of the world's civilization, a nearer approximation to truth seems to be attainable from the standpoint of a national state consciousness than from the standpoint of what is termed the consciousness of mankind. An appeal

[1] Thirty Hogsheads of Sugar *v.* Boyle, U. S. Reports, 9 Cranch.

to the consciousness of mankind, if it bring any reply at all, will receive an answer confused, contradictory, and unintelligible. In the far-distant future it may be otherwise; but for the present and the discernible future, the national state appears to be the organ for the interpretation, in last instance, of the order of life for its subjects. Contact between states may, and undoubtedly does, clarify and harmonize the consciousness of each; but it is still the state consciousness which is the sovereign interpreter, and the state power which is the sovereign transformer of these interpretations into laws. But, it may be objected, if sovereignty must have this character of infallibility, it should be denied to the state altogether. That would mean, at once and from the start, the annihilation of the state. The state must have the power to compel the subject against his will: otherwise it is no state; it is only an anarchic society. Now the power to compel obedience and to punish for disobedience, is, or originates in, sovereignty. This condition can, therefore, offer no loophole of escape from the proposition.

In the second place, the unlimited sovereignty of the state is not hostile to individual liberty, but is its source and support. Deprive the state, either wholly or in part, of the power to determine the elements and the scope of individual liberty, and the result must be that each individual will make such determination, wholly or in part, for himself; that the determinations of different individuals will come into conflict with each other; and that those individuals only who have power to help themselves will remain free, reducing the rest to personal subjection. It is true that the sovereign state may confer liberty upon some and not upon others, or more liberty upon some than upon others. But it is also true that no state has shown so little disposition to do this, and that no state has made liberty so full and general, as the modern national popular state. Now the modern national popular state is the most perfectly and undisputedly sovereign organ-

ization of the state which the world has yet attained. It exempts no class or person from its law, and no matter from its jurisdiction. It sets exact limits to the sphere in which it permits the individual to act freely. It is ever present to prevent the violation of those limits by any individual to the injury of the rights and liberties of another individual, or of the welfare of the community. It stands ever ready, if perchance the measures of prevention prove unsuccessful, to punish such violations. This fact surely indicates that the more completely and really sovereign the state is, the truer and securer is the liberty of the individual. If we go back an era in the history of political civilization, we shall find this view confirmed beyond dispute. The absolute monarchies of the fifteenth, sixteenth, and seventeenth centuries were, no one will gainsay, far more sovereign organizations of the state than the feudal system which they displaced; and yet they gave liberty to the common man at the same time that they subjected the nobles to the law of the state. In fact they gave liberty to the common man by subjecting the nobles to the law of the state.[1] Should we continue to go backward from the absolute monarchic system to those systems in which the sovereignty of the state was less and less perfectly developed, we should find the liberty of the individual more and more uncertain and insecure, until at last the barbarism of individualism would begin to appear.

At the beginning of this argument, I assumed the state to be deprived of its unlimited power over the individual. But who or what can do this? That which can be so deprived is not the state; that which deprives is the state. Really the state cannot be conceived without sovereignty; *i.e.* without unlimited power over its subjects. That is its very essence. Of course the state may abuse its unlimited power

[1] Ranke, Französische Geschichte, Bd. I, S. 34; Englische Geschichte, Bd. I, S. 97, 98; Von Sybel, über die Entwickelung der absoluten Monarchie in Preussen, S. 24 ff.; Krones, Handbuch der Geschichte Oesterreichs, Bd. IV, S. 488.

over the individual, but this is never to be presumed. It is the human organ least likely to do wrong, and, therefore, we must hold to the principle that the state can do no wrong.

I think the difficulty which lies in the way of the general acceptance by publicists of the principle of the sovereignty of the state is the fact that they do not sufficiently distinguish the state from the government. They see the danger to individual liberty of recognizing an unlimited power in the government; and they immediately conclude that the same danger exists if the sovereignty of the state be recognized. This is especially true of European publicists, most especially of German publicists. They are accustomed practically to no other organization of the state than in the government; and in spite of their speculative mental character, they, as well as other men, reveal in their reflections a good deal of dependence upon the conditions of the objective world. In America we have a great advantage in regard to this subject. With us the government is not the sovereign organization of the state. Back of the government lies the constitution; and back of the constitution the original sovereign state, which ordains the constitution both of government and of liberty. We have the distinction already in objective reality; and if we only cease for a moment conning our European masters and exercise a little independent reflection, we shall be able to grasp this important distinction clearly and sharply. This is the point in which the public law of the United States has reached a far higher development than that of any state of Europe. Several of the most modern European publicists, such as Laband, Von Holst and Jellinek, have discovered this fact; and their conception of the state has, in consequence thereof, become much clearer. The European states have made great progress towards this condition since the period of the French Revolution. Europe has seen the French state several times organized in constituent convention; and in the years 1848 and 1867 something very like

constituent conventions sat at Frankfort and Berlin, to say nothing of the Spanish Cortes and the less important movements of similar character. Such an organization of the state is, however, hostile to independent princely power. It tends to subject the prince to the state. It may leave the hereditary tenure, but it makes the princely power an office instead of a sovereignty. Therefore the princely government disputes the sovereignty of the constituent convention; and the political scientists become confused in their reflections by the din and smoke of the conflict in the objective world. They do not know exactly where the state is; and, therefore, they hesitate to recognize its great and essential attribute of sovereignty. The national popular state alone furnishes the objective reality upon which political science can rest in the construction of a truly scientific political system. All other forms contain in them mysteries which the scientific mind must not approach too closely.

CHAPTER II.

THE ORIGIN OF THE STATE.

THIS has been, and is still, a greatly mooted question. The views of publicists and jurists differ widely in regard to it. I think, however, that these divergences of opinion may be so classified as to reduce the apparently numerous shades of difference to three propositions. I will call the first of these the theological theory, the second the social, and the third the historical. The first claims that the state is founded by God, the second that it is founded by human agreement, and the third that it is the product of history. I think the latter is the true view, and that, when correctly comprehended, it will be seen to do full justice to the other two, and to reconcile all three. The proposition that the state is the product of history means that it is the gradual and continuous development of human society, out of a grossly imperfect beginning, through crude but improving forms of manifestation, towards a perfect and universal organization of mankind. It means, to go a little deeper into the psychology of the subject, that it is the gradual realization, in legal institutions, of the universal principles of human nature, and the gradual subordination of the individual side of that nature to the universal side. Many were the centuries before the human mind became even partially conscious of the state in idea, character and purpose. The state existed as a fact long before it was known and understood, and its powers were long exercised under forms which we do not now regard as political at all. If the theologian means, by his doctrine of the divine origin of the state, simply that the Creator of man

implanted the substance of the state in the nature of man, the historian will surely be under no necessity to contradict him. The unbiassed political historian will not only not dispute this proposition, but he will teach that the state was brought through the earlier and most difficult periods of its development by the power of religion,[1] and in the forms of religion; *i.e.* that the earliest forms of the state were theocratic. This is entirely comprehensible from the standpoint of a correct political philosophy. The first and most fundamental psychological principle concerned in the development of the state is that of piety; *i.e.* reverence and obedience. Unless the character of the mass of the population be moulded by this principle, the reign of law can never be attained. Now the lifting of this principle from under the barbaric powers of hate and defiance, was the first tremendous struggle of civilization with barbarism. It took thousands of years to accomplish it, and exhausted the spiritual powers of all Asia in its accomplishment. I have already indicated the fact that Asia has produced no real states. Asia has, on the other hand, produced all the great religions of the world. This will not be held to mean, however, that Asia has done nothing towards the historical development of the state, when we consider that her religions have educated and disciplined the larger part of the human race in that preparatory spiritual principle absolutely indispensable to the development of the state. It is often said by modern writers that Asia is but the home of theocracies and despotisms. This is undoubtedly true, but it should not be taught in the language of depreciation. Theocracies and despotisms have their place in the historical development of the state; and their work is as indispensable in the production of political civilization as is that of any other form of organization. We have not done

[1] Laurent, Études sur l'histoire de l'humanité, Tome I, p. 98; Von Ranke, Weltgeschichte, Erster Theil, S. 1.

with them yet, either. The need of them repeats itself wherever and whenever a population is to be dragged out of barbarism up to the lowest plane of civilization. To subject barbaric liberty to law, is the first problem in the development of the state everywhere; and the world's history teaches no way to accomplish this save through the theocracies and the despotisms based thereon. Every close reader of Europe's political civilization knows that the political organization of the European states rested originally upon the union of the throne and altar; *i.e.* upon the principle of the Asiatic despotism. The principle, so happily expressed by Rousseau, that "le plus fort n'est jamais assez fort pour être toujours le maitre, s'il ne transforme sa force en droit, et l'obéissance en devoir," [1] is as true for Europe or America as for Asia; and religion is the only power that can work this transformation in the earliest stages of man's civilization. It was the Christian religion, the Christian church, and Christian bishops that enabled the Carolingians to organize Europe politically, and to start the Teutons upon the path of political civilization.[2] Prize as highly as we may the ancient liberty of the Germans, there was in it but little organizing force. The fact that the Saxons, the German race *par excellence*, had made no political progress from the time when Tacitus wrote of them to the period of their incorporation in the Carolingian Empire, is satisfactory proof of this. The same religious forces enabled the Rurics to organize Russia and stand behind the throne of the Czar to-day, procuring for it the support and obedience of the great masses of the population.[3] The same forces sustained the Cerdics in the making of England. Dunstan, Lanfranc and Wolsey were the pillars of the English monarchy; and the church is still to-day the chief bond of unity between the masses and the

[1] Du Contrat Social, Livre I, Chap. III.
[2] Waitz, Deutsche Verfassungsgeschichte, Bd. III, S. 162.
[3] Weber, Geschichte des Mittetalters, Bd. I, S. 757 ff.

throne.[1] And should we examine carefully into the sources of that readiness to obey law which has characterized the true American citizens of this republic, we should without doubt find ourselves ultimately face to face with the early religious discipline of New England.[2]

The principle of the historical genesis of the state does not, then, stand opposed to the doctrine of the divine origin of the state, when that doctrine is rationally construed: it includes it, and makes it the starting-point in the evolution.

On the other hand, the theory of the social compact, though reconcilable with the principle of the historical development of the state, requires far more modification in its interpretation. In the first place, the historical principle cannot accept this theory as the starting-point in the evolution of the state. The application of this theory — yea, even the conscious recognition of it — presupposes an already highly developed state-life. It presupposes that the idea of the state, with all its attributes, is consciously present in the minds of the individuals proposing to constitute the state, and that the disposition to obey the law is already universally established. Now we know that these conditions never exist in the beginning of the political development of a people, but are attained only after the state has made several periods of its history. This theory cannot therefore account for the origin of the state: its place is far forward in the evolution of the state. Its application can be conceived in changing the form of the state or in planting the state upon new territory by a population already politically educated, but not in its primal creation. The political historian can accept it only as a force in the development of the later forms of the state, through popular revolution or colonization.

[1] Stubbs, Constitutional History of England, Vol. I, pp. 236 ff.; Bagehot, The English Constitution, p. 111.

[2] Bancroft, History of the United States, Vol. I, pp. 370 ff., C. E.

Under this interpretation it fits into and harmonizes with the principle of the historical development of the state, but under no other interpretation. It would be utterly senseless to speak of the state as a product of history, if, before it came into existence, the individuals proposing to create it were already so highly educated politically as to solve the great problem of sovereignty by the resolution of an original convention. The solution of this problem is the goal towards which political history is working. The most advanced states of the world are to-day still occupied with it, and will continue to be until the mission of man on earth is fulfilled. To assume its complete solution at the beginning, as this theory presupposes, would be either to deny the law of history altogether or to inject into political history the theological doctrine of paradise, fall and redemption. Primal paradise and redemption cannot be conceived of, however, except as the immediate creations of Deity. The Rousseauist cannot therefore take shelter under this doctrine. He would destroy the basis of his own theory, and range himself with the followers of Augustine, Hildebrand and Aquinas.

Finally, the principle of the historical development of the state needs some further explanation, but no modification or qualification. It takes for its basis and point of departure human nature; it distinguishes in that nature a universal side and a particular side; it recognizes the former as the state subjective; it accepts the principle that the creator of that nature is, therefore, the originator of the subjective state, *i.e.* the political idea. But the political scientist is looking for the state made objective in institutions and laws, and this is the product of history. It may be that divine power is continually engaged upon this work; but if so, it is not through direct intervention, but by influence upon human consciousness and human wills. We may, then, without questioning the doctrine of the divine origin of the state, claim that the great work of making the sub-

jective state objective in institutions and laws is, for the political scientist, a creative process which may properly be termed origination. Man through history has been the sole, immediate force in the accomplishment of this. Our knowledge of the history of the human race does not, indeed, reach back to the beginning of that history. We know nothing of the influences and the conditions under which the human mind first awakened to the consciousness of the state, and felt the impulse to exert itself for the objective realization of that consciousness. We are fully warranted, however, by the status of human society which history first presents us, in concluding that this great light did not come to all at once. The period of barbaric liberty and self-help permits and promotes the development of the few mighty personalities and their elevation to those heights of superiority over their fellows which the dawn of civilization first illumines. These few great personalities form the nuclei of political organization. They are, at first, priests rather than statesmen. They are inspired by the belief that what they behold in themselves is divinity. They so represent it to the masses of the uninitiated. They invent the means to impress this belief upon the masses. They establish a cult, and from behind its power and influence they govern the people. The religious sanction secures obedience to the laws of the state. Religion and law, church and state, are confused and mingled. They are joint forces in the period when the human race emerges from barbarism and enters upon its course of civilization; but the state is enveloped by the church, and exists only by the moral support which it receives from the church. Under this form the people are disciplined and educated. The consciousness of the state spreads wider. Non-priestly personalities begin to be touched by its light. They are forced thereby either to regard themselves as priests, or to reflect that the state, in its subjective character, is not a special revelation of divinity. They either seek entrance into the

ranks of the priesthood or begin to dispute its exclusive political powers. The resistance of the priesthood to these movements provokes the view on the part of the newly enlightened that the existing system is a pious fraud, and incites them to organization about one of their number, as chief, for the purpose of forcing the priesthood to a division of power. The struggle must not be allowed to come to open conflict. The newly initiated must not declare what they have seen to the masses, lest the faith of the masses be shaken and the supports of law and order, of civilization and progress, be destroyed. The two parties must compromise. The priests must divide their powers with the warriors. They must also support the rule of the warriors by the power of religion. The despotism results. In spite of its ugly name, it marks a great step in advance.[1] It gives greater exhibition of violence, but, at the core, it is far less despotic than the theocracy. It leaves a larger sphere of individual activity unrestrained. It lightens the spiritual oppression and depression which rest upon the souls of men, subject at every step and turn to the immediate intervention of divine command. It is a more human, if not a more humane, system. It tends to prevent the respect and obedience for law developed by the theocracy from becoming too timorous and servile. It raises human courage. It opens the way for a more general exertion of human reason. It makes it easier for the consciousness of the state to spread to still wider circles, while it holds fast to what has been won in political piety during the preceding era. It prepares the forces for the terrible struggle of the succeeding era, to whose awakening and exciting power we owe the spread of the consciousness of the state to the masses. The conflict in principle between the royal organization and the priesthood becomes irrepressible. The king loses his religious support in the eyes of the

[1] Bluntschli, Lehre vom modernen Stat, Bd. I, S. 392.

masses. His official subordinates learn to defy him successfully, and by the help of the priesthood to change their official agencies into more or less independent powers. It is an all-around battle between all the existent directing forces of human society. So far as these forces are concerned, it is not only irrepressible, but interminable. They can never bring peace; at best only armistice. A new and still more controlling force must appear. At last, through the educating power of the terrible antagonism, a large proportion of the population is awakened to the consciousness of the state, and feels the impulse to participate in the work of its objective realization. Animated by patriotism and loyalty, by the sense of human interests and by rationality, they gather about their king, as the best existing nucleus of their power. They give him the strength to overcome both defiant priesthood and rebellious officials. They establish the objective unity of the state. They bring the absolute sovereignty to objective realization. They subject all individuals and all associations of individuals to its sway. Apparently they make the king the state. Really they make him but the first servant of the state. The state is now the people in sovereign organization. This is an immense advance in the development of the state. It is the beginning of the modern political era. Under its educating influence the consciousness of the state spreads rapidly to the great mass of the population, and the idea of the state becomes completely secularized and popularized. The doctrine that the people in ultimate sovereign organization are the state becomes a formulated principle of the schools and of political science and literature. The jurists, the publicists and the moral philosophers lead in the evolution of the idea. The warriors and the priests are assigned to the second place. The sovereign people turn their attention to the perfecting of their own organization. They lay hands upon the royal power. They strip it of its apparent sovereignty and make it purely

office. If it accommodates itself to the position, it is allowed to exist; if not, it is cast aside. At last the state knows itself and is able to take care of itself. The fictions, the makeshifts, the temporary supports, have done their work, and done it successfully. They are now swept away. The structure stands upon its own foundation. The state, the realization of the universal in man, in sovereign organization over the particular, is at last established, — the product of the progressive revelation of the human reason through history.

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

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

CHAPTER III.

THE FORMS OF STATE.

THERE is no topic of political science concerning which a more copious literature is at hand than this. There is none, again, in regard to which a less satisfactory treatment has been attained than this. A careful student of what has been written upon this subject, both in Europe and America, will, I think, discover that the cause of this unsatisfactory result, upon the part of the European publicists, is the fact that they do not discriminate clearly between state and government; upon the part of the American writers, that they copy too closely the European authors.

Both of these facts are explicable. In Europe, state and government are actually more or less mingled and commingled. The publicists are confused in their reflections by the confusion in the external object. It will be profitable to dwell upon this point a moment, and inquire how this actual condition of things has come about, which has exercised such a troubling influence upon political science. I think the explanation is to be found in the consequences of the historical development of the state. No great state in Europe, except France, has cut its history into two distinct and separate parts by revolution, and founded its existing institutions directly and consciously upon revolution. We may say then, as the rule, that in the European states the form of state generated in one period of their history laps over upon that developed in the succeeding period or periods. A close scrutiny of this process will disclose the following significant facts, *viz;* that in the transition from one form of state to another,

the point of sovereignty moves from one body to another, and the old sovereign body, *i.e.* the old state, becomes, in the new system, only the government, or a part of the government. Take the example of English history after 1066, to make this clearer. First, the king was the state as well as the government. Then the nobles became the state, and the king became government only. Then the commons became the state, and both king and lords became but parts of the government. Now this change from the old form of state to the new, when it works itself out gradually and impliedly, so to speak, does not mark off the boundary sharply and exactly between the old and the new systems. Naturally the old state does not perceive the change at all or, at least, not for a long time, and not until after suffering many bitter experiences. It still expresses itself in the language of sovereignty. It still struts about in the purple, unconscious that the garment is now borrowed. On the other hand, the new sovereignty comes very slowly to its organization. Moreover, it organizes itself, for the most part, in the government, and only very imperfectly outside of and supreme over the government. For a long time it has the appearance of being only a part of the government, and, at first, the less important part. For a considerable time it is uncertain where the sovereignty actually is. With such conditions and relations in the objective political world, it is not strange that the European publicists have failed, as yet, to distinguish clearly and sharply between state and government, nor that their treatment of all problems, dependent for correct solution upon this distinction, is more or less confused and unsatisfactory.

In America, on the contrary, existing conditions and relations are far more favorable to the publicists. Our state is but little more than a century old, and rests wholly and consciously upon a revolutionary basis. The organization of the state existing previous to the year 1774 was completely de-

stroyed, and did not reappear in the succeeding organization as a part of the government, holding on to its traditions of sovereignty. We Americans have seen the state organized outside of, and supreme over, the government. We have, therefore, objective aids and supports upon which to steady our reflection and by which to guide our science. The reason why the American publicists have not written better upon this subject cannot, therefore, be the lack of the proper external occasions for the excitation of thought. It is, it seems to me, as I have already said, the fact that they still copy too closely the European authors, and have not ventured to essay independent work. America has yet to develop her own school of publicists and her own literature of political science. Down to this time, the two names which stand highest in our American literature of political science are Francis Lieber and Theodore D. Woolsey. The former was, as everybody knows, a European, educated under European institutions, and a refugee from their oppression, as he regarded it. The latter was Lieber's ardent admirer, — we might almost say disciple. It is not strange that they should have suffered under the power of the old influences, and should have confounded, in some degree at least, state and government in their reflections. The new and latest generation of American students of political science have been most largely trained in European universities, under the direction of European publicists, again, and by means of European literature. It will be an effort for them to make such use of their European science as always to gain advantage. It will be of the greatest service to them if they can employ it as a stepping-stone to a higher and more independent point of view; one which will enable them to win scientific appreciation of the distinctive lessons of our own institutions. If they fail to do this, however, we can expect little help from them in the attainment of a better and more satisfying treatment of the topic of this chapter.

It is, therefore, with a good deal of misgiving that I

approach this part of my subject. I know that nothing has, as yet, been written in regard to it which has commanded general assent from the political scientists. I am myself conscious of mental dissatisfaction with all that has been advanced, and I believe that the cause of the confusion of thought, clearly manifest in the different theories presented, is what I have above indicated; but when I come to the task of making clear and exact the distinction between state and government myself, I find myself involved in the same difficulties against which I have just given the word of warning. The fact is, that the organization of the state outside of, and supreme over, the government is, as yet, everywhere incomplete; and that when we assign to it this separate and supreme position, we are, in greater or less degree, confounding the subjective with the objective state, the ideal with the actual state. Nevertheless, I am resolved to make the trial upon this line; content if, upon a single point, I can bring a little more light into this discussion, and make it manifest that a better organization of the state outside of the government would be a great advance in practical politics.

The great classic authority upon this topic is Aristotle. Every student of political science is acquainted with his noted distinction of states, as to form, into monarchies, aristocracies, and democracies (*πολιτείαι*).[1] Not every student reflects, however, that the Greek states were organized wholly in their governments; *i.e.* completely confounded with them. This fact made the question far more simple than it is at present. We of to-day have a double question instead of a single one. We must determine, first, the forms of state, and then, the forms of government. It is perhaps natural that the state and its government should harmonize in this respect; but it is not always a fact that they do, and it is not always desirable that they should completely coincide in form. It is diffi-

[1] Polit. III, 4 and 5.

cult to see why the most advantageous political system, for the present, would not be a democratic state with an aristocratic government, provided only the aristocracy be that of real merit, and not of artificial qualities. If this be not the real principle of the republican form of government, then I must confess that I do not know what its principle is. Now, it seems to me that the Aristotelian proposition contains the true solution of the whole question for the Hellenic politics, and for all systems in which the state and the government are identical; and that it is the true and complete principle of distinction in regard to the forms of state, but not of government, in those systems where state and government are not identical, but exist under more or less separate organization. I accept the Aristotelian proposition, therefore, as to the forms of state, and reserve the discussion of the forms of government to a later part of this work.

Under this modification, the principle of Aristotle must be explained somewhat differently from what he himself intended. He undoubtedly had government in mind more than state when he invented this classification. He spoke of monarchy as the *rule* of one, of the aristocratic form as the *rule* of the minority, and of the democracy as the *rule* of the masses. In limiting his proposition strictly to the state, as distinguished from the government, I must define the monarchy to be the sovereignty of a single person, the aristocracy to be the sovereignty of the minority, and the democracy to be the sovereignty of the majority. Von Mohl criticises the doctrine of Aristotle as being purely arithmetical, and containing no organic principle.[1] If this were a just criticism, it would also condemn the proposition in the modified form which I have imposed upon it. I think it is not only an unjust, but a crude and careless, criticism. Forty-five years before von Mohl published the first edition of his noted treatise,

[1] Encyklopädie der Staatswissenschaften, S. 110.

Schleiermacher had demonstrated the spiritual and organic character of this Aristotelian principle of classification.[1] The numbers and proportions are used simply to indicate how far the consciousness of the state has spread through the population, and to note the degree of intensity with which that consciousness is developed; and the principle is, that no part of the population in which the consciousness of the state is strongly developed can be kept out of the organization of the state, and that, therefore, the number inspired with this consciousness and participating in this organization really does determine the organic character of the state.

Von Mohl's own classification appears to me confused and fanciful.[2] He distinguishes the forms of state into patriarchal, theocratic, despotic, classic, feudal and constitutional. Now patriarchal and theocratic states are generally monarchies. All states are despotic legally. The feudal state is aristocratic. The phrase constitutional state (*Rechtsstaat*) is very misleading. Looked at from one standpoint, all states are constitutional; and from another, none. As a term of distinction the expression applies to government rather than to state.[3] The state makes the constitution, instead of being made by it, and through it organizes a government which may act only in accordance with the legal forms, and for the legal purposes, prescribed in the constitution. Evidently this is what von Mohl means by his "Rechtsstaat." While as to his "classic state," nothing definite can be concluded from the phrase itself; the adjective is no term of political science at all; it belongs rather to the nomenclature of belles-lettres. Von Mohl concedes himself that the classic state may be either monarchic, aristocratic, or democratic.[4] Then why

[1] Ueber die Begriffe der verschiedenen Staatsformen. — Abhandlungen der Berliner Akademie, 1814.

[2] Encyklopädie der Staatswissenschaften, S. 103 ff.

[3] Von Holtzendorff, Principien der Politik, S. 205.

[4] Encyklopädie der Staatswissenschaften, S. 106.

use this term at all as distinguishing, in ultimate generalization, any form of state? The author would have been more consistent had he classified states into ancient, classic, mediæval, and modern. Any one can see, however, that this would be unscientific; that it would be a chronological classification, and not one of political science. In a word, von Mohl's classification follows no one consistent principle; its different principles are not all political; and it confounds state and government again. His fundamental error is, I think, to be found in his proposition that states differ in their essence as well as in their form, and that it is the difference in essence instead of in form which is to be considered.[1] He reaches this conclusion from the observation that one state devotes its energies more to the development of the religious life of the people, another cultivates more especially the æsthetic life, another the legal and practical, another the military, etc. Now evidently we have here no difference in the essence of these different states. The distinction here remarked is in the ends to be accomplished. The essence of the state is everywhere, and at all times, one and the same, *viz;* sovereignty. The difference is only in the form; and the difference in form determines, more than anything else, the end which will be made most prominent in the activity of any particular state. The monarchic states are more likely to develop the power of the state; the aristocratic make the creation of the system of private rights more prominent; while the democratic rather pronounce the socialistic end. Manifestly what von Mohl regards as a difference in essence is only a difference in ends, or a difference in what the French and Germans call "politique."

The book above all others from which we are justified in expecting clear treatment upon this topic is that of the noted Bluntschli, Lehre vom modernen Stat. Bluntschli

[1] Encyklopädie der Staatswissenschaften, S. 110.

lived and thought for many years in Switzerland; *i.e.* in a European state in which considerable headway has been made practically with the distinction between state and government. Circumstances were more favorable to him than to most of the European publicists. But our expectation is not altogether fulfilled. He holds to the general principle that states are to be distinguished into monarchies, aristocracies and democracies, but undertakes to add a fourth form, which he calls "Idiokratie."[1] He defines the idiocracy to be a state in which the supreme ruler is considered to be God or some superhuman spirit or an idea. This appears to me very fanciful. The person or body of persons who in last resort interpret the will of God or of the superhuman spirit or the idea for a given people, and who give their interpretations the force of law, constitute the state. It signifies nothing that that person or body of persons may have professed to *derive* his or its powers, so long as the will of God or of the superhuman spirit or the principles of the idea can only be known and legally formulated through him or it. Political science cannot examine into the truth or fiction of such a claim. Its dictum is simply that the highest human power over a given population is the state, no matter what may be the superhuman support upon which it may claim to rest. We must, therefore, reject this new creation from our political science. It must be relegated to the domain of political mysticism.

Bluntschli very properly condemns the notion that there is a mixed form of state.[2] I do not think, however, that the reason he advances for so doing is satisfactory. He holds that one of the elements in what appears as the mixed form always holds the balance of power, and the other elements are really but limitations upon it. He has here, again, certainly confounded state and government. The state cannot

[1] Lehre vom modernen Stat, Bd. I, S. 372. [2] *Ibid.* S. 372 ff.

be limited, simply because it is sovereign; and it does not hold simply the balance of power; it is the source of all power. The true reason for the rejection of the mixed form from the classification is that the state is and must be a unit. Its essence as sovereignty demands this; and where the state is not organized objectively as a unit, we have only to say that it has not perfected its organization, that it is, as the Germans express it, im werden begriffen, in the process of development. If we examine carefully the so-called mixed form, we shall either find that no one of the elements, nor any combination of the elements, is the state; or that one of them is the state, and the others are but parts of the government. Take for example the English system. The Parliament as government consists of King or Queen, Lords, and Commons. In legislation simply, the three elements have equal power. Each can legally initiate legislation, and each can veto absolutely the acts of the others. On the other hand, the Parliament, as state, is composed of but a single body, the Commons. When this body acts as the state, the Lords and the King must obey; for they are not separate organizations of the state, but only parts of the government. This view did not escape Bluntschli entirely. He declared that the state must be a unit in its organization; but his adoption of the principle of the relation of the government to the governed, instead of the principle of the relation of sovereign to subject, as the key to the modern explanation and adjustment of the Aristotelian proposition, obscured his vision and made his treatment of the topic confused, at the same time that he attained the correct result so far as the rejection of the notion of the mixed form of state is concerned.

A still more convincing proof that Bluntschli confounded state and government in his reflections is the fact that he introduces a large number of subdivisions into his classification, under such titles as these: the Hellenic and old Germanic kingship, the old Roman kingship and the Roman

imperium, the Frankish kingship; the feudal monarchy, the absolute monarchy, and the constitutional monarchy; the Roman aristocracy, the aristocracy of birth, of wealth, of learning; the antique democracy, the modern or representative democracy (the republic). Now here are, in the first place, cross-divisions in this classification, following, in some cases, non-political principles. For example, the terms Hellenic, Roman, old German, and Frankish belong to the nomenclature of ethnology, the terms antique and modern belong to that of chronology, while the term feudal is more economic than political. In the second place, all states are absolute, whether they be monarchic, aristocratic, or democratic. His feudal monarchy is but the government of an aristocratic state. His constitutional monarchy is but a royal government, limited, in its powers and procedure, by the state; while the imperium is, in theory, a monarchic state with monarchic government; but in practice it is more frequently, at least in modern politics, only kingly government over a large territory and population. In political science we must classify states upon a rigidly political principle, and we must always distinguish the state from the government. There is no other way to escape confusion and inconsequence in thought.

Bluntschli closes his discussion of this topic rather unexpectedly to the reader by introducing a fifth state-form, which he calls the compound state (*Zusammengesetzte Statsform*);[1] *i.e.* the form in which the sovereignty is divided between the union and the states forming the same. This compound state he subdivides into states having colonies or vassal provinces, states in personal union, confederacies, and federal unions. This appears to me to be a continuation of the old error of confounding state and government. A colony is, at the outset, no state. It is a local government, with perhaps more

[1] Lehre vom modernen Stat, Bd. I, S. 555 ff.

or less of local autonomy. It may grow to contain in itself the elements to form a state, and may become a state by revolution or by peaceable severance from the motherland; but before this, there is one simple state, and after it, there are two simple states, but at no time is there a compound state. If the motherland should so extend its state organization as to include the colony as active participant in the same, the state organization would still be simple; it would only be widened. A larger proportion of the population of such a state would be thereby introduced into the sovereign body. The only change which could be effected in this manner, as to the form of the state, would be possibly the advance from monarchy to aristocracy, or from aristocracy to democracy. The sovereignty would not be divided between the motherland and the colony, for the sovereignty is and must be a unit. It must be wholly in the motherland or wholly in the motherland and colony as one consolidated, not compounded, organization.

The same criticism will apply without modification to the vassal province. Its separate organization is only as government, not as state. If it should become a state, then it would cease really to be vassal; and if any relation, other than that prescribed by international law and treaty, should remain between it and the former suzerain, a scientific analysis will demonstrate that the so-called suzerain is now but a part of its government, for the accomplishment of certain limited and restricted purposes.

Again, two states in personal union form no compound state. They do not even form a compound government. A personal union of two or more states results when the executive head of the government of one becomes the executive head of the government or governments of the other or others. This person then acts in two or more entirely distinct capacities. In international congresses, for instance, he has as many votes as there are states represented by

him.[1] The fact that two or more states make use of the same person, or even of the same institution, in their governmental organization, does not make these states a compound state. Its influence towards the consolidation of the states is favorable; but that is another thing.

Again, the confederacy is no compound state. The states forming the same remain separate, simple states. The confederate organization has no power to bind any one of the states entering into the same without its own separate and express consent; *i.e.* it has no sovereignty; it is no state at all; it is only government. The confederate constitution is a treaty, an interstate agreement. It differs from the usual treaty in two points, *viz;* it creates a sort of governmental organization, or rather a council of advisers, and contains the general agreement on the part of the different states to execute the recommendations of this body; and it has, generally, no limitation as to duration. These are circumstances favorable to the consolidation of the separate states into one state. The very fact of the confederacy is the best of proof that there are natural forces at work conspiring to secure such consolidation. After this consolidation shall have been accomplished, however, there is no compound state as the result; *i.e.* no state in which the sovereignty is partly in the new state and partly in the old states, but there is a simple state of wider organization.

This last reflection leads to the consideration of the final species of compound state cited by Bluntschli, *viz;* the federal. I take the ground here, again, that this is no compound state; that there is no such thing as a federal state; and that what is really meant by the phrase is a dual system of government under a common sovereignty. If we put this case to a rigid scientific test, we shall find that the so-called federal state is a state which extends over a territory and

[1] Bluntschli, Das moderne Völkerrecht, S. 92.

comprehends a population previously divided into several independent states; that physical, ethnical, economic, and social harmony, conspiring to produce political unity, existed throughout the several states; that consolidation was resisted by the governments of some of the states, possibly by some of the states themselves; that, consequently, the consolidation was produced by violence, and the first organization of the new state was therefore revolutionary, *i.e.* was not created according to the prescripts of existing law; that the new state under its revolutionary organization has framed a constitution in which it has constructed a government for the general affairs of the whole state, and has left to the old bodies, whose former sovereignty it has destroyed, the residuary powers of government, to be exercised by them, under certain general limitations, as they will, so long as the new state may not see fit to make other disposition in reference to them. Exactly the same result, regarding the position of the old states in the new system, is effected as in the case of the transition of the sovereignty from the monarch to the aristocracy, and from the aristocracy to the democracy, when the preceding form in which the sovereignty was organized is not entirely abolished; *i.e.* the old states become parts of the government in the new state, and nothing more. It is no longer proper to call them states at all. It is in fact only a title of honor, without any corresponding substance. Confusion and inertia of thought support it for a long time. When new things proceed out of old ones, it is a long time before we invent the new names rightly describing the new character.

It is possible, of course, that several states may consolidate to form a single state, with a federal or dual system of government, peaceably and in accordance with the forms of existing law. It is also possible that a single state may, as a matter of fact, construct its governmental system upon the federal or dual principle. Neither of these processes, however,

is very likely to be followed. It is rather fortunate for political science that they are not, at least that the first is not. Should it be followed, it would be far more difficult to clear away the appearances of the confederacy from the new state. In the latter case this difficulty would not, indeed, be felt; but a state which has already attained a consolidated government has probably passed beyond that period of its political civilization which requires the dual form; and the re-establishment of it would, therefore, be rather an evidence of retrogression in social conditions.

My contention is, therefore, that the classification of states, as to form, into monarchies, aristocracies, and democracies, is both correct and exhaustive; that no additional forms can be made out of a combination of these, or out of a union of several states; and that the notion that there can be proceeds from the confounding of state and government in the treatment of the subject.

There remains now but a single point further to be touched under this topic. What we call the modern states are those based upon the principle of popular sovereignty; *i.e.* they are democracies. Not all of them appear to be such, but a close scrutiny of the facts will reveal the truth of the proposition that they are. The reason of the deceptive appearance in such cases will be found to be the fact that the state has but recently taken on its new form, and has not perfected its organization; while the old state-form, remaining as government, is still clad in the habiliments of sovereignty, shabby and threadbare perhaps, but still recognizable. It will be highly instructive to consider, for a moment, the social conditions which precede, and make possible, the existence of the democratic state. They may be expressed in a single phrase, *viz;* national harmony. There can be no democratic state unless the mass of the population of a given state shall have attained a consensus of opinion in reference to rights and wrongs, in reference to government and liberty.

This implies, in the first place, that they shall understand each other; *i.e.* that they shall have a common language and a common psychologic standpoint and habit. It implies, in the second place, that they shall have a common interest, in greater or less degree, over against the populations of other states. It implies, finally, that they shall have risen, in their mental development, to the consciousness of the state, in its essence, means and purposes; that is, the democratic state must be a national state, and the state whose population has become truly national will inevitably become democratic. There is a natural and an indissoluble connection between this condition of society and this form of state. It is this connection which has led to the interchangeable use of the terms state and nation. We must not forget, however, that they belong primarily to different sciences, and should not be used interchangeably without explanatory qualifications.

CHAPTER IV.

THE ENDS OF THE STATE.

Upon this topic, also, we have a most copious literature. It is, however, exceedingly inharmonious, and generally unsatisfactory. The most elaborate and advanced treatment of the subject which has yet appeared is to be found in von Holtzendorff's *Principien der Politik*. A critical analysis of his propositions will, however, reveal the fact that he does not clearly distinguish state from government, and that he loses sight of the ultimate end of the state in contemplating the immediate ends, which, from the standpoint of the ultimate end, are but means. The great value of his work consists in the fact that he points out the stages of advance in the attainment of the ultimate end, and warns against attempting to take the third step before the first and second shall have been successfully completed. After an exhaustive review and criticism of the theories which have prevailed, at different periods of history, in the literature of this topic, von Holtzendorff advances his own doctrine under the title of the actual purposes of the state (*die realen Staatszwecke*).[1] He holds that the state has a triple end, the elements of which are interdependent and harmonious. Of these the first is power (*der nationale Machtzweck*). The state must constitute itself in sufficient power to preserve its existence and proper advantage against other states, and to give itself a universally commanding position over against its own subjects, either as individuals or associations of individuals. The second

[1] Seite, 219 ff.

is individual liberty (*der individuelle Rechtszweck*). The state must lay out a realm of free action for the individual, and not only defend it against violation from every other quarter, but hold it sacred against encroachment by itself. And the third is the general welfare (*der gesellschaftliche Culturzweck*). The state must stand over against the private associations and combinations of its subjects as independent power, preventing any one or more of them from seizing and exercising the power of the state against the others. It must prevent the rivalries between different associations from coming to a breach of the peace. It must protect the rights of the individual member of any association against the tyranny of the association. It must hold all associations to their primary public purpose, if such they have, and aid them, if strictly necessary, in its accomplishment. Finally, it must direct the education of its subjects.

This appears to me to be a confused and an incomplete statement of the ends of the state. In the first place, it is confused. Why, for example, should the duty of the state to hold itself in a position of independent power over against the attempts of any association to seize and employ the power of the state for its own advantage, or to keep the peace of the public in the midst of the rivalries of associations, be classed under the end of the general welfare, rather than under the end of power? Why, again, should the duty of the state to protect the rights of an individual member of an association against the tyranny of the association be classed under the end of the general welfare rather than under the end of individual liberty? In the second place, the proposition is incomplete. It takes no account of the world-purpose of the state. It makes no place in its political science for the body of customs and agreements which we term, rather prematurely indeed, international law. While Hegel, in his doctrine that morality (*Sittlichkeit*) is the end of the state, lost sight of the proximate ends in the ultimate end, von Holtzendorff, on the other

hand, loses sight of the ultimate end in the proximate ends. Moreover, neither he, nor any other publicist who has yet written, indicates any other means employed by the state in the attainment of its ends than government. This topic requires, therefore, a new and an independent examination and statement; and the fundamental principle of the new proposition must be that it shall include both the proximate and ultimate ends of the state, in their proper relation, and shall distinguish clearly state from government in the account of the forces employed in the attainment of these ends. Unless these requirements be fulfilled, no advance in the better comprehension of this cardinal subject can be hoped for.

First, then, as to state ends. An exhaustive examination of this subject will reveal the fact that there are three natural points of division. There is a primary, a secondary, and an ultimate purpose of the state; and, proceeding from the primary to the ultimate, the one end or class of ends is means to the attainment of the next following. Let us regard the ultimate end first. This is the universal human purpose of the state. We may call it the perfection of humanity; the civilization of the world; the perfect development of the human reason, and its attainment to universal command over individualism; the apotheosis of man. This end is wholly spiritual; and in it mankind, as spirit, triumphs over all fleshly weakness, error, and sin. This is what Hegel meant by his doctrine that morality (*Sittlichkeit*) is the end of the state; and the criticism that this doctrine confounds the domain of the individual with that of the state, so freely indulged in by most publicists, is a crude view, a narrow conception of the meaning of the term morality. The true criticism is, that Hegel takes the third step without resting upon the first and second, and mankind is not strong enough of foot to follow him.

The state cannot, however, be organized from the beginning as world-state. Mankind cannot yet act through so extended

and ponderous an organization, and many must be the centuries, and probably cycles, before it can. Mankind must first be organized politically by portions, before it can be organized as a whole. I have already pointed out the natural conditions and forces which direct the political apportionment of mankind. I have demonstrated that they work towards the establishment of the national state. The national state is the most perfect organ which has as yet been attained in the civilization of the world for the interpretation of the human consciousness of right. It furnishes the best vantage-ground as yet reached for the contemplation of the purpose of the sojourn of mankind upon earth. The national state must be developed everywhere before the world-state can appear. Therefore I would say that the secondary purpose of the state is the perfecting of its nationality, the development of the peculiar principle of its nationality. I think this is what Bluntschli means when he says the end of the state is the development of the popular genius, the perfection of the popular life.[1]

But now, how shall the state accomplish this end? The answer to this question gives us finally the proximate ends of the state. These are government and liberty. The primary activity of the state must be directed to the creation and the perfecting of these. When this shall have been fairly accomplished, it may then, through these as means, work out the national civilization, and then the civilization of the world. First of all, the state must establish the reign of peace and of law; *i.e.* it must establish government, and vest it with sufficient power to defend the state against external attack or internal disorder. This is the first step out of barbarism, and until it shall have been substantially taken every other consideration must remain in abeyance. If it be necessary that the whole power of the state shall be exercised by the government in order to secure this result, there should be no

[1] "Entwickelung der Volksanlage, Vervollkommnung des Volkslebens." Lehre vom modernen Stat, Bd. I, S. 361.

hesitation in authorizing or approving it. This latter status must not, however, be regarded as permanent. It cannot secure the development of the national genius. If continued beyond the period of strict necessity, it will rather suppress and smother that genius. So soon as, through its disciplinary influence, the disposition to obey law and observe order shall have been established, it must, therefore, suffer change. The state must then address itself to the establishment of its system of individual liberty. It must mark out, in its constitution, a sphere of individual autonomy; and it must command the government both to refrain from encroachment thereon itself and to repel encroachment from every other quarter. At first this domain must necessarily be narrow, and the subjects of the state be permitted to act therein only as separate individuals. As the people of the state advance in civilization, the domain of liberty must be widened, and individuals permitted to form private combinations and associations for the accomplishment of purposes which are beyond the powers of the single individual, and which could be otherwise fulfilled only by the power of the government. Of course the state must define with distinctness the sphere of free action accorded to these associations, and vest government with such control over them as will prevent them from an abuse of their privileges and powers and hold them to the fulfilment of their public purpose. It may, also, be good policy for the state to aid them in the accomplishment of work which they could not, without such aid, perform, instead of authorizing the government itself to undertake and execute such enterprises. This all signifies, however, only a readjustment by the state, from time to time, of the relation of government to liberty, and does not require the conception of a third immediate end of the state. In the modern age, the state works, thus, through government and liberty, and accomplishes many of its fairest and most important results for civilization through the latter. It is often said that the *state*

does nothing for certain causes, as, for instance, religion or the higher education, when the *government* does not exercise its powers in their behalf. This does not at all follow. If the state guarantees the liberty of conscience and of thought and expression, and permits the association of individuals for the purposes of religion and education, and protects such associations in the exercise of their rights, it does a vast deal for religion and education; vastly more, under certain social conditions, than if it should authorize the government to interfere in these domains. The confusion of thought upon this subject arises from the erroneous assumptions that the state does nothing except what it does through the government; that the state is not the creator of liberty; that liberty is natural right, and that the state only imposes a certain necessary restraint upon the same. This doctrine of natural rights or anti- or extra-state rights, which led to the revolutions of the eighteenth century, still exercises a sort of traditional power over popular thinking; but the publicists and the jurists have, most largely, abandoned it as unscientific, erroneous and harmful. The theory did its practical work when the state was a single person, or a few persons, indistinguishable from the government, and, in its formulation of rights, was acting in utter disregard of the popular ethical feeling. Where the state is the people in ultimate organization, the theory can only mean that the state should act rationally in its construction of the principles of liberty; but of their rationality, the state, again, is the final interpreter. In fact, this is the only scientific value which the proposition ever had. There never was, and there never can be, any liberty upon this earth and among human beings outside of state organization. Barbaric self-help produces tyranny and slavery, and has nothing in common with the self-help created by the state and controlled by law. Mankind does not begin with liberty. Mankind acquires liberty through civilization. Liberty is as truly a creation of the state as is government; and

the higher the people of the state rise in civilization, the more will the state expand the domain of private rights, and through them accomplish the more spiritual as well as the more material ends of civilization; until, at last, law and liberty will be seen to be harmonious, both in principle and practice.

These, then, in historical order, are the ends of state: first, the organization of government and of liberty, so as to give the highest possible power to the government consistent with the highest possible freedom in the individual; to the end, secondly, that the national genius of the different states may be developed and perfected and made objective in customs, laws, and institutions; from the standpoints furnished by which, finally, the world's civilization may be surveyed upon all sides, mapped out, traversed, made known and realized. This proposition contains a plan for every appearance and product of human history; for private law and internal public law, for the law between nations and the law of nations, for war and for peace, for national exclusiveness and universal intercourse. Take these ends in their historical order, and pursue them with the natural means, and mankind will attain them all, each in its proper time. But this order cannot be successfully reversed, either in part or whole. The state which attempts to realize liberty before government, or the world-order before the national-order, will find itself immediately threatened with dissolution and anarchy. It will be compelled to begin *de novo*, and to do things in the manner and sequence which both nature and history prescribe.

Book III.

THE FORMATION OF THE CONSTITUTIONS OF GREAT BRITAIN, THE UNITED STATES, GERMANY, AND FRANCE.

It may appear, at first thought, a little surprising that I should treat of the topic of this book under the part of my work entitled Political Science, instead of under the part assigned to Constitutional Law. The second thought, however, will reveal the reason. The formation of a constitution seldom proceeds according to the existing forms of law. Historical and revolutionary forces are the more prominent and important factors in the work. These cannot be dealt with through juristic methods. If it should be attempted, erroneous and sometimes dangerous results will be reached. The constitutions of which I propose to treat are not exceptions to this order of things. They are all capital examples of it. I wish to impress this fact very vividly upon the minds of my readers; and therefore I take it into account in my classification, as well as in my treatment.

This is also the place for me to explain why, in my treatment of comparative constitutional law, I select the constitutions of Great Britain, the United States, Germany, and France, and limit myself thereto. The reasons are many and obvious. In the first place, my space is limited. My work is to be included in a single volume, or at most in two volumes. In the second place, my treatment is to be systematic, not encyclopædic. In the third place, these are the most important states of the world. Finally, these constitutions represent substantially all the species of constitutionalism which have as yet been developed. If any general

principles of public law are to be derived from a comparison of the provisions of the constitutions of different states, surely they will be more trustworthy if we exclude the less perfect systems from the generalization, disregard the less important states, and pass by those species which are not typical.

CHAPTER I.

THE FORMATION OF THE CONSTITUTION OF GREAT BRITAIN.

This constitution has been regarded as the historical constitution *par excellence*. But all constitutions are historical. It has been termed an unwritten constitution. But it is, in large part, written; and no one of the four which we are to consider is wholly written. It is sometimes said that it differs from the others in not being a revolutionary product. But it is largely a product of revolution. In what respects, then, does it have a distinctive character, as to its formation, when compared with the others? It seems to me in three respects. First, it is more largely unwritten than the others; second, what is written is scattered through different acts instead of being contained in a single instrument; and third, the revolutions which have attended its formation have not been, perhaps, so violent as in the cases of the others. In a word, the difference between the British constitution and the other three in the matter of formation is not at all so great as has been usually supposed.

Moreover, this constitution has been represented as being very ancient when compared with the others. In my view this is also a mistake. I contend that the present constitution of Great Britain did not exist before the year 1832. Very nearly all of its elements had been developed before that date; but the relation in which these organs now stand

to each other is altogether different from what it was before 1832; and the relation of the governmental organs to each other and to the state is what determines, more than anything else, the character of a constitution. I contend, furthermore, that the change wrought in the British constitution in the year 1832 was a revolutionary procedure; *i.e.* it did not proceed according to the provisions of law existing and in force at that time. I am aware that this is a somewhat unusual statement, and feel, therefore, under obligation to substantiate it by explanation and proof.

I consider that, since the consolidation of England by the Norman Kings, there have been three great revolutions in the political system of Great Britain. It is difficult to assign an exact date to either of these. If, however, I must give dates, I would designate the years 1215, 1485, and 1832. The first of these marks roughly the period when the British state progressed from its monarchic to its aristocratic constitution. The Barons organized themselves in the confederation of St. Edmunds and in the Parliament at Runnymede,[1] framed a constitution of liberties, and forced the same upon the King; *i.e.* the aristocracy seized the sovereign power, became the state, whereas, before this, the King had held the sovereign power, had been the state as well as the government. They did not abolish the kingship, but they reduced it from the position of sovereign state to limited government. The King himself recognized this fact in his angry declaration concerning the council of barons chosen by the whole body to compel him to observe the constitution. He said: "They have given me four-and-twenty over-kings."[2] It may be said that as the King assented to this constitution, it was established through the forms of existing legality; but this would be a very extreme use of legal fiction. The only legal form of consent which existed

[1] Stubbs, Constitutional History of England, Vol. I, pp. 528 ff.
[2] Green, History of the English People, Vol. I, p. 248.

or could exist when the King was sovereign was his free consent, and the only kind of limitation which he could suffer was self-limitation, which might at pleasure be thrown off. No historian pretends that the constitution called Magna Carta was secured in this manner or existed under this condition.[1] The King was *forced* to accept it and *forced* to keep it; and it was a good half-century before he and his successors ceased to struggle against it as a violation of the royal power. Here then was a revolution in the English state, both in substance and in form. The next two and a half centuries were occupied in the perfection and adjustment of the institutions of state and government on the new basis.

By the middle of the fifteenth century the actual power of the state had passed from the aristocracy to the people. It remained now for the people to organize themselves and seize the sovereignty. Nominally they were organized in the House of Commons, but really they were not. The House of Commons was then but a kind of overflow-meeting of the House of Lords. The people were not yet far enough advanced in the development of their political consciousness to create an entirely independent organization. An *existing* institution must furnish them the nucleus. They were deeply conscious of their hostility to the aristocracy. There remained, then, only the King. He, too, was hostile to the aristocracy. Through their common enemy, the King and the people were referred to each other. In the organization which followed, called in political history the absolute monarchy of the Tudors, the people were, in reality, the sovereign, the state, but, apparently, the King was the state. England under the Tudors was a democratic political society under monarchic government. The absolute monarchy in this sense is certainly a step in advance from the aristocratic

[1] Stubbs, Constitutional History of England, Vol. I, p. 543.

state, but the foothold attained is very uncertain. It depends almost entirely upon the insight and disposition of the monarch as to whether a popular policy will be followed in the administration, or even as to whether the private rights of the people will be conscientiously observed. The change wrought during the century after 1485 has more the appearance of governmental usurpation than of political revolution. But if we go behind the appearance, we shall find that the basis of the government had been changed. Star-chamber and High Commission, as fashioned and employed by the Tudors, were national popular institutions. They protected the people against the violence of the barons and the rapacity of the foreign ecclesiastics.[1] So long as the King followed a popular policy, and observed and protected popular rights, the relation between state and government in this system continued unclear. So soon as the government, the King, set up distinctly the claim to be the state in the *jure divino* theory of the Stuarts, then the real character of the relation became manifest. The people, now consciously the real state, broke away from their connection with the King, renounced him as the bearer of the power of the state. The problem was now that of creating a new and better organization of the state. The Parliament was the only existing institution which could now serve as nucleus. The Parliament was, however, but the representative of the aristocracy in the government. The people tried to reform it so as to make it representative of the people. This could not be done in a moment. The immediate result of the struggle between the people and the King was the partial restoration of the power of the aristocracy.[2] I do not consider that a revolution in the form of state was effected by the movements of 1640–1688. The reform of 1688 touches mainly the government. It denied that the King was the state, but it

[1] Gneist, Das englische Verwaltungsrecht, S. 507, 515. Zweite Auflage.
[2] *Ibid.* S. 584.

did not settle the question as to who or what or where the state was.

It was nearly a century and a half before this problem received its solution. It was finally resolved by the revolution of 1832, the revolution *par excellence* in England's political history. This is usually termed a reform, but it was a revolution in every sense of the word, — in form, in result, and in the manner in which it was accomplished. The popular uprising throughout western Europe in 1830 gave the immediate impulse. The whig leaders in the Parliament wisely and shrewdly undertook to direct this impulse. The movement accomplished itself under the issue of a bill in Parliament for making man, instead of land, the holder of suffrage, and for the distribution of representation upon the principle of population. The opposition of the House of Lords to the measure precipitated the revolution. Monster popular assemblies declared resistance to the government, and threatened the House of Lords with destruction. The persons of peers were attacked. The King was threatened with revolution by the ministers. He was forced, thus, to order dissolution against his will and, at last, to agree that the prime minister might pack the House of Lords.[1] It did not come quite to civil war, but violence was both threatened and exercised. The great political result of the revolution was that the people, the state, became organized in the House of Commons. The House of Commons came, thereby, to occupy a double position in the English system. It is one branch of the legislature, and it is sovereign organization of the state. In the former capacity it has no more power than the House of Lords. In the latter, it is supreme over King and Lords as well as common subjects.

It is generally claimed that the House of Commons reached this position through the employment of the existing forms

[1] May, Constitutional History of England, Vol. I, pp. 330 ff., Vol. II, pp. 218 ff.; Molesworth's History of England, pp. 32–112.

of law and, therefore, without revolution; but I think this confounds fiction with form. When in the universal consciousness the form does not contain the original spirit or intent of the law, but is made a subterfuge for the accomplishment of something contrary to the same, then it becomes a fiction, and though from a juristic standpoint we may still consider it as containing existing law, from the standpoint of political science we must regard it as cloaking a new principle. The King's power to dissolve the Parliament was originally governed wholly by the royal discretion. When the ministers ordered out the Horse Guards and threatened the unwilling King with popular violence if he did not go down in person and dissolve Parliament, and secured their purpose in this way, they simply usurped the powers of the Crown. And when they forced the King in the same manner to consent to the packing of the House of Lords, they usurped again what had been, to that time, independent prerogative. It is a pure fiction to say that because the Crown now nominally does these things, it may do them in fact. It is the ministry, the chiefs of the party in majority in the House of Commons, who actually do these things. By the events of 1832 the King was really forced to surrender to the House of Commons those prerogatives which might be called prerogatives of sovereignty or prerogatives of the state, and the House of Lords was definitely assigned to its modern position of a governmental organ only. I contend, then, that this change of system, wrought by the events of 1832, was a revolution in every sense of the word, and that the present form of constitution of the English state and government dates no further back than the year 1832, at which time what has been usually termed the revolution of 1688 finally accomplished itself. The present constitution was then and thus formed by the people through the House of Commons; and that house is now the perpetual constitutional convention for the amending of the constitution. Its

acts in this capacity must, indeed, be approved by the Lords and the King; but if either of them resists, if either of them undertakes to change his or their nominal powers into real powers in this respect, *i.e.* if he or they attempt to act as state instead of government, the means and precedents are already fully established whereby the Commons, as organization of the sovereign, the state, may overcome the attempt. The only effect of such resistance is to keep the House of Commons in living and constant *rapport* with the people, whose sovereign organization it now is. The only sense, then, in which the British constitution is a more historical system than that of the United States, Germany, or France, is that in its development it has proceeded with somewhat less violence and has retained old forms and old names, even after they have become mere fictions, under which are cloaked the same spirit and principles, more openly manifested and more boldly pronounced in the other systems.[1]

Forms of government may be changed through existing legal methods, but not forms of state. A change in the form of state results from a natural change of the point of sovereignty in the political society and manifests itself through the display of superior power. In a word, changes in the forms of state are and can be accomplished only through revolution.

[1] Bagehot, The English Constitution, pp. 117 ff.

CHAPTER II.

HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES.

THE constitution of the United States also is a product of revolution, not only mediately but immediately; and in dealing with it from the juristic standpoint we need go no further back, certainly, than the year 1787. We are not yet, however, upon legal ground, as I explained at the beginning of the foregoing chapter. We are in this chapter tracing the organization of the American state to the point where it created its present constitution. We are compelled to examine the genesis of the American state from the standpoint of history and political science. To do this correctly we must begin at its beginning, and not at some arbitrarily chosen point in the course of that development.

We may divide our political history, down to the date of the formation of the present constitution, into three periods, *viz;* the colonial, the revolutionary, and the confederate.

In the colonial period what existed on this side of the Atlantic was thirteen local governments. The state was the motherland. From the juristic point of view the motherland was acting entirely within its rights and powers when it changed or modified, abolished or re-established, these governments at its own discretion. They were the creatures of the British state and, legally, absolutely subject to its sovereignty. The forms of existing law offered no escape from this conclusion. On the other hand, physical and social conditions and forces were working for the crea-

tion of a state on this side of the water, which, so soon as it should reach a sufficient degree of consolidated strength, would dispute the sovereignty of the British state as unnational and foreign. As first among these conditions and forces, I would place the geographic separation by three thousand miles of sea, equal in this day to at least four times that distance, so far as intercourse is concerned. As geographic unity is one of the most powerful of the centripetal forces in political formation, so geographic separation is one of the most powerful of the centrifugal forces; and while these thirteen colonies were thus so widely separated from the state, which was the source of their institutions, they all lay in a territory of natural unity. The physical conditions were highly favorable to the formation of a sovereignty, a state, upon this territory. Secondly, the ethnical and social conditions were conspiring to the same end. At least three-fourths of the population were of English descent, the language was English, the religion was Christian and Protestant, the custom was the common law, the pursuits were agricultural and commercial. A substantial consensus in all that goes to make up ethnical unity prevailed. On the other hand, the ethnical separation from the motherland was not at all so distinct as the geographical. There were, indeed, Dutch, Germans, Swedes, and French inhabiting certain parts of this territory, and it can hardly be doubted that in New York and Pennsylvania these un-English elements were easily imbued with anti-English sentiments. There was also the negro race, making up, at the time of the revolution, about one-sixth of the population, and living for the most part south of the Pennsylvania line. It was then, however, a real subject race, exerting no direct influence upon the ethnical development of the dominant race, either through an amalgamation of blood or civilization. The ethnical separation from the motherland was rather more to be seen in the differences of private law and custom than in race. The general proprietor-

ship of land and general equality in the domain of private rights were quite substantial distinctions which had been worked out in the new world.

Complete geographical separation and partial ethnical separation from the motherland, together with complete geographical unity, substantial ethnical unity, and almost complete identity of interests among themselves were the forces which conspired, at last, to awaken the consciousness of the people of these thirteen colonies to the fact that they had attained the natural conditions of a sovereignty, — a state. The impulse to objectify this consciousness in institutions became irresistible. Its first enduring form was the Continental Congress. This was the first organization of the American state. From the first moment of its existence there was something more upon this side of the Atlantic than thirteen local governments. There was a sovereignty, a state; not in idea simply or upon paper, but in fact and in organization. The revolution was an accomplished fact before the declaration of 1776, and so was independence. The act of the 4th of July was a notification to the world of *faits accomplis*. A nation and a state did not spring into existence through that declaration, as dramatic publicists are wont to express it. Nations and states do not spring into existence. The significance of the proclamation was this: a people testified thereby the consciousness of the fact that they had become, in the progressive development of history, one whole, separate, and adult nation, and a national state, and that they were determined to defend this natural status against the now no longer natural supremacy of a foreign state. French statesmen had foreseen and predicted this development and result a decade before the stamp act. The American state, organized in the Continental Congress, proclaimed to the world its sovereign existence, and proceeded, through this same organization, to govern itself generally, for the time being, and to authorize the people resident within the separate colonies to make

temporary arrangement for their local government, upon the basis of the widest possible suffrage.

The first paper constitution enacted by the American state was that of November, 1777, called the "Articles of Confederation." The one fatal and disastrous defect of this constitution was that it provided no continuing organization of the state. It created only a central government, and that, too, of the weakest character. When, therefore, the Continental Congress, the revolutionary organization of the American state and its revolutionary central government, gave way, in March of 1781, to the central government created by this constitution, the American state ceased to exist in objective organization. It returned to its subjective condition merely, as idea in the consciousness of the people. From the standpoint of political science what existed now, as objective institutions, was a central government and thirteen local governments. From the standpoint of public law, on the other hand, what existed, as objective institutions, was thirteen states, thirteen local governments, and one central government. This was a perfectly unbearable condition of things in theory, and was bound to become so in fact. The system would not work at all when it was attempted to put it into operation. A maze of contradictions was, of course, revealed at every point; and so soon as the effort was made to correct the defects, it was discovered that the system provided no practically possible way to effect the same, even in the smallest degree. Of course it did not and could not. There was here simply a struggle between the central government and the local governments about the distribution of governmental powers, which could only be settled by the word of the sovereign — the state. The state, however, was not organized in the confederate constitution; *i.e.* it could not *legally* speak the sovereign command. The statesmen of the day did not know, at first, what was the matter. At length two, more far-seeing than the rest, discovered the root of the

difficulty, *viz;* that the sovereign, the state, had no legal organization in the system. These two were Bowdoin and Hamilton. It was, in one sense, at least, a disheartening discovery, for it meant revolution or national death. They were not long in making up their minds to the former, of course. Their chief concern was to make the revolution peaceable. The more blunt and straightforward Bowdoin proceeded openly and trustfully. He moved the Massachusetts legislature to instruct the delegates sent by it to the Confederate Congress to offer a resolution in that body providing for the call of a convention of representatives from the whole country, who should initiate a revision of the confederate constitution. Expressed in the language of political science, Bowdoin's idea was to reorganize the American state in the form of a general convention representing the whole people resident within the thirteen commonwealths, with the power to bind the whole by the vote of the majority. Those Massachusetts delegates were, however, so astounded by the revolutionary character of this proposition that they disobeyed their instructions, although they were legally bound to follow them. Manifestly some other method than the direct, and some other machinery than that of the Confederate Congress, must be employed in securing the reorganization of the American state. The more astute and politic Hamilton was better qualified than Bowdoin to seize opportunities and manipulate occasions. In the spring of 1785, the derangement of business relations between the inhabitants of Virginia and Maryland made it necessary that some understanding should be reached by these two commonwealths in regard to the navigation of the waters lying between them. Commissioners representing each were appointed, and held conference upon the subject at Alexandria in March of that year. They soon perceived that the regulation of commercial relations between Virginia and Maryland would avail but little unless all the commonwealths could be prevailed upon to adopt the

same rules. They reported this conclusion to the legislatures of their respective commonwealths. The legislature of Virginia thereupon proposed a commercial convention of all the commonwealths to meet at Annapolis in September of 1786. Hamilton saw in this his opportunity. His plan was formed at once to change this commercial convention into a constitutional convention. He secured the acceptance of the Virginia invitation by the legislature of New York and his own appointment as a delegate.

Upon arriving in Annapolis he found only five commonwealths represented. A *coup d'état* attempted by so small a body could not but fail. Hamilton changed his plan. He moved the convention to adopt a proposition recommending to the commonwealths the assembling of a constitutional convention. He did not express it exactly in this language. He knew that he was proposing an extra-legal act, *i.e.* from the juristic standpoint, an illegal act. According to the existing constitutional law, the Confederate Congress alone could originate changes in the constitution, and unanimous approval by the legislatures of the commonwealths could alone make them law. The exact wording of his proposition was for a convention "to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled," *i.e.* to the Confederate Congress, "as, when agreed to by them, and afterwards confirmed by the legislature of every state" (commonwealth), "will effectually provide for the same."[1] This is not at all what happened when the convention was successfully assembled, as we shall see. That Hamilton consciously and deliberately intended this form of words as a cloak to his real purpose, we

[1] Elliot's Debates, Vol. I, p. 118.

do not exactly know; but we may well surmise it. A great deal of discussion followed in regard to this proposition, in the Confederate Congress, in the legislatures of the commonwealths, in the press, and among the people. Hamilton almost despaired of seeing it accepted. He resolved upon the expedient of securing from the New York legislature instructions to its delegates in the Confederate Congress to move and support in that body a recommendation by that body to the several commonwealths for the assembly of the convention. He succeeded in the legislature, and, with the aid of Massachusetts, in the Congress. This settled the question; and the convention, composed of delegates from all the commonwealths but Rhode Island, met in Philadelphia in May of 1787.

It was composed of almost all the really great characters which the revolution had produced. The natural leaders of the American people were at last assembled for the purpose of deliberating upon the whole question of the American state. They closed the doors upon the idle curiosity and the crude criticism of the multitude, adopted the rule of the majority in their acts, and proceeded to reorganize the American state and frame for it an entirely new central government. Our question at this point is in regard to the first part of their work, *viz;* the reorganization of the American state; not its reorganization *in* the constitution, — that is a topic of constitutional law, and comes under the next division of my treatise, — but its reorganization for the original establishment of the constitution. This was the transcendent result of their labors. It certainly was not understood by the Confederate Congress, or by the legislatures of the commonwealths, or by the public generally, that they were to undertake any such problem. It was generally supposed that they were there for the purpose simply of improving the machinery of the Confederate government and increasing somewhat its powers. There was, also, but one legal way for them to proceed in reorganizing the American state as the

original basis of the constitution which they were about to propose, *viz;* they must send the plan therefor, *as a preliminary proposition*, to the Confederate Congress, procure its adoption by that body and its recommendation by that body to the legislatures of the commonwealths, and finally secure its approval by the legislature of every commonwealth. The new sovereignty, thus legally established, might then be legally and constitutionally appealed to for the adoption of any plan of government which the convention might choose to propose. The convention did not, however, proceed in any such manner. What they actually did, stripped of all fiction and verbiage, was to assume constituent powers, ordain a constitution of government and of liberty, and demand the *plébiscite* thereon, over the heads of all existing legally organized powers.[1] Had Julius or Napoleon committed these acts, they would have been pronounced *coup d'état.* Looked at from the side of the people exercising the *plébiscite*, we term the movement revolution. The convention clothed its acts and assumptions in more moderate language than I have used, and professed to follow a more legal course than I have indicated. The exact form of the procedure was as follows. They placed in the body of the proposed constitution itself a provision declaring that ratification by conventions of the people in nine states (commonwealths) should be sufficient for the establishment of the constitution between the states (commonwealths) so ratifying the same.[2] They then sent the instrument entire to the Confederate Congress, with the direction, couched in terms of advice, that the Congress should pass it along, untouched, to the legislatures of the commonwealths, and that these should pass it along, also untouched, to conventions of the people in each commonwealth, and that when nine conventions should have approved, Congress should take steps to put the new government into

[1] Elliot's Debates, Vol. I, pp. 414 ff.; *Ibid.* Vol. V, pp. 197, 216.
[2] United States Constitution, Art. VII.

operation and abdicate. Of course the mass of the people were not at all able to analyze the real character of this procedure. It is probable that many of the members of the convention itself did not fully comprehend just what they were doing. Not many of them had had sufficient education as publicists to be able to generalize the scientific import of their acts.

Apparently the form of this procedure supplemented rather than violated existing law, except in one point. It might be conceived as *adding* the approval of the conventions of the people to that of the Confederate Congress and the legislatures of the commonwealths. Really, however, it deprived the Congress and the legislatures of all freedom of action by invoking the *plébiscite*. It thus placed these bodies under the necessity of affronting the source of their own existence unless they yielded unconditionally to the demands of the convention. And the one point which this theory of the supplementary character of the *plébiscite* could not cover was the one of transcendent importance, and the real test of the nature of the whole procedure. That point was the declaration of the convention that the assent of the conventions of the people in nine commonwealths should be deemed sufficient for the adoption of the new constitution. The real import of this declaration was confused by the limitation that the new constitution should be regarded as established only for the assenting. It was not clearly seen, at the moment, that the proposition attributed power to the nine to act for the whole thirteen. A little critical analysis will, however, make this easily manifest. The confederate constitution, the existing law, prescribed, as we know, that no *alteration* should be made in the articles of the confederation except by agreement of the Congress and approval by the legislature of every commonwealth.[1] Now if the new con-

[1] Articles of Confederation, Art. XIII.

stitution could be adopted by the conventions of the people in nine commonwealths, even though professedly for themselves alone, then and in consequence thereof the old constitution must be destroyed, *for the whole thirteen*, by the act of the nine. This act would therefore violate the existing law both in spirit and letter, and would stamp the whole procedure as extra-legal; *i.e.* as illegal. We must, therefore, give up the attempt altogether to find a legal basis for the adoption of the new constitution and have recourse to political science, to the natural and historical conditions of the society and the state. The principle of that science is that the undoubted majority of the political people of any natural political unity possess the sovereign constituting power, and may as truly act for the whole people in building up as tearing down; more truly, in fact, for in political science the only purpose of tearing down is to secure a better building up of the whole structure. This proposition of the convention, therefore, when scientifically explained, really declared by implication that the *plébiscite* in nine commonwealths should be sufficient approval of the acts of the convention to establish the new constitution over the whole thirteen. Nor did this principle remain mere theory. The confederate constitution was abolished, and the new constitution put into operation when approved by the *plébiscite* in but eleven commonwealths. Nominally the new system was not yet established for the two non-assenting commonwealths, but the old system was destroyed for them without their consent; and, as we have seen, the same principle which justifies the act of the eleven in reference to the latter procedure not only justifies but requires a coextensive positive, constructive procedure. As a fact, it was but policy which dictated a little patience and secured the necessary result without resort to force.

From this review of the history of the original formation of our present constitution, I contend that the procedure cannot be scientifically comprehended except upon the principle

that the convention of 1787 assumed constituent powers, *i.e.* assumed to be the representative organization of the American state, the sovereign in the whole system; ordained the constitution of government and of liberty; called for the *plébiscite* thereon, and fixed the majority necessary for approval. The all-important hermeneutical conclusion from this principle is, that the original construction of the American state cannot be interpreted by juristic methods. Scientifically we must place its genesis in the domain of political history and political science, and follow and explain it by the methods of these sciences.

CHAPTER III.

HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE GERMAN EMPIRE.

It will not be possible to comprehend the genesis of the modern German state without going back to the Carolingian constitution. What we now term the German Empire received its first political organization in the great European Empire of Charlemagne. It was not distinguished politically from the other parts of the Empire. The Emperor was immediate sovereign, and governed through margraves, counts and bishops, appointed by himself, and amenable to himself. The division of the Empire, in 843, gave that part of the Empire lying east of the Rhine and north of the Alps to Louis the German, under the name "Ostfranken."[1] In 870 the western boundary of Ostfranken was, by the compact at Mersen, moved westward, so as to include the larger part of Lorraine and Frisia.[2] With this, the territorial basis of the independent German state was substantially completed. The political system given to it by Charlemagne while it formed a part of the great European Empire, suffered very great modification by the dissolution of the Empire. The ruler was no longer an Emperor, but only a King. I know of no better way to express the idea of this difference than by the proposition that the Emperor was sovereign, but the King was officer; the Emperor was the state, but the King was only the government; the Emperor was the vicegerent of God, but the King was only the leader of the people. The stu-

[1] Waitz, Deutsche Verfassungsgeschichte, Bd. IV, S. 591 ff.; Giesebrecht, Geschichte der deutschen Kaiserzeit, Bd. I, S. 148. [2] *Ibid.* S. 150.

dent of the history of the development of the Carolingian imperium, in its connection with Rome and with its theocratic basis, will recognize and appreciate these distinctions. The result of the change was decrease of power at the centre, increase of independence in the localities. The margraves, counts and bishops, who had received their appointments from the Emperor, raised the claim that the King could not remove them, that their right was as sacred as his. That is, the impulse to federalize the system was beginning to manifest itself. The King did not know how to meet this; he even helped it on by dividing the kingdom among his three sons.[1] At the extinction of the Carolingian house, in 911, the kingdom had not only become federalized in fact, but the hereditary descendants of the former officials of the Empire had become the bearers of the sovereignty, and in their union were the supreme organization of the state. They now *elected* their King, and conferred upon him his powers; and they guaranteed to each other their independence of the King. The state had thus become aristocratic. It was represented by the united princes. The King was only the central government; and each prince was local government in his particular locality.[2] King Otto the Great succeeded in arresting momentarily the course of this development. In conjunction with the Pope and the bishops, he succeeded in restoring the imperial sovereignty, and in reducing the princes momentarily to the position of officials again.[3] The great struggle between the Emperor and the Pope during the latter half of the eleventh century shook the theocratic foundation of the re-established imperial sovereignty, and opened the way for the reappearance of the aristocratic state, with its federal system of government.[4]

The Hohenstaufen Emperors struggled manfully against this course of things, but without avail. Frederic II was

[1] Giesebrecht, Geschichte der deutschen Kaiserzeit, Bd. I, S. 158.
[2] *Ibid.* S. 188. [3] *Ibid.* S. 447 ff. [4] *Ibid.* Bd. III, S. 1020.

obliged, himself, to recognize this status of fact and give it, for the first time, the sanction of law. In the imperial instruments known as the "constitutio de juribus principum ecclesiasticorum" of the year 1220, and the "constitutio de juribus principum saecularium" of the year 1232, the Emperor legalized the federal system of government for Germany, by acknowledging the independent rights of the princes to govern in their own localities.[1] The imperium as sovereign state was thus destroyed. The German kingship, as central government, was really all that remained. The imperium was now but a titular appendage. The truth of this proposition is surely made manifest in the "constitutio Francofurtensis de jure et excellentia imperii" of the year 1338, in which the princes and the King agreed that the person elected German King by the princes should be also Emperor without recognition and coronation by the Pope.[2]

From this event down to the election of Charles V this state of things became fixed in all the details of the constitution. In the aristocratic state the centrifugal forces are always predominant. The individuals who compose the aristocracy are the most capable and self-reliant personalities. Each of them feels his ability to take care of himself and his independence of governmental protection. If they are not compelled to unity over against the monarchy or the democracy, they drift more and more into political disunion. This was the course of development in the German state from the "constitutio de jure et excellentia imperii" to the accession of Maximilian I in 1493. Maximilian undertook to restrain the princes in their particularistic politics through three very important measures. The first was called "der ewige Landfrieden," the permanent peace, of the year 1495. It forbade the "Fehde," self-help, among the princes, and asserted the jurisdiction of the imperial courts over their disputes. The

[1] Zöpfl, Grundsaetze des gemeinen deutschen Staatsrechts, Bd. I, S. 159.
[2] *Ibid.*

second of these measures created the "Reichskammergericht," the court of the Imperial Chamber, consisting of a judge and sixteen assistants, the judge and one assistant appointed by the Emperor, the other assistants elected by the princes.[1] This organization was vested with jurisdiction over the controversies between the princes and was intended to displace the appeal to the "Fehde," which had become the universal custom in the aristocratic state. The third measure reorganized, in 1518, the "Reichshofrath," the Aulic Council, which was both an administrative and a judicial body, so as to give it a better hold upon the princes.[2]

The successor of Maximilian, Charles V, made the attempt to restore the imperial sovereignty. Two bloody and destructive wars resulted, in which the Emperor was worsted, and consequently the German state still further decentralized. The peace of Westphalia, which closed the epoch, presented a constitution for the German system which lacked but little of complete confederatism. It not only recognized the inherent right of the princes to govern independently of the Emperor, each in his own locality, and to participate with the Emperor in the imperial government, but it acknowledged to each prince the power to determine the religion of his land and people and the international powers of war and treaty with foreign states.[3] After the middle of the seventeenth century we can, therefore, no longer speak, with any degree of correctness, concerning the German state. The "Reichstag" still remained, but it was little more than a congress of ambassadors. The Emperor remained, but the imperium was little more than an office with very limited executive powers. The sovereignty was rapidly passing from the united princes to the individual

[1] Zöpfl, Grundsætze des gemeinen deutschen Staatsrechts, Bd. I, S. 217.

[2] *Ibid.* S. 224.

[3] *Ibid.* S. 162; Instrumenti pacis Westphalicæ, Instrumentum pacis Monasteriense, §§ 62, 63; Ghillany, Diplomatisches Handbuch, Bd. I, S. 92.

princes.[1] The destruction of the Empire by Napoleon in 1806 completed the work. There was after 1806 no longer a German state, but a great number of German states. All but four of these, *viz;* Austria, Prussia, Swedish Pomerania and Holstein, entered the confederation of the Rhine under the protectorate of Napoleon.[2] The overthrow of Napoleon terminated this connection, and the congress of Vienna in 1815 recognized finally, within the territory of the former Empire north of the Alps, thirty-eight states in league with each other.[3] With this the confederatizing of the Empire was completed both in fact and in law. With this the successors of the original officials of the Empire had become sovereigns. The aristocratic development had triumphed completely over the monarchic in the Empire.

If the unity of Germany as a single state should ever again be attained, it must be through the power of the democracy, and the state must become national, popular. For thirty years after 1815 this was the dream of the idealists and the patriots. At last, in 1848, it came to the first trial for realization. The result was universal development of the idea and the impulse, but no immediate success in the world of fact. One great lesson, at least, was learned by the experiences of 1848 and 1849, *viz;* that the people alone could not secure the reorganization of the German state. One of the existing states must take the lead and furnish the organized power to carry the plan successfully through. Which should it be? The people looked to Prussia, but her King was not inclined to accept the responsibility. Prussia, however, was the only state capable of doing this great work. Austria was too un-German, and the rest were too weak.[4]

[1] Schulze, Lehrbuch des deutschen Staatsrechts, Erstes Buch, S. 51 ff.

[2] *Ibid.* S. 81 ff.

[3] *Ibid.* S. 96; Acte du Congrès de Vienne, Art. LVIII; Ghillany, Diplomatisches Handbuch, Bd. I, S. 346.

[4] Schulze, Lehrbuch des deutschen Staatsrechts, Erstes Buch, S. 123 ff.

Fifteen years more of waiting and of longing passed. The timid and vacillating Frederic William IV passed away, and the strong and resolute William I succeeded to the Prussian throne. It was hardly to be supposed that this thoroughly monarchic character would approach the German people and assume the leadership in transforming the confederacy of princes into a national popular state. This was, however, exactly what happened. When the hopes of the idealists were running lowest, there appeared, under date of September 15, 1863, a memorial from the Prussian ministry, declaring that the most important and essential reform required by existing conditions was the introduction of national popular representation into the confederate government.[1] From this moment Prussia, the real bearer of German political civilization in the confederacy, assumed her proper rôle as the nucleus around which the national popular state should form itself. The centuries of dissolution of the old Empire under the leadership of the half-German Austria were now seen to have their meaning. The German nation was coming to itself politically. On the 9th of April, 1866, the Prussian representative in the Confederate Diet laid before that body the proposition from the Prussian government that a national convention, consisting of members chosen by universal suffrage and direct election, should be called, and that a plan for the reform of the existing confederate constitution, to be agreed upon by the governments of the several states, should be laid before this convention for deliberation and ratification.[2] The Diet referred the proposition to a committee. The princes generally were naturally unfriendly to the plan, since it presaged the destruction of their individual sovereignty. The proposition dragged, therefore, in committee; and the Prussian government was unable to secure any agreement even for a date of assembly of the national convention.[3] It

[1] Laband, Staatsrecht des deutschen Reiches, Bd. I, S. 10.
[2] *Ibid.* S. 11. [3] *Ibid.* S. 12 ff.

was clearly manifest that the great change could not be accomplished through the process of peaceable reform. The Diet was for the maintenance of the *status quo* under the leadership of Austria.

In the conflict of ideas and of interests between Austria and Prussia which at the moment was becoming most critical upon the question of the disposition which should be made of Schleswig-Holstein, then held by those two states conjointly and entirely independently of the German confederacy, the Diet was, therefore, easily persuaded by Austria to assume the settlement of the dispute and, when Prussia resisted this unwarranted stretch of its powers, to order the mobilization of the armies of the confederated princes against Prussia. This occurred on the 14th of June, 1866. The Prussian ambassador in the Diet immediately pronounced this resolution to be a violation of the constitution of the confederacy, and declared that Prussia would regard the constitution as broken and no longer binding. At the same moment he said: "His Majesty, my King, will not regard the national foundation upon which the confederacy rested as destroyed with the extinction of the confederacy. Prussia holds fast, on the contrary, to these foundations, and to the unity of the German nation under the transitory forms of its expression."[1] The institutional bond of connection between the German states was now rent in twain, and each stood for itself with such alliances as it might be able by way of diplomacy to secure. The princes might go with Austria, and probably would; but the people now looked to Prussia for the establishment of German unity and the organization of the national popular state. Prussia was therefore in position to cut the sinews of the princely power everywhere. She followed up her advantage with great wisdom and energy. On the 15th of June the Prussian government addressed identical ultimata to the govern-

[1] Schulthess, Europäischer Geschichtskalender, 1866, S. 90; Ghillany, Diplomatisches Handbuch, Bd. III, S. 208.

ments of Saxony, Hanover and Electoral Hesse, demanding the demobilization of their armies and their assent to the summoning of the "German Parliament."[1] On the 16th it issued a manifesto to Germany, and ordered the Prussian troops to distribute the same among the people in the states which they might invade. The manifesto contains this significant clause: "Only the basis of the confederation, the living unity of the German nation, is left; and it is the duty of the governments and the people to find for this unity a new and vigorous expression."[2] On the same day Prussia addressed identical notes to the governments of all the states north of the river Main, except Hanover, Saxony, Electoral Hesse, Hesse Darmstadt, and Luxemburg, containing a proposition for an alliance, which was accepted by all, except Saxe-Meiningen and Reuss elder line.

The triumph of Prussia in the trial of arms resulted in the absorption of Hanover, Electoral Hesse, Nassau and Frankfort, and in the accession of all the other German states north of the Main to the alliance agreed upon, on the 18th of the previous August, between Prussia, Saxe-Weimar, Oldenburg, Brunswick, Saxe-Altenburg, Saxe-Coburg-Gotha, Anhalt, Schwartzburg-Sonderhausen, Swartzburg-Rudolstadt, Waldeck, Reuss younger line, Schaumburg-Lippe, Lippe, Lübeck, Bremen and Hamburg. These remaining states were Mecklenburg-Schwerin, Mecklenburg-Strelitz, Reuss elder line, Saxe-Meiningen, Saxony and Hesse-Darmstadt. These twenty-two states now pledged themselves to an offensive and defensive alliance, and agreed to place their military power under command of the King of Prussia. They pledged themselves, furthermore, to secure the formation of a constitution of perpetual union between themselves, based upon the principles already put forward by Prussia in the Confederate Diet. To that end, they agreed to send representatives,

[1] Schulthess, Europäischer Geschichtskalender, 1866, S. 94.
[2] Ghillany, Diplomatisches Handbuch, Bd. III, s. 210.

appointed by themselves, to Berlin, who should draft a constitution; to cause the election of members to a popular convention, upon the principles of universal suffrage and direct vote; to call the convention together and lay before it the proposed constitution, and in agreement with it to establish the same.[1] The alliance was to terminate upon the 18th of August, 1867, one year from the date of its formation. If, therefore, the constitution should not be established before this date, nor the alliance renewed, the German states would be, after this date, entirely disconnected from each other. If, on the other hand, the constitution should be established before this date, it would take the place of the alliance.

The several state executives began the fufilment of their obligations under the treaty by laying before the legislatures of their respective states the draft of the law of suffrage and elections for the choice of the members to the popular convention, as agreed upon in the treaty. In the discussion of the bill in the lower house of the Prussian legislature, the idea was advanced that the constitution agreed upon between the body of representatives appointed by the governments (*i.e.* executives) of the several states and the body of representatives elected by the people of all the states, must be submitted to the Prussian legislature, and consequently to the legislatures of all the other states, for ratification, on the ground that it might, and undoubtedly would, alter many provisions of the Prussian constitution by the withdrawal of powers from that state to the advantage of the union, and that such alteration could not be legally effected except by agreement of the legislature as well as of the King thereto. In other words, the Prussian legislature proposed to degrade the convention of popular representatives from the position of a resolving, constituent body to that of a merely deliberative and recommending body.[2] It seems to me that

[1] Laband, Staatsrecht des deutschen Reiches, Bd. I, S. 15 ff. [2] *Ibid.* S. 18 ff.

the proposition reduced the body of governmental representatives to the same position, although the commentators do not dwell upon this point. The Prussian legislature insisted upon this principle and procedure, and the allied governments (*i.e.* executives) gave way. The delegates appointed by the governments met in Berlin, on the 15th of December, 1866, and framed a constitution for the North German Union. The representatives elected by the people were called by the Prussian King, by authority from the allied governments, to assemble in Berlin on the 24th of February, 1867. The draft of the constitution was laid before them. They amended it in forty-one points, adopted it, and returned it as adopted to the body which drafted it. The vote in the convention was 230 to 53. They voted by heads, not by states; were uninstructed; and a simple majority was all that was necessary, according to their rules of procedure, for the validity of their acts. The representatives of the governments approved the changes, and unanimously resolved to accept the constitution as returned to them by the convention.[1] It was then laid by the governments (*i.e.* the executives) of the states before their respective legislatures, and ratified by them all in the manner prescribed in each for making constitutional changes. The 1st of July, 1867, is the date at which the new constitution went into effect.

This was the constitution of the North German Union, not yet of the German Empire. The states of Bavaria, Württemberg, Baden and Hesse south of the Main were still outside of this Union. Immediately following the peace with Austria, in 1866, these states had formed offensive and defensive alliances with Prussia; and after July 1, 1867, it was considered that the North German Union was the legal successor to the rights and duties of Prussia in these treaty relations. These connections were strengthened and made

[1] Laband, Staatsrecht des deutschen Reiches, Bd. I, S. 23 ff.

closer by the "Zollverein" of the 8th of July, 1867; whereby these states entered into a customs union with the North German Union and created a sort of government for the administration of the customs.

The attempt of France to prevent the complete union of all the German states into one national state, precipitated that union. At the moment of the triumph of the German arms over those of France, the King of Bavaria took the initiative.[1] The President of the North German Union, the King of Prussia, was already empowered, by the second paragraph of the seventy-ninth article of the North German constitution, to lay propositions before the legislature of the North German Union for the entrance of the South German states or any of them into the Union; which entrance would be accomplished, so far as the North German Union was concerned, by a legislative act. During the course of the month of November, 1870, the President of the North German Union entered into treaties with the Grand Dukes of Hesse and Baden and with the Kings of Württemberg and Bavaria, which contained the articles of union of these states with the North German Union and the pledge to establish the German Empire on the 1st of January, 1871. These treaties were submitted by these respective Princes to the legislatures of their respective states and were ratified in the manner prescribed by the constitutions of these respective states for making constitutional changes. The constitution of the North German Union already specially provided for this case, in Art. 79, authorizing the Federal Council and Diet to ratify such agreements by way of legislation. The constitution of the German Union or the German Empire was thus, at first, contained in several instruments. This was clumsy and confused. The union of the several instruments into one was manifestly necessary. After the representatives from

[1] The diary of the Emperor Frederic seems to show that he did so under considerable pressure from the Prussians.

the new states had appeared in both the Federal Council (*Bundesrath*) and Diet (*Reichstag*), the chancellor proposed a revision of the constitution as to form. This was carried by great majority in both bodies. No new provisions were introduced into the organic law, and no existing provisions were modified.[1] The revision was, we may say, wholly formal. It bears the date April 16, 1871, while the birth moment of the Empire must be placed at January 1, preceding.[2]

Such was, in brief, the history of the formation of the constitution of the present German Empire. The question of political science now is: Where is, or where was, the sovereignty, the original organization of the German state, upon which the constitution rests, and from which it derives its legitimacy and legal force? Three different organizations or classes of organizations participated in the formation of the constitution of the North German Union, *viz;* the governmental heads of the several states, *i.e.* the Princes of the nineteen so-called monarchic states and the Senates of the three free cities; the representatives of the people of the North German states assembled in one Convention Parliament; and the legislatures of the several states. When the North German Union was expanded into the German Empire by the entrance of the South German states into the Union, three classes of organizations again participated, *viz;* the governmental heads of the North German Union and the South German states; the Federal Council and Diet of the North German Union; and the legislatures of the South German states; these legislatures acting, however, in all these cases in the manner prescribed by the constitutions of these respective states for making constitutional changes.

[1] Except a clause providing for the constitution of a committee in the Bundesrath for foreign affairs.

[2] Laband, Staatsrecht des deutschen Reiches, Bd. I, S. 36 ff.; Schulze, Lehrbuch des deutschen Staatsrechts, Erstes Buch, S. 168 ff.

Which now of these organizations or classes of organizations represented the sovereign, the German state? Which ordained the constitution, and which were merely the ornamental and theatrical addenda? If we take a purely juristic view of the subject, — *i.e.* if we start with the condition existent just after the dissolution of the German confederacy in 1866, as the normal condition, and proceed upon the principle that legal authority must be found for every act done in reaching the consummation — then we come to the conclusion that the separate states, each sovereign and independent, first formed an international league of limited duration and promised to establish a state in which their separate sovereignties should become a united sovereignty; that the new sovereignty upon which the present constitution rests therefore came into existence through a voluntary merging of the sovereignties and of parts of the governmental powers of twenty-five states into one state and one government.[1] According to this view, the new state was organized in the body representing the original states in their organic capacity, *i.e.* in the Federal Council (*Bundesrath*).[2] The Convention Parliament, the Diet, and the state legislatures had no constituent powers, only ratifying powers.

I find two great difficulties with this view, the one historical and the other technical. In the first place, it ignores the revolutionary character of the conditions out of which the North German Union and its expansion, the German Empire, sprang. When the Diet of the German confederacy threatened Prussia with coercion, and Prussia seceded from the legally "indissoluble" union,[3] and issued her ultimata to the state governments and her call to the German people, it seems to me that she abandoned legal ground and made appeal to power. It was no longer "Rechtsfrage," but "Machtfrage." Legal methods and processes had been tried

[1] Laband, Staatsrecht des deutschen Reiches, Bd. I, S. 32. [2] *Ibid.* S. 88.
[3] Deutsche Bundesate, Art. 5, Schlussacte.

until it was found that they could furnish no solution to the existing complications and no satisfaction to the existing needs. The moment had arrived, in the development of the political history of Germany, for the change not only of the form of government, but also of the form of state. The sovereignty was not as a fact where the confederate constitution recognized it to be. Fact and law were in conflict. Fact could not give way, and law would not. Prussia's justification stands firm upon grounds of political morality; but, measured by the existing principles of legality, she was guilty of rebellion. Only the successful appeal to the ordeal of battle could change the rebellion into revolution and become the foundation of a new legality. What can Laband himself, the thoroughly juristic interpreter of the history of the formation of the constitution, mean other than this, in that beautiful sentence on the tenth page of his great work on the public law of Germany, which reads: "darin liegt die historish-politische, die sittliche Berechtigung des Krieges von 1866, dass er nicht im Sonderinteresse Preussens, sondern in dem Gesammtinteresse Deutschlands geführt wurde und dass von Anfang an nicht die Vergrösserung Preussens, sondern die Erlösung Deutschlands von dem politischen Elend, welches die Verträge von 1815 über dasselbe gebracht haben, das hohe Ziel des Kampfes war." But if this be the true view, then we must treat the formation of the German state upon which the constitution rests as a spontaneous rallying of forces about a natural centre of unity, following natural principles of attraction and repulsion, and using the forms and fictions of existing, or once existing, legality so far as possible in the attainment of the transcendent purpose.[1] We must not, then, take the form for the substance. In this great act the German princes and the several state legislatures were but the representatives of the German people in their historical organiza-

[1] See Jellinek, Gesetz und Verordnung, S. 264 ff.

tions,[1] and the Convention Parliament was the representative of the German people in their newly found totality. The German people were, therefore, the ultimate sovereign in the new system; and they put to themselves, under three forms of organization, the question of the adoption of the constitution, in order that it might escape the errors and imperfections of haste and one-sidedness, and correspond to the wants and wishes of the people as a whole and in every part. We must not, then, call either of these classes of organizations sovereign, and the others only ratifying bodies. If it had come to a conflict between them, one could have triumphed over the other two, or two over one, only by the strength of the popular support; *i.e.* only by the people renouncing the two or the one as unfaithful representatives of the people. If the people resident within the state of Prussia had undertaken to prevent the formation of the imperial constitution, either through their King or their legislature or through the Convention Parliament, they could undoubtedly have done so, since they constituted the great majority of the German people; but if the people resident within any other state had made this attempt through those bodies in which the rule of the simple popular majority was not followed, *i.e.* in the Federal Council and in the combined legislatures, let the fate of Hanover, Hesse, Nassau and Frankfort answer as to what might have been the result.

The technical difficulty which I find with the juristic view leads to the same results. If either one of these three forms of organization was sovereign, then it must have been able to do what it would, as well as to prevent what it would. If the test of sovereignty is only the power to propose and prevent, then each of the three forms of organization was sovereign and equally so. The test of sovereignty is rather the

[1] Laband, Staatsrecht des deutschen Reiches, Bd. I, S. 89.

power to overcome all resistance and attempted prevention. Now one of three could have had such power only when supported by the people in sufficient force and with sufficient determination to overcome the rest; and that would signify that the people were the sovereign, the state, and had rejected the other forms of organization. My view is, therefore, that the German people resident within the twenty-two purely German states had, by 1866, reached a point in their national development where the ethnical unity was bound to pass over into political unity; that the German state had become existent subjectively, as idea in the consciousness of the people, and that the impulse to objectify the idea in institutions and laws was the force which employed the customary forms of legality in the attainment of the result; but the original power was in that force, not in those forms. It was fortunate for the continued existence of these that they proved elastic enough to permit the entrance of that force. It was not compelled, thus, to cast them aside and create its own more natural forms. The task of the commentator, however, is made much more difficult on account of this fact. He, and those who read him, are obliged to preserve a constant tension of mind in distinguishing these forms when filled with the new power, from the same as containing only the old power. Both he and they almost inadvertently glide into the juristic processes, and, delighted with a show of logical exactness, forget that the juristic theory will not contain the demonstrations of war and violence and the evolutions of power with which the birth moment of the new state was attended.[1]

[1] Jellinek, Die Lehre von den Staatenverbindungen, S. 262.

CHAPTER IV.

THE HISTORY OF THE FORMATION OF THE FRENCH CONSTITUTION.

THE Carolingian constitution is again the point of departure in tracing this development. The dissolution of the theocratic imperium in 843 gave to the French state its substantial territorial and ethnical basis, but left it disorganized politically. The King, the marquises, the counts and the bishops remained; but they were only officers, government, not the state, not the sovereign. The Emperor alone was the state, for the real monarchic state must rest upon a theocratic foundation, must be *jure divino*. When the state is purely secular, it can never be monarchic except in appearance. It may have a monarchic government, but it itself is either aristocratic or democratic. The theocratic principle, as we know, was wanting in the kingship; and although the post-Carolingian King claimed the rights, powers and prerogatives of the Emperor, the marquises, counts and bishops denied and successfully resisted the claim under the principle, as we of to-day would express it, that they had derived their offices and powers from the same source as the King himself, *viz;* from the Emperor, the state, and that therefore their tenures and prerogatives were equally sacred with those of the King.

The officials of the Empire now laid claim, in the period of the dissolution of the Empire, to the rights and powers of princes; *i.e.* of autonomous government in their respective seigneuries. Thus the dissolution of the imperial sovereignty left immediately the federal form of government without any

objective organization of the state, but with the unorganized material of an aristocratic state. The powerlessness of the King to meet successfully the Norman invasions furnished the occasion, in fact, made it necessary, for the aristocratic state to give itself objective organization. This was finally accomplished in the assembly of the princes, both ecclesiastical and secular, at Senlis, in the year 987, where they in union constituted themselves as sovereign, as state, discarded the claims of a Carolingian pretender and elected Hugh Capet, duke of the Isle de France, King.[1]

The royal government was more fortunate in France than in Germany. The tendency of the aristocratic state towards excessive decentralization in government met with a far more decided and permanent check in France through the development of the democracy, than in Germany through the re-establishment of the imperium. For the first hundred years, however, the Capetians merely held their own. About all the advance they can be said to have made was their successful defence of the royal tenure against republicanization. The crusades of the eleventh century relieved the King of the hostile presence of a large part of the seigneurs, who went forth upon those eastern campaigns never to return.[2] The confiscations of the territories of the Duke of Normandy and the Count of Toulouse at the beginning of the thirteenth century, increased immensely the power of the crown.[3] The King followed the policy of union with the bourgeoisie against the seigneurs. The democracy was becoming conscious of itself and was seeking its first form of organization about the royal centre. In the first decades of the fourteenth century the union of the King and people seemed on the point of consummation. The King, however, pressed forward too rapidly and recklessly. The people needed a longer training, a

[1] Martin, Histoire de France, Tome II, pp. 547 ff.
[2] *Ibid.* Tome III, p. 193.
[3] *Ibid.* Tome III, p. 585; Tome IV, p. 150.

more gradual development. The reaction began before the death of Philip the Fair.[1] His own inconstancy to the popular cause, the misfortunes of his family, and the descent of the crown to the Valois branch of the Capetians in 1328, checked the organization of the democratic state about the King as the sole and exclusive organ of government; *i.e.* checked the development of what is termed by the publicists the absolute monarchy, which is, as I have already demonstrated, the democratic society with monarchic government. In consequence of this check the aristocratic state revived in France. The Valois Kings turned their backs upon the bourgeoisie and restored to the seigneurs the autonomy of which the older line had with so much pains and persistence succeeded in partially depriving them.[2] The decentralization of the government was of course the result. In this condition of weakness the French state came to meet the century of war with England. The aristocratic state was on the point of dissolution when the democracy of France came to the rescue. This was the political significance of the appearance of the Pucelle in 1429.[3] The King, Charles VII, did not comprehend it, but his successor, Louis XI, did.[4] Louis XI cultivated the democracy with great assiduity and made the crown the bearer of its power against the aristocracy. From Louis XI to Louis XVI, *i.e.* for three hundred years, the political system of France was the unorganized democratic state, *i.e.* the democratic society, with monarchic government, *i.e.* the democratic society under monarchic organization. It was this which preserved France from the disunity of Germany during the period when the French democracy was coming to the consciousness of the state, and was passing through the school of preparation necessary to develop the capacity for the democratic organization of the state.

[1] Martin, Histoire de France, Tome IV, p. 512.
[2] Ranke, Französische Geschichte, Bd. I, S. 37 ff.
[3] *Ibid.* S. 44; Kitchin, History of France, Vol. I, pp. 522 ff.
[4] Kitchin, History of France, Vol. II, p. 100.

At length, in 1789, the moment for this organization of the state arrived. The body called together by the King as "États generaux" transformed itself into a national constituent assembly; *i.e.* the democratic state gave itself its natural form of organization. The first written constitution of democratic France, *viz;* that of 1791, was framed and ordained by this body. This body was, therefore, the ultimate and sovereign organization of the state. The acceptance of this constitution by the King was in fact but an appearance-saving form. It could still, however, be claimed by the royal jurists that the assembly only framed the constitution, while the act of the King was the real ordaining, *i.e.* sovereign, act. This claim, thrown in the face of the people, had no small influence in developing the idea and feeling that the King must necessarily be made away with, before the sovereignty of the democratic state, under its own chosen form of organization, could be placed beyond dispute. This was the scientific meaning of the dethronement and execution of the King. The second convention, *viz;* that of 1792, represented the jacobinistic view, *i.e.* the extreme democratic view of the state. It did not regard itself as a constituent, but only as an initiating, body. It submitted the constitution which it drafted to the direct universal suffrage of the people.[1] It thereby recognized the people, organized in their respective electoral districts, as the sovereign, the state. This is the doctrine of the *plébiscite* pure and simple. The introduction of this principle into the French practice cannot then be charged upon Bonaparte. He found it there. It was the legacy of jacobinism to the Empire, and the successful use which Bonaparte made of it demonstrates the near approach in principle of the extreme democracy to real Cæsarism. The constitution of 1793, framed by the convention and ordained by the *plébiscite*, was never put in

[1] Lebon, Das Staatsrecht der französischen Republik, S. 12.

force. The need of the state, at that moment, was for a stronger government than this constitution created. The same convention accordingly framed another constitution, two years later, constructing a more powerful government, and submitted this again to the *plébiscite.* It was approved by an overwhelming majority; and by the help of the military, commanded by the young artillery officer of Toulon, Bonaparte, it was put into operation.[1] The new government did not, still, prove strong enough for the necessities of the state. In 1799, Bonaparte suppressed it with his soldiers and appealed to the *plébiscite* for his justification. His doctrine also was, therefore, that the sovereign, the state, is the people organized in their electoral assemblies or districts. The constitution which he submitted was ratified by the popular vote, 3,011,007 in favor of it, to 1562 against it.[2] The amendment of this constitution in 1802, and finally the establishment of the imperial constitution of 1804, rested likewise upon the *plébiscite.* In the imperial system, therefore, the jacobinistic doctrine, that the state is the people organized in their voting precincts, was preserved.

After the overthrow of Bonaparte and the restoration of the Bourbons, the first constitution, that of 1814, proceeded wholly from the King.[3] The doctrine which lay at the base of this constitution was, therefore, that the state was organized in the King. The King shrewdly applied this principle, without theoretical enunciation, in amending the constitution in some points to meet the popular views.[4] The successor of Louis XVIII was not so wise. Charles X proclaimed the sovereignty of the King over the constitution, and undertook to exercise the same in the issue of measures obnoxious to the people.[5] The revolution of 1830 was the result.

[1] Lebon, Das Staatsrecht der französischen Republik, S. 13
[2] *Ibid.* S. 14. [3] *Ibid.* S. 15.
[4] Lavallée, Histoire des Francois, Tome V, p. 103 ff.
[5] *Ibid.* pp. 352 ff.

The legislature created by the Bourbon constitution anticipated the people, or rather the populace; revised the constitution, and demanded its acceptance by Louis Philippe as the condition of his elevation to the throne by the suffrage of the legislature. He accepted it, and thereby acknowledged the sovereignty of the people as organized in the legislature.

This solution of the question of the organization of the state could not, however, be permanently satisfactory. In the first place, the qualification for suffrage was so high that the legislature represented only about 300,000 voters;[1] and, in the second place, the King had a veto upon all acts of the legislature, whether they were amendments to the constitution or ordinary statutes. The resistance of the King to the extension of the suffrage — an extension which would have made the legislature a truer organization of the state — provoked the revolution of 1848.[2] The provisory government, which assumed power after the expulsion of the King, called upon the people to elect, by universal suffrage, members to a constituent convention. This was accomplished during the month of April, and upon the 4th of May the assembly was organized. It was the sovereign organization of the state.[3] It framed and ordained the constitution of 1848. Under it Louis Napoleon was elected President of the republic.

But Napoleon took advantage of the weakness of the French democracy for the *plébiscite*, and in his conflict with the legislature ignored the method prescribed in the constitution for effecting changes in the organic law, and appealed to the people to empower him by direct vote to put in force a constitution, the framework of which he presented to them in his appeal. That is, he reintroduced the principle that the state is the people organized in their voting precincts. His appeal was ratified by the people, and the principle of the *plébiscite*

[1] Lebon, Das Staatsrecht der französischen Republik, S. 16, Anmerkung.
[2] *Ibid.* S. 16.
[3] Stern, Revolution de 1848, Tome II, pp. 212 ff.

upon the constitution re-established.[1] At last the imperial constitution of 1852 was established by the *plébiscite*.[2]

The overthrow of the Empire in 1870 and the capture of the Emperor necessitated a provisory government. The members of the legislative body of the Empire representing the constituencies of the city of Paris assumed power; issued a call on the 8th of the month (September) for the election, by universal suffrage, of members to a constituent convention; fixed the day of assembly upon the 16th of the following October, and designated the city of Paris for the place. The approach of the German armies moved the provisory government to send a delegate, Crémieux, to Tours, to provide for the event of the severing of communication between Paris and the provinces. It also resolved to hasten the elections to the convention, and appointed the 2nd of October, instead of the 16th, for the day of assembly. Before the 20th of September, however, the Germans had surrounded the city, cutting off all communication with the country. The delegation of the provisory government at Tours was thus forced to assume the government outside of Paris. It annulled the order for elections to a constituent assembly, and manifested the determination to establish itself in dictatorial power for the purpose of driving out the invader. The provinces of the south and west, however, immediately resented the action and attitude of the Tours government, and threatened to act upon their own responsibility. The government at Tours reconsidered its resolution annulling the elections, and ordered that these be held upon the day originally designated. The government in Paris was advised of this last act by balloon communication, and, under the influence of Gambetta, annulled this second order for elections. On the 8th of October Gambetta escaped by balloon from Paris and went to Tours. He immediately assumed

[1] Lebon, Das Staatsrecht der französischen Republik, S. 16 ff.
[2] *Ibid.* S. 17.

the war department and dictatorial power, in order to organize the provinces for the rescue of Paris. But the south revolted. The league of the south formed itself in Toulouse, and Esquiros assumed dictatorial power in Marseilles, independent of both Tours and Paris. Gambetta was able, however, to overcome these movements, and, on the 2nd of November, the Tours government issued the call for the *levée en masse* for the expulsion of the invader. The advance of the Germans compelled the overnment to withdraw to Bordeaux. From this point, it inaugurated the campaign for the relief of Paris. This was a failure, and on the 28th of January, 1871, Paris capitulated. The Germans demanded that the provisory government at Paris should immediately order elections to a constituent assembly, which should meet within fourteen days, at Bordeaux, to deliberate upon the preliminaries to the treaty of peace. The Germans were unwilling, of course, to treat with the provisory government, on the ground that the French people might refuse to regard themselves as bound by its acts. Pressed by the invader, the Paris government issued the decree for the elections and ordered them to be held on the 8th of the following month (February). The Paris government was, however, obliged to rely upon the branch at Bordeaux to execute the decree. Gambetta offered some resistance, but finally, on the 31st of January, sent out the necessary order to the proper officers, but commanded the disfranchisement of the Bonapartists. Of course the Germans could not permit this, for the reason that the international engagements, which an exclusively republican assembly might assume, might not be regarded by the disfranchised party as binding upon them, in case they should succeed again to power. Bismarck, therefore, protested against this measure and the Paris government annulled it and proclaimed the powers of the Bordeaux branch withdrawn. The elections were held on the 8th of February, and on the 13th the convention met at Bordeaux. This body was elected by universal

suffrage and, therefore, represented the whole people. It took upon itself, first, the powers and duties of government, and, after six years of existence in this capacity, it framed and ordained the present constitution of the French republic.

The French state, therefore, upon which the present constitution rests, is the people, organized in national constituent convention.

It is to be hoped that the French democracy has finally worked itself clear of the fallacy that the *plébiscite* is the proper form of organization of the state. The system of the *plébiscite* is a very subtile bit of political deception. Its dangerous points are, first, that the organization of the people in their electoral assemblies is a very loose form of organization; in fact, it is not a very great departure from disorganization, when viewed from any central standpoint. The natural purpose of this kind of organization is the selection of a number of persons, all of whom taken together may possibly work out, by interchange of opinion, a well-digested view of the law and policy of the state, but it is not naturally adapted at all for the immediate consideration and decision of the principles of that law and policy. In the second place, its employment upon such subjects is dangerous, because it gives rise to the popular notion that it is no matter who proposes the constitution or the statute, so long as the *plébiscite* ratifies the same. This, as we have seen, opens the way for Cæsar, who, having once attained the powers of government, will give the people the alternative between ratifying his own arbitrary *régime* and the horrors of revolution. The body which *proposes* the constitution, or the amendment of the constitution, must be a truly representative body of the whole people in order to a true organization of the democratic state; and it is then a matter of little concern whether the *plébiscite* be employed to ratify the work of such a body or not. Its employment will more often be hurtful than advantageous.

It will thus be seen that all four of the states, whose con-

stitutions I propose to examine in the next part of this work, have reached the democratic period of their development. Two of them are usually described as monarchies, but they are such only in appearance, and hardly that. A very moderate degree of scientific observation will discover that we have to do in these cases with old forms filled with a new force. In England and Germany these old forms have so adapted themselves to the new content that little would be gained by their destruction. They do somewhat obscure the vision of the observer; they do offer a vantage-ground for resistance to the realization of the new order; and they do confuse, in some degree, the organization of the state. Should their use for these purposes be pressed too far, they will probably be compelled to give way to forms corresponding more naturally to the existing conditions of power; but if they prove sufficiently elastic, they may still furnish the names and titles of the new powers for decades, perhaps centuries, to come.

Part II.

COMPARATIVE CONSTITUTIONAL LAW.

Book I.

THE ORGANIZATION OF THE STATE WITHIN THE CONSTITUTION.

A COMPLETE constitution may be said to consist of three fundamental parts. The first is the organization of the state for the accomplishment of future changes in the constitution. This is usually called the amending clause, and the power which it describes and regulates is called the amending power. This is the most important part of a constitution. Upon its existence and truthfulness, *i.e.* its correspondence with real and natural conditions, depends the question as to whether the state shall develop with peaceable continuity or shall suffer alternations of stagnation, retrogression, and revolution. A constitution, which may be imperfect and erroneous in its other parts, can be easily supplemented and corrected, if only the state be truthfully organized in the constitution; but if this be not accomplished, error will accumulate until nothing short of revolution can save the life of the state. I do not consider, therefore, that I exaggerate the importance of this topic by devoting an entire book, in my arrangement, to its consideration. The second fundamental part of a complete constitution, I denominate the constitution of liberty; and the third, the constitution of government. These I shall treat in the second and third books of this division of my general subject.

CHAPTER I.

THE ORGANIZATION OF THE STATE IN THE BRITISH CONSTITUTION.

In the absence of any constitutional law distinctly separate from ordinary statute law, enacted by a different body and written down in a single instrument, we are compelled, in regard to this question as to all other questions of the English system, to look to precedent. It is a difficult matter to determine exactly what is constitutional law as distinguished from ordinary statute law, when the enacting body in both cases is the same. We are deprived altogether of the juristic test and thrown back entirely upon the less exact tests of political science and comparative constitutional law. But we may assume, I think, that the sovereignty within the constitution, the general principles of liberty, the form and construction of the government, and the character and extent of the suffrage are natural subjects of constitutional law. Now when the British state comes to deal with these questions it treats them just as it does any question of ordinary law; *i.e.* the Parliament determines the law which regulates them.[1] If the two houses can agree, then a simple majority of a quorum in each is all that is necessary for such legislation. If they cannot agree, and if the House of Commons insists upon having its own way, it may cause the Crown to create by patent a sufficient number of new peers in sympathy with its views to carry the measure. If the Crown declines in the first instance to do this, it is necessary only that the ministry

[1] Anson, Law and Custom of the Constitution, p. 34.

resign, and that the members of the party which it represents in the House of Commons refuse to form a new ministry. This will force the Crown to take a ministry from the opposition; but such a ministry, not having the support of the House, cannot govern. The Crown will then be obliged to take another ministry from the majority, or dissolve Parliament. If it should order dissolution and the constituencies then return the same party in majority as before, the Crown and the Lords will be compelled to give way.[1] But this is exactly the course of legislation upon any other subject, and this is exactly the manner in which the whole of the present constitution came to be just what it is. In other words, the organization of the state within the constitution is the same as was its organization back of the constitution. It is the newly elected House of Commons. It is the political people organized through their representatives in that House, chosen in view of a particular principle or measure. This is not the *plébiscite* in the French sense. The vote is not directly upon the proposition of law, but for persons who profess to support or to oppose the proposition. Neither are these persons bound by the views of their constituents as manifested in their election. The English *plébiscite* thus avoids the dangers to which the French principle is exposed, at the same time that it secures a substantial agreement between the people and their representatives.

There is very great advantage in this correspondence between the revolutionary organization of the state back of the constitution and its continuing organization within the constitution. A difference in this respect is unnatural and artificial. The organization of the state back of the constitution is the result of a free development in the political society. It may therefore be assumed to correspond with the actual substance of power. If now, when the state provides for its

[1] Bagehot, The English Constitution, p. 295 ff.

own organization *within* the constitution, it binds itself by forms which limit its original freedom of action, or if, on the other hand, it emancipates itself from the forms which guarded it originally against accidental results, it will soon be found either that the true development of the state will be hindered, or that the state will be driven into rash and hurtful experiments.

It is not necessary, however, to this advantageous correspondence of organization between the state back of and within the constitution, that this organization should be, at the same time, the whole or a part of the government. In fact, there are disadvantages in this. In the first place, it is confusing. It makes it difficult to determine what legislative measures are to be regarded as organic and relatively stable and what are to be regarded as ordinary statutes. For example, it is customary to hear the phrase "statutory Parliament" applied to the proposed Gladstonian legislature for Ireland. I do not understand what other kind of Parliament could be legally created in Ireland, or in any other part of the British dominions subject to the Parliament at Westminster. I suppose it was intended to indicate by the phrase that the proposed Irish legislature was to be an institution which might be abolished by the Parliament at Westminster; but every institution of the British state may be so abolished. There is deception in the phrase. It implies to an American reader a less independent institution than would really be thus constituted. In the second place, the identity in organization of the state and the government, or a part of the government, leaves individual liberty a less independent position in the constitution than is wholly compatible with its importance to the welfare of society. It opens the way for the government to encroach *ad libitum* upon the natural domain of individual autonomy, and leaves the individual defenceless against such encroachment. Lastly, the identity in organization of the state and the government renders a

federal system of government impossible. The test of that system lies in the principle that the central government cannot destroy nor modify the local, nor the local government the central. Now this relation between central and local government is impossible unless both rest upon a common basis, *i.e.* the co-ordination of these independent governments as parts of a harmonious political system requires an organization of the sovereign, the state, distinct from and supreme over both.

It will thus be seen that the organization of the state within the British constitution has its points of advantage and of disadvantage. It has consistency in character, absoluteness in power, precision in action and facility in employment. Through its correspondence with the revolutionary organization of the state back of the constitution on the one side, and with the government on the other, it receives the impulse to change from below and the disposition to conserve from above; but it risks everything upon the wisdom, the integrity, and the patriotism of the party in majority in the House of Commons. Should these qualities fail in the make-up of that body, the liberty of the individual and the welfare of society would inevitably suffer violence and perhaps destruction.

CHAPTER II.

THE ORGANIZATION OF THE STATE IN THE CONSTITUTION OF THE UNITED STATES.

THE fifth article of the constitution of the United States reads: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the Legislatures of two-thirds of the several States" [commonwealths], "shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the Legislatures of three-fourths of the several States," [commonwealths] "or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State," [commonwealth] "without its consent, shall be deprived of its equal suffrage in the Senate." The first part of the proviso has become obsolete, and therefore needs no further consideration; but the second is as permanent and binding as any other part of the constitution.

As I have already indicated, the proper standpoint from which to examine the organization of the state within the constitution is its relation, on the one side, to the revolutionary organization of the state back of the constitution or, if the political society back of the constitution has outgrown that original organization, to the existing social conditions back of the constitution and, on the other side, to the gov-

ernment created in the constitution. In an earlier chapter of this work, I have endeavored to show that the real organization of the United States as the sovereign, the state, in our present system, was in the constituent convention. This, like the Continental Congress, was a single body, representing the whole people of the United States and passing its resolves by simple majority. The people of the United States, as a whole, were behind this body, and gave it the power to ignore practically the Confederate Congress and the legislatures of the commonwealths, and, while formally submitting its work to ratification by the immediate representatives of the people in the commonwealths, chosen by the people for that especial purpose, to really ordain the constitution. As I have shown, this theory of the character and position of the convention is the only one which will give scientific explanation to its acts, and the only one which fits in with the natural status and relations of what we may term American political society. The organization of the state *within* the constitution, however, is of a double, and perhaps of a triple or quadruple, character. Article V provides, in the first place, for an organization apparently very nearly correspondent with the original organization back of the constitution, *viz;* a convention for proposing amendments, and conventions of the people resident within the several commonwealths for ratifying the same. According to the letter of the law, however, the general convention is only an initiating body, and a three-fourths majority of the separate conventions is the real constituent. This was the apparent relation between the original convention of 1787 and the separate conventions within the commonwealths; but, as I have shown, that body really exercised constituent powers when it framed an entirely new constitution, designated the bodies who should ratify it, and fixed the majority necessary for ratification. It is probable that another convention, representing in a single body the whole people of the United

States, upon a truthful basis of representation, would have such a moral power as to carry its resolves through the separate conventions unchanged, unless some absorbing sectional interest should control the conventions in more than one-fourth of the commonwealths. In such a case the national convention might be able to propose and cause to be applied a different method of ratification from that provided in the existing constitution, as did the convention of 1787; but this would be revolution again, as that was, and not existing law.

It will be seen that the constitution does not elaborate the details of this form of organization of the state. It therefore impliedly leaves that to the Congress. The Congress has never touched the subject, and the constitution has never been changed by the sovereign under this form of organization. From a theoretical standpoint, this is much to be regretted. We have here upon paper an organization of the sovereignty separate from the organs of government. It is a great advance in constitutional law, and if it could be actually applied to practice, it would give us the vantage-ground for the solution of the many difficulties which arise out of confounding the state with the government.

The second form of organization of the state within the constitution vests the sovereign power in the Congress and the legislatures of the commonwealths, the former originating, and the latter ratifying, the changes in constitutional law. The confederate constitution of 1781 vested the amending power in these same bodies; but that constitution required unanimity in the ratifying bodies, with simple majority of the commonwealths represented in the proposing body, while the present constitution requires only a three-fourths majority of the ratifying bodies, with a two-thirds majority of both houses of the proposing body. This difference is fundamental. It stamps the present system as consolidated over against the confederatism of the other. When any one

commonwealth can be bound against its will, confederatism is overcome.

The difficulty with this form of organization is that it identifies the organization of the state with the organs of government, and promotes that confusion of thought in dealing with the subjects of public law which arises from the lack of a sufficiently clear distinction of state from government. This is felt in a different way in our system from what it is in the English. We do not lose thereby the juristic test of constitutional law, as the English do. Only that which passes both Congress and the legislatures of the commonwealths is constitutional law, while ordinary statute law is made by these bodies separately. But we become confused upon the still more important point as to whether the sovereignty is in the United States or in the commonwealths; and we are led to misconceive the real character of the commonwealths, and to think of them really as states instead of merely as governments. This is also true, in some degree, when the ratifying bodies are conventions of the people resident within the commonwealths; but it is much easier to comprehend that these bodies, created directly by the constitution of the United States and solely for United States purposes, are institutions of the United States, than that the legislatures of the commonwealths are such, even when acting in this capacity only.

The advantage, on the other hand, of this form of organization of the sovereignty lies in its convenience. The bodies called upon to act are always in existence. It is not necessary, therefore, to exhaust time and energy and incur special expense to call them out of potential into actual being. It is to be presumed, moreover, that those accustomed to the work of legislation know best when and where the organic law should be changed or supplemented. The former consideration especially has, no doubt, determined the practice in our system. All the changes in our constitutional law

have been made by the sovereignty under this form of organization.

In the third place, it will be seen from an examination of the article of the constitution relating to this subject that the Congress may direct which method of ratification shall be followed. The Congress may, therefore, combine itself with conventions of the people within the commonwealths or may combine the general convention with the legislatures of the commonwealths. Either would be a more convenient form of organization than the first form treated. The combination of the general convention with the commonwealth legislatures, however, would be confusing upon the most vital topic of our system. The combination of the Congress with the conventions within the commonwealths would, on the other hand, furnish us a form of organization much less liable to misconception and, at the same time, fairly convenient.

Congress, as I have indicated, has never ordained any such combinations; and in the method actually followed, Congress has not elaborated any complete system of procedure. Anything approaching an exhaustive regulation of this subject would require an express determination of the following questions, *viz;* whether the proposed amendment is subject to the President's veto power; how the submission of the same to the legislatures of the commonwealths is to be effected; whether the two houses of the commonwealth legislatures are to sit in joint session; whether the resolutions of these bodies upon the proposition or propositions of Congress are subject to the usual veto power of the executives of the respective commonwealths; what period is to be set for and to the deliberations of these bodies upon the proposition or propositions of the Congress; how the acts of these bodies shall be communicated to the Congress; whether a commonwealth legislature can reconsider its resolution either before or after notification of the same to Congress, and from what date an approved proposition shall be deemed in force as a

part of the constitution. All we have upon this subject from the Congress is contained in the formula of the resolution submitting a proposition for ratification which reads: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, two-thirds of both Houses concurring, That the following article be proposed to the legislatures of the several states, as an amendment to the constitution of the United States; which when ratified by three-fourths of the said legislatures shall be valid as part of the said constitution;[1] and in the direction as to promulgation, which reads: "Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States" (commonwealths) "by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States."[2]

It will be seen from an examination of the first of these provisions, that Congress treats the origination of the propositions of amendment as exempt from the veto power of the President. The resolutions of this nature are not printed in the statutes as approved by the President, but as signed by the speaker of the House of Representatives and the president of the Senate, and attested by the clerk of the House of Representatives and by the secretary of the Senate. The constitution of the United States declares, however, that "every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be nec-

[1] United States Statutes at Large, Vol. I, pp. 97, 402; Vol. II, p. 306; Vol XIII, p. 567; Vol. XIV, p. 358; Vol. XV, p. 346.

[2] Revised Statutes of the United States, p. 32, sec. 205.

essary (except on a question of adjournment)" is subject to the President's veto.[1] There certainly seems to be here a repugnance between the law and the practice. It is sometimes said that this question is one of no practical consequence, since the two-thirds majority necessary to pass the proposition in the first place could override the President's veto.[2] I think this a superficial view. The President may veto the resolutions of Congress, no matter by how great majority originally passed. If he does, the resolutions are thereby subjected to a second consideration and vote, and it is not at all improbable that the President's objections may produce a change in the vote sufficient to defeat the original proposition, or to cause a modification of the same.

Moreover, it will be seen that the practice of Congress is to connect the determination of the question as to whether the proposition or propositions of amendment shall be submitted to conventions of the people within the several commonwealths or to the legislatures thereof with the passage of the proposition or propositions, thus avoiding the veto of the President upon that point. The question of determining the bodies to whom submission shall be made is certainly a distinct one from the internal question of the proposition itself. It is a question determined *finally* by the Congress and not dependent for validity upon ratification, as is the content of the proposition. It might well be claimed that though the content of the proposition should be fixed by Congress alone, yet the act of submission should be in the form of a law; *i.e.* should be subject to the President's veto. If this be not so, then I do not see that it would ever be necessary, in the determination of this question, to unite more than a simple majority in the houses of Congress, since the constitution simply prescribes that Congress shall deter-

[1] Art. I, sec. 7, § 3.

[2] Paschal, Annotated Constitution, p. 247, sec. 236.

mine which of the two methods of ratification shall be followed, without designating the majority necessary to do so. It must be confessed that the language of the constitution upon this most important subject is not clear, and that the practice of Congress has some appearance of repugnance to it; but happily we have a decision of the Court which declares that the procedure followed by the Congress is in conformity with the constitution.[1]

After the submission, the Congress leaves everything to the legislatures of the commonwealths until their ratifications, in sufficient number to make the proposition a valid part of the constitution, are in the hands of the Secretary of State of the United States. One question may be said to have been touched and a settlement indicated, in the practice, during this stage of the procedure, *viz;* that a commonwealth may always reconsider its refusal to ratify, but that ratification once voted cannot be withdrawn, neither after the sufficient number shall have ratified to make the proposition a part of the constitution, but before promulgation, nor before the sufficient number shall have been reached. I say this settlement of the question is only indicated, not fully fixed.[2] It is certainly the only sound view of the subject. When the official report of ratification from any commonwealth is in the hands of the Secretary of State of the United States, all further power over the subject has passed from that commonwealth. It may with some reason be held that another point is implied in the precedents, *viz;* that no commonwealth may insert any change in the proposition of the Congress nor ratify conditionally. Certainly the insertion of any change would be an exceeding of the powers conferred by the constitution of the United States upon the legislatures of the commonwealths in regard to this subject. The con-

[1] Hollingsworth *v.* Virginia, U. S. Reports, 3 Dallas, 378.
[2] Cooley, Principles of Constitutional Law, p. 203.

stitution confers upon them only ratifying powers; *i.e.* it confers upon them no powers of initiation. It is not so certain, however, that the legislatures of the commonwealths can attach no conditions to their ratifications. For example, if a legislature should ratify, and fix a certain date past which its ratification would not hold unless the legislatures of three-fourths of the commonwealths should have ratified before or upon that date, it is not certain that this would not be valid as within the powers of the legislature. The constitution of the United States does not fix the date within which ratifications must be made. Congress has not done so, and certainly there are scientific objections to having a proposition so long undecided as to become obsolete. Nevertheless, I think the sound view of the subject, from the standpoint of political science, is that the legislatures should not be allowed to affix any conditions whatever to their ratifications. I think also that the sound interpretation of the constitution of the United States must arrive at the same result. The only power which the legislatures have upon this subject is derived from an express grant in the constitution of the United States; and since that grant speaks only of ratification, it is the reasonable conclusion that if ratification, in any other than its primary and simplest form, is allowed at all, it must be by permission of the Congress, antecedently given; because the attachment of any conditions to the ratification would be an exercise of the power of initiation, and the constitution vests the whole power of initiation upon this subject in the Congress.

I cannot sympathize with that unreserved commendation of the fifth article of the constitution of the United States indulged in by Mr. Justice Story[1] and other commentators. When I reflect that, while our natural conditions and relations have been requiring a gradual strengthening and

[1] Story, Commentaries on the Constitution of the United States, Vol. II, p. 574 ff., §§ 1826–1831.

extension of the powers of the central government, not a single step has been taken in this direction through the process of amendment prescribed in that article, except as the result of civil war, I am bound to conclude that the organization of the sovereign power within the constitution has failed to accomplish the purpose for which it was constructed. I am not of those who believe that we have done with war in the world yet. I believe that much of the civilization of the world is still to be wrought out through its apparently destructive agency. But I do say this: that when a state must have recourse to war to solve the internal questions of its own politics, this is indisputable evidence that the law of its organization within the constitution is imperfect; and when a state cannot so modify and amend its constitution from time to time as to express itself truthfully therein, but must writhe under the bonds of its constitution until it perishes or breaks them asunder, this is again indisputable evidence that the law of its organization within the constitution is imperfect and false. To my mind the error lies in the artificially excessive majorities required in the production of constitutional changes. According to the census of 1880, it was possible for less than 3,000,000 of people to successfully resist more than 45,000,000 in any attempt to amend the constitution under the present process. The argument in favor of these artificial majorities is that innovation is too strong an impulse in democratic states, and must be regulated; that the organic law should be changed only after patience, experience and deliberation shall have demonstrated the necessity of the change; and that too great fixedness of the law is better than too great fluctuation.[1] This is all true enough; but, on the other hand, it is equally true that development is as much a law of state life as existence. Prohibit the former, and the latter is the existence of the

[1] Story, Commentaries upon the Constitution of the United States, Vol. II, p. 575, § 1828.

body after the spirit has departed. When, in a democratic political society, the well-matured, long and deliberately formed will of the undoubted majority can be persistently and successfully thwarted, in the amendment of its organic law, by the will of the minority, there is just as much danger to the state from revolution and violence as there is from the caprice of the majority, where the sovereignty of the bare majority is acknowledged. The safeguards against too radical change must not be exaggerated to the point of dethroning the real sovereign.

There is another way, a better way and a natural way of securing deliberation, maturity and clear consciousness of purpose without antagonizing the actual source of power in the democratic state, *viz;* by repetition of vote. If, for example, the Congress should, in joint session and by simple majority, resolve upon a proposition of amendment, and give notice of the same to the people in time for the voters to take the matter into consideration in the election of the members of the House of Representatives for the next succeeding Congress; and if the succeeding Congress should then repass the proposition in joint session and by like majority; and if then it should be sent to the legislatures of the commonwealths for ratification by the houses thereof, acting in joint assembly and resolving by simple majority vote; and if then the vote of each legislature should have the same weight in the count as that of the respective commonwealth in the election of the President of the United States, and an absolute majority of all the votes to which all of the commonwealths were entitled should be made necessary and sufficient for ratification, — why would not this be an organization of the sovereign, of the state within the constitution, which would be truthful to the conditions of our national democratic society and our federal system of government; which would secure all needful deliberation in procedure and maturity in resolution; which would permit changes when the nat-

ural conditions and relations of our state and society demanded them; and which would give us an organization of the state convenient in practice and, at the same time, sufficiently distinct from the organization of the government to prevent confusion of thought in reference to the spheres and powers of the two organizations?

To reach such an organization of the state within the constitution legally would, of course, require the amendment of the provision of the constitution for amendment. This may be done legally in the manner prescribed for making any amendment, since no part of the constitution is withdrawn by the constitution from the process, except the equality of the commonwealths in the senatorial representation. The only question would be as to whether this exception must be connected with the new law of amendment. It seems to me that the letter of the constitution and the intentions of the framers would require this, unless the new law should be ratified by the legislature of every commonwealth. If this be not true, then a commonwealth might be deprived indirectly of its equal representation in the Senate without its own consent, while by the existing law it cannot in any manner be so deprived. From the standpoint of political science, on the other hand, I regard this legal power of the legislature of a single commonwealth to resist successfully the will of the sovereign as unnatural and erroneous. It furnishes the temptation for the powers back of the constitution to reappear in revolutionary organization and solve the question by power, which bids defiance to a solution according to law. There is a growing feeling among our jurists and publicists that, in the interpretation of the constitution, we are not to be strictly held by the intentions of the framers, especially since the whole fabric of our state has been so changed by the results of rebellion and civil war. They are beginning to feel, and rightly too, that present conditions, relations and requirements should be the chief consideration, and that

when the language of the constitution will bear it, these should determine the interpretation. From this point of view all the great reasons of political science and of jurisprudence would justify the adoption of a new law of amendment by the general course of amendment now existing, without the attachment of the exception; and in dealing with the great questions of public law, we must not, as Mirabeau finely expressed it, lose the *grande morale* in the *petite morale.*

CHAPTER III.

THE ORGANIZATION OF THE STATE WITHIN THE GERMAN CONSTITUTION.

THE seventy-eighth article of the imperial constitution reads as follows: "Changes of the constitution shall be effected by legislation. Propositions therefor are to be regarded as defeated when fourteen voices in the Federal Council declare against them. Those provisions of the imperial constitution, through which specific rights are secured to an individual commonwealth of the Union in its relation to the Union, can be changed only with the consent of the commonwealth so privileged."[1] This language requires much explanation before any criticism will be intelligible.

1. What is meant by the provision that changes in the constitution shall follow the usual course of legislation? The first element of the answer is, of course, that the legislative department of the imperial government makes constitutional law. No distinction, then, as to personnel or organization, exists between the body which makes constitutional law and the body which makes ordinary law. The second element of the answer requires a description of the usual course of legislation. The two houses of the legislature are the Federal Council (*Bundesrath*) and the Diet (*Reichstag*).[2] Bills may be originated in either house.[3] They become law when passed by both houses by simple majority vote of those voting, a quorum being present.[4] A quorum in the Diet is

[1] Reichsverfassung, Art. 78.
[2] *Ibid.* Art. 5.
[3] *Ibid.* Arts. 7 and 23.
[4] *Ibid.* Art. 5.

the majority of the whole number.[1] In the Federal Council it consists of those present at a meeting regularly called, the chancellor or his representative being among those present.[2] The constitution does not require the Emperor's approval to bills which may become law through the general course of legislation, and therefore amendments to the constitution are not subject to his veto, since they, by provision of the constitution, follow this course.

2. But when this general provision of the constitution in reference to legislation is made applicable to the work of changing the constitution, it is placed under one general and one special limitation.

The first limitation requires an extraordinary majority in the Federal Council to effect any constitutional changes. Less than fourteen voices in that body must oppose the proposition in order that its passage may be effected.[3] The Federal Council (*Bundesrath*) is composed of members appointed by the executives of the twenty-five commonwealths of the German Empire, to the number of fifty-eight voices.[4] The representation therein is distributed as follows: Prussia has seventeen voices; Bavaria, six; Saxony and Württemberg have four each; Baden and Hesse have three each; Brunswick and Mecklenburg-Schwerin have two each; the rest have one each.[5] The vote of each commonwealth is cast solid and according to instructions from the executive of the commonwealth.[6] The Diet (*Reichstag*), on the other hand, is composed of members elected by the universal suffrage of all male Germans twenty-five years of age and in full possession of their civil rights, and the representation is according to population.[7] Each member thereof represents

[1] Reichsverfassung, Art. 28.

[2] Von Rönne, Das Staatsrecht des deutschen Reiches, Bd. II, Erste Abtheilung S. 12.

[3] Reichsverfassung, Art. 78.

[4] By an amendment to the constitution in 1911, Alsace-Lorraine was granted three voices in the Federal Council, making sixty-one voices in all.

[5] *Ibid.* Art. 6.

[6] *Ibid.* Arts. 6 and 7.

[7] *Ibid.* Art. 20.

the whole Empire and votes uninstructed.[1] Fully three-fourths of the members are from Prussia. The vote in this body upon changes of the constitution is by simple majority of those voting thereon, a quorum being present.

It will be seen from an examination of the representation in these two bodies, that while the King of Prussia or the representatives in the Diet from Prussia may prevent any change in the constitution, both of them together cannot effect a change in the constitution. It will also be seen that the Kings of Bavaria, Württemberg and Saxony can together prevent any change in the constitution, but that all the executives, without the King of Prussia, and the unanimous voice of the Diet taken together cannot force a change of the constitution upon the King of Prussia. Finally, it will be seen that the executives of at least twelve of the largest commonwealths must unite with the majority of the Diet in order to effect a change in the constitution.

The second limitation upon the general course of legislation in making constitutional changes is special, and ordains that those provisions of the constitution, through which specific rights are guaranteed to the individual commonwealths in their relation to the Union, cannot be changed except with the consent of the commonwealths so privileged.[2]

Limitations upon and exceptions to general provisions are of course to be strictly construed. Under this exception to the general course of constitutional amendment, therefore, nothing can be claimed as a specific right requiring, as the condition of its change, the consent of the commonwealth affected, unless it shall be expressly guaranteed in the constitution, and unless it shall affect the relation of the particular commonwealth to the Union. For example, the general rights and powers of local self-government not withdrawn from the commonwealths by the imperial constitution, but

[1] Reichsverfassung, Art. 29. [2] *Ibid.* Art. 78.

not expressly secured to the commonwealths by that constitution, are not protected by this exception from the general course of constitutional amendment.

These specific rights, guaranteed in the constitution, are quite numerous. They are either in the form of specific powers conferred upon particular commonwealths, or specific exemptions of particular commonwealths from the general powers of the imperial government. In the first class belong the right of Prussia to the presidency of the Union;[1] the right of Bavaria to the chairmanship of the standing committee of the Federal Council for Foreign Affairs,[2] and to a permanent seat in the standing committee of the Federal Council for the Army and Fortifications;[3] the right of Würtemberg to a permanent seat in the standing committees for Foreign Affairs[4] and for the Army and Fortifications;[5] and the right of Saxony to a permanent seat in the standing committee of the Federal Council for Foreign Affairs.[6] These are clearly all specific powers touching the relation of the particular commonwealth to the Union, and guaranteed by the express provisions of the constitution to the particular commonwealth, and there is no difference of opinion among the commentators in regard to their falling under the class of rights which may be dealt with only by consent of the commonwealth so privileged. The commentators, however, generally go further, and bring under this class also powers not guaranteed to a particular commonwealth by the constitution, but by the treaty made between the North German Union and Bavaria, connecting Bavaria with the North German Union in the present German Union or Empire.[7] The powers guar-

[1] Reichsverfassung, Art. 11.
[2] *Ibid.* Art. 8.
[3] *Ibid.* Art. 8.
[4] *Ibid.* Art. 8.
[5] *Ibid.* Schlussbestimmung zum XI. Abschnitt, Art. 15.
[6] Reichsverfassung, Art. 8.
[7] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 14; von Rönne, Das Staatsrecht des deutschen Reiches, Bd. II, Erste Abtheilung S. 46, 47.

anteed to Bavaria in this treaty are: that in case Prussia shall be prevented from exercising the presidency of the Federal Council, Bavaria shall have that right,[1] and that in case the imperial ambassadors shall be prevented from representing the Empire at courts to which Bavarian ambassadors are accredited, these latter shall have that right.[2] These provisions of that treaty are mentioned in the law passed by the imperial legislature on April 16, 1871, empowering the Emperor to proclaim the revised constitution in force, and are declared in that law to be unchanged by the constitution; *i.e.* they are declared to retain their character as treaties between the Empire, in place of the North German Union, and Bavaria; *i.e.* they cannot be changed by the process of constitutional amendment without the consent of Bavaria. This is undoubtedly regarded as law by the German jurists, statesmen and publicists, but it certainly is very bad political science. It is bad enough to acknowledge that the sovereign is not sovereign upon subjects expressly and specifically excepted in the constitution. When, however, we go beyond this, we are certainly on the road to Warsaw. Some of the commentators go still further and construct specific rights for certain commonwealths out of the general principles of the constitution, and then assign such implied rights to the class of rights requiring the consent of the commonwealth affected to any change therein. They claim, for example, that the existing distribution of the voices in the Federal Council belongs to this class.[3] Those who do not hold this view in general place, nevertheless, the right of Bavaria to six voices instead of four — the number to which Bavaria would have been entitled if the same principle of distribution had been applied to Bavaria as was applied to

[1] Bayerisches Schlussprotokoll, IX.

[2] *Ibid.* VII.

[3] Von Rönne, Das Staatsrecht des deutschen Reiches, Bd. II, Erste Abtheilung S. 47.

the other commonwealths — under this class.[1] Laband goes so far as to claim legal equality of the commonwealths in rights and duties as a right of each commonwealth, which cannot be changed without the consent of the commonwealth unfavorably affected.[2] This is utterly indefensible from the standpoint of political science, and I think also from that of the constitutional law of the Empire. The constitution only declares "that those provisions of the constitution through which specific rights are guaranteed to a particular commonwealth" are subject to this particularistic method of change. It therefore excludes everything else from this category. If we depart from the strict construction of this exception to the sovereignty of the Empire, there will be no firm ground at all under our feet. The whole organization of the state will become a matter of conflicting opinion instead of objective reality. Such honeycombing of the constitution is not dictated either by the needs of science or the condition of the Empire. It springs from the blindness of particularism.

The other class of specific rights guaranteed by the constitution to particular commonwealths consists of exemptions of the particular commonwealths from the general powers of the imperial government. These are far more numerous than those of the first class.

Bavaria is the most richly privileged. The constitution provides that Bavaria shall be exempt from the legislation and supervision of the imperial government in regard to the law of residence and settlement;[3] in regard to the taxation of domestic liquors and beer;[4] in regard to the regulation of the railway system, except in so far as the general defence of the Empire shall require uniformity;[5] in regard to the regulation of the internal postal and telegraphic system, and

[1] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 14; Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 113.

[2] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 109.

[3] Reichsverfassung, Art. 4, sec. 1. [4] *Ibid.* Art. 35. [5] *Ibid.* Art. 46

also the postal and telegraphic intercourse with her immediate foreign neighbors;[1] and in regard to the regulation of the military system, except in so far as imperial control is permitted by the treaty between Bavaria and the North German Union, providing for the union of these two states in the Empire.[2]

To these exemptions expressly mentioned in the constitution the commentators add those contained in the treaty above mentioned, *viz;* the control of marriage relations and insurance of realty.[3] Laband even adds exemptions in regard to the fixing of the normal standard of weights and measures, and in regard to the issue of bank notes created by imperial legislation.[4] This seems to be altogether strained and exaggerated. As I have said above, I can go no farther than the treaties made between the North German Union and the several South German states providing for their entrance into the Union, and mentioned, as to certain of their provisions, in the law putting the revised constitution of the Empire into force, as still binding. That makes confusion enough. Anything more stands upon no ground either in science or law.

Next in the order of extent of exemption comes Württemberg. The constitution provides that Württemberg shall be exempt from the legislation and supervision of the imperial government in regard to the taxation of domestic liquors and beer;[5] in regard to the regulation of the internal postal and telegraphic system, and the postal and telegraphic intercourse with her immediate foreign neighbors;[6] and in regard to the regulation of the military system, except so far as imperial control is permitted by the treaty of the 21–25 of November, 1870, between Württemberg and the North

[1] Reichsverfassung, Art. 52.
[2] *Ibid.* Schlussbestimmung zum XI. Abschnitt.
[3] Bayerisches Schlussprotokoll, I, IV.
[4] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 112.
[5] Reichsverfassung, Art. 35. [6] *Ibid.* Art. 52.

German Union. The commentators add to these the exemption, contained in this same treaty, of Württemberg from the power of the imperial government to introduce the one pfennig freight charge upon the railways of Württemberg.[1] This treaty is mentioned in the law empowering the Emperor to proclaim the revised constitution in force, and this exemption is declared therein to be unchanged by the constitution.

Lastly, Baden is exempted by the constitution from the legislation and supervision of the imperial government in regard to the taxation of domestic liquors and beer.[2]

The commentators Hänel and von Rönne speak of an exemption of Oldenburg from the power and duty of the imperial government to maintain the chaussee-tolls throughout the Empire at the Prussian rates of 1828.[3] They find this duty imposed upon the imperial government, and this exemption of Oldenburg from its operation, in the 22d article of the customs-union treaty of the 8th of July, 1867, which they claim to be a part of the present constitution. Article 40 of the constitution declares that the provisions of the customs-union treaty of the 8th of July, 1867, shall remain in force in so far as they shall not be changed by law or constitutional amendment as the particular case may require.[4] If, therefore, this treaty guarantees a special exemption to a particular commonwealth, they argue, that it can be now withdrawn only by constitutional amendment in its exceptional form, *i.e.* only by consent of the commonwealth so privileged.

There are two other points to be explained before I leave this most confusing subject. The first is in regard to the organ through which the privileged commonwealth shall express its assent or dissent in reference to a change of its specifically guaranteed right. I think it is now the universal view that its representation in the Federal Council is the

[1] Württembergischer Schlussprotokoll, 2.

[2] Reichsverfassung, Art. 35.

[3] Von Rönne, Das Staatsrecht des deutschen Reiches, Bd. II, Erste Abtheilung S. 46.

[4] Reichsverfassung, Art. 40.

proper constitutional organ for this purpose, and that the commonwealth is bound by the acts of that organ in this respect. If that organ should act contrary to the instructions of the executive which appoints it, or if the legislature of the particular commonwealth should disapprove the instructions of the executive, the questions which would arise therefrom are internal to the particular commonwealth. The imperial government will not inquire into any of these matters, but will treat the word and act of the representatives in the Federal Council as final and irrevocable.[1]

The second point is, that the consent of the privileged commonwealth to a change of its specific constitutional right does not do away with the power of the fourteen voices to veto the change. The condition that less than fourteen voices must be found in the negative must be fulfilled, as well as that the voice of the privileged commonwealth must not be found in the negative.[2]

My criticism of this organization of the state within the constitution is based upon three considerations. The first is the lack of correspondence between it and the real power back of the constitution, the second is the fact that it is not wholly sovereign, and the third is the confusion in organization of the state with the government.

First. The real power back of the constitution is, as we have seen, the German people under the lead of the Prussian organization. The power of the Prussian arms established the German Empire. The many and in some respects petty and misleading legal forms employed in the formal part of the work must never blind us as to where the real power was and is. As the Germans would say, "Preussen ist Deutschland im werden begriffen;" which Mr. Emerson would have translated, "Prussia is Germany in the making." Now, there-

[1] Von Rönne, Das Staatsrecht des deutschen Reiches, Bd. II, Erste Abtheilung S. 36 ff.; Schulze, Lehrbuch des deutschen Staatsrechtes, Zweites Buch, S. 19.

[2] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, SS. 114, 115.

fore, any organization of the sovereignty within the constitution which would prevent the whole German people and the Prussian organization from amending the constitution is more or less artificial. It prevents the natural development of the German state. It sets law in opposition to fact, the result of which, in the long run, will be a period of stagnation followed by a period of violent changes.

The constitutional provision which gives to a majority of the representatives of the whole German people, or to the Prussian executive, the power to prevent an amendment to the constitution is certainly a truthful legalization of the facts; but that is only one side of this transcendent question. The mere power to prevent is not the test of sovereignty: the sovereign must also have the power to overcome the attempt of any other force to prevent. When, therefore, we reflect that, according to the organization of the sovereignty within the imperial constitution, the whole German people together with the executives of Prussia, Bavaria, Saxony, Württemberg, Baden, Hesse, Brunswick, Mecklenburg-Schwerin, Lubeck, Bremen, and Hamburg could not legally change the constitution upon a single point, in case the fourteen petty princes of Waldeck, Reuss, Lippe, *etc.* should object, we cannot fail to see that upon this side of the question the organization of the sovereignty within the constitution departs very far from the real conditions of power back of the constitution.

And when, in the second place, we come to the provision which recognizes to a single prince the power to prevent constitutional development by legal means upon many subjects which naturally concern the entire German state, thus really dethroning the sovereign by making the will of its subject superior to its own will, then must every healthy mind come to the conclusion that there is not only incompleteness, but positive error, in such an organization of the state. It does not require a great deal of scientific reflection to detect the

root of the error. It lies in the doctrine of the federal state. I contend that there is no such thing in political science as a federal state; that this political adjective is applicable only to government; and that the attempt to make a federal state in law is caused by confounding the conceptions of state and government. This political phenomenon always appears in that period of the history of a state when, through the expansion of the state, the organization of the sovereignty suffers natural changes which do not express themselves immediately in new forms of law. The dull mind of the average legislator cannot at once be made conscious of such changes. It takes them in only piecemeal, and formulates them only piecemeal, and is always deceived by the tempting conceit that the whole thing is a matter of legislative will.

The third great difficulty with the organization of the state in the German constitution is its confusion with the government. The sovereign acts through the ordinary organs of legislation and according to the ordinary forms of legislation; and its acts are distinguished from the ordinary acts of the legislature only by the extraordinary majority required in the Federal Council for their validity. The first consideration, therefore, as to any project which is presented in either house of the imperial legislature is whether it be a project of ordinary law or of constitutional amendment and, if the latter, whether it touches a specifically guaranteed right of a particular commonwealth. Who shall decide these questions? The constitution makes no *express* provision in regard to such a power. If it makes any provision, it must be by implication. Some of the commentators hold that this is a question of constitutional interpretation, to be determined preliminary to the passage of the bill, and that the constitution impliedly vests this power in the legislature, since the legislature must exercise the same whenever it passes any act; and that the power is to be exercised in the manner of ordinary legislation, *i.e.* by vote of the simple majority in the Federal Coun-

cil and in the Diet.[1] But if this be true, then what becomes of that most vital power of the King of Prussia to veto any proposition for constitutional change through his more than fourteen voices in the Federal Council? The simple majority in the Federal Council and in the Diet would only find it necessary to declare a project for changing the constitution to be a project of ordinary law, and the Prussian government would be helpless. Moreover, of what value would be the constitutional reservation of specific rights to particular commonwealths, and the requirements that these rights shall not be changed without the consent of the particular commonwealths, if the simple majority in the Federal Council and in the Diet could legally avoid this requirement through this power of preliminary interpretation?

Other commentators have been so impressed by this consideration that they have found in the Emperor's prerogative of promulgating the laws the power to examine their contents and determine therefrom their character and leave them unpromulgated if, in the Emperor's opinion, they have not been passed in the manner and with the legislative majority prescribed by the constitution.[2] But what a tremendous power this would place in the hands of the Emperor. He would only find it necessary to declare any project distasteful to him a constitutional amendment in order to be able to veto it in the Federal Council by the Prussian votes. Moreover, this power of the Emperor would not legally protect the other commonwealths against an attempt of the imperial legislature to deprive them of their specifically guaranteed rights by the power of interpretation. It would protect Prussia only. It may be said, of course, that the simple majority of the Federal Council and of the Diet on the one side, or the Emperor on the other, would not so abuse the

[1] Von Rönne, Das Staatsrecht des deutschen Reiches, Bd. II, Erste Abtheilung, S. 35.

[2] Schulze, Lehrbuch des deutschen Staatsrechtes, Zweites Buch, S. 119; Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 549 ff.

power of interpretation as to achieve the results above indicated; but we are treating of law now, not of personal disposition; not of what probably would be, but of what might be.

This close connection, almost identification, of the organization of the state with the government, has already led to some indistinctness as to what is constitutional law and what merely ordinary law. For example: a project of law, which could be passed by the imperial legislature only after an amendment to the constitution had been made empowering the legislature thereto, has been considered valid without such formal preliminary change of the constitution, provided it shall have been passed by a majority sufficient to have made the constitutional change.[1] Now is this law a part of the constitution? It has been held by precedent that it is not as to form, only as to matter, and that it may be changed subsequently as a piece of ordinary legislation, even though the change would involve further modifications of the original constitutional provision.[2] All this is most unscientific and confusing. The question of amendment should be considered and decided separately, apart from and antecedent to the passage of any law authorized by such amendment. If the organization of the state, the constitution-making power, were distinct from the government, this source of confusion would not exist.

Of course the German state may reorganize itself in the constitution; but it can do so, legally, only through the forms of procedure prescribed therein for its present organization. The likelihood of its being able to do so in fact is not, therefore, great. It is more probable that the reappearance of the actual, though unorganized, power back of the constitution will precede any further advance in the development of the fundamental principles of the constitution. If so, however, the organization of the state within the constitution will have, so far, failed of its purpose.

[1] Laband, Das Staatsrecht des deutschen Reiches, Bd. I, S. 547 ff. [2] *Ibid.*, S. 549.

CHAPTER IV.

THE ORGANIZATION OF THE STATE IN THE FRENCH CONSTITUTION.

THE eighth article of that part of the constitution passed in February of 1875 reads as follows: "The chambers shall have the power, upon their own motion, or upon the motion of the President of the Republic, to determine, separately and by absolute majority in each, whether a revision of the constitution shall be undertaken. After each of the two chambers shall have passed this resolution in the affirmative they shall unite in National Assembly and proceed to the revision.[1] The propositions of revision shall be valid parts of the constitution when voted by an absolute majority of the members composing the National Assembly."[2]

These provisions are quite clear and very simple. They require but little explanation and not a great deal of criticism.

1. As to the principles of the composition of the two chambers, we may say here, generally, that they both proceed from universal suffrage, and that the one is chosen by direct and the other by indirect election. Their power to initiate and ordain the revision of the constitution is thus popular sovereignty, pure and simple.

2. As to the procedure in the chambers when acting separately, we may say that the constitution leaves all questions regarding the inception of the motion for revision to be settled by each chamber for itself, and only requires that in the

[1] Loi relative a l'organisation des pouvoirs publics, 25–28 février, 1875, Art. 8.
[2] *Ibid.*

passage of the resolution the necessary majority shall be the absolute majority, *i.e.* the majority of all the seats in the chamber.

The constitution furthermore leaves it to the two chambers to determine the exact time of meeting in joint assembly. There is, therefore, no power in any body outside of the chambers to hasten, delay or frustrate the meeting of the National Assembly.

Lastly, the constitution leaves everything to the National Assembly in regard to the making of the revision, except the official organization of the Assembly and the principle of the majority necessary to vote the revision. It makes the bureau of the National Assembly to consist of the President, Vice-Presidents and Secretaries of the Senate; and fixes the majority for voting the revision at the absolute majority, *i.e.* the majority of all the seats in the Assembly.

3. The first element of uncertainty in these provisions attaches to the question whether the National Assembly may proceed to a revision of the constitution in regard to subjects which the two chambers have not, in separate preliminary session, resolved to consider. If the separate resolutions shall have been general and unlimited, then, of course, any subject whatsoever may be considered and decided in the National Assembly. If, on the other hand, the chambers shall have specified the subjects in regard to which they deem revision necessary, and in regard to which alone therefore they agree to go into joint, *i.e.* National, Assembly, then the question becomes pertinent and important. Lebon contends that the importance of this question is chiefly theoretic.[1] His argument is, that since the personnel of the two chambers and of the National Assembly is the same, therefore the majorities in the two chambers form the majority in the joint assembly, and that, therefore, if the National Assembly

[1] Das Staatsrecht der französischen Republik, S. 74.

resolves to consider subjects not specified in the acts of the separate chambers, it must be presumed that each chamber then and thereby consents to the same.

This seems to me to be superficial. In the first place, it ignores the fact that the number of members of the separate chambers is not the same. There are but three hundred senators to five hundred and seventy-three deputies.[1] This difference alone would enable the deputies to overpower the senators in National Assembly and force upon them constitutional revision in regard to subjects which they, in separate assembly, would never have consented to bring before the joint assembly. The fact is, that when the Constituent Convention ordained the constitution of 1875–76, the Legitimists, Orleanists and Bonapartists made up together the majority in that body. They constructed the Senate so as to make it the representative of royalty as against republicanism, and they meant to furnish the Senate with the power to prevent the deputies from revising the constitution at their will. It is true that the republicans are now in majority in the Senate, but the Senate is still far more conservative in its republicanism than the Chamber of Deputies, and, therefore, a conflict may still arise between the two bodies concerning the fundamental principles of the organic law. In the second place, it is conceivable that if the two chambers were composed of the same number of members, still the majority in the National Assembly might not represent the majorities in the two chambers taken separately. Yea, it is even conceivable that a practically solid Senate, if supported by a respectable minority of the deputies, might overcome the majority of the deputies in National Assembly and force revision of the constitution in regard to subjects which the deputies, in separate session, would never have agreed to bring before the joint assembly. It seems to me manifest,

[1] Almanach de Gotha, 1890, p. 696.

therefore, that this question is not merely or chiefly theoretic, but may at any moment become intensely practical.

We shall do well, therefore, to examine the constitution narrowly to see if, perchance, we may find any means for its solution. I am not able to discover any, unless they be in the power of the President, with the consent of the Senate, to dissolve the Chamber of Deputies. Lebon considers that the ordinary legislative session of the two chambers is to be regarded as continuing during National Assembly. The two chambers may therefore continue to act separately, as well as jointly, during such a period. If the deputies should undertake to overpower the senators in National Assembly (and this would be the event most likely to occur), the Senate might meet in separate session and call upon the President to dissolve the Chamber of Deputies; and if the President should respond affirmatively, the session of the National Assembly might thus be closed by the legal termination of the mandates of a majority of its members.[1]

I doubt very much if the President has any such power over the National Assembly. I think the National Assembly is entirely exempt from the powers of the President, whether exercised directly or indirectly. The National Assembly is the organization of the state. The President is only a part of the government. Unless, therefore, we mean to make a branch of the government sovereign over the state, we must dismiss this idea as untenable. Moreover, there are means provided by the constitution and developed through practice whereby any move of the kind above indicated might be practically frustrated by the deputies. For example, the constitution provides that every act of the President shall be signed by a minister,[2] and that the ministers are responsible collectively and individually to the chambers for their political acts.[3]

[1] Das Staatsrecht der französischen Republik, S. 75.

[2] Loi relative a l'organisation des pouvoirs publics, 25–28 fevrier, 1875, Art. 3, § 6.

[3] *Ibid.*, Art. 6, § 1.

By the exercise of its power over the budget the Chamber of Deputies has now made the ministry practically responsible to itself alone. No minister therefore would now sign a decree of the President dissolving the Chamber of Deputies, unless it were practically certain that the new election would return a different political majority to that chamber from the existing one. Practically no minister would now take any such desperate chances. We must conclude, therefore, that the constitution provides no method whereby limitations sought to be placed upon the powers of the National Assembly by either of the chambers in separate session can be realized against the will of the majority in the National Assembly, and that practice has not yet worked out any. This result accords with sound theory. The National Assembly is the organization of the state. No branch of the government could, therefore, exercise compulsion over it without committing *coup d'état; i.e.* without dethroning the sovereign.

Curiously enough, the National Assembly has undertaken to tie its own hands upon a single subject. It enacted a constitutional amendment in August of the year 1884 which declares that the republican form of government shall never be subject to revision.[1] There is no power, however, outside of the Assembly to hold it to this pledge. It is, therefore, only a self-limitation, which the Assembly may, at any moment, remove through the exercise of the same power by which it was imposed. It is simply a bit of useless verbiage.

It must be conceded, finally, that when compared with the three preceding systems which I have treated, the French constitution has gone farther in the development of an independent organization of the state, distinct from the organization of the government and possessing more completely all the elements of sovereignty, both in theory and practice,

[1] Loi Constitutionnelle du 13–14 Août, 1884, Art. 2, § 2.

than any of the others. The identity of personnel in the National Assembly and in the legislative chambers is the one point in which the constitution fails in logical perfection. There are indeed practical advantages in this, *viz;* it does away with the cost and exertion attendant upon a special election, and it creates a National Assembly in quasi-permanence; but on the other hand it is the source of some difficulties, as I have already demonstrated.

The political scientists and the statesmen have yet to solve, in logical and practical completeness, this question of the permanent organization of the state distinct from the organization of the government and in possession of complete sovereignty over both the individual and the government. This is the most important question of political science and constitutional law. The failure to deal with it clearly and intelligently has produced inexpressible confusion in the conceptions both of liberty and of government. Its correct elucidation can alone light our way along the labyrinths of liberty, law and government.

Book II.

INDIVIDUAL LIBERTY.

CHAPTER I.

THE IDEA, THE SOURCE, THE CONTENT AND THE GUARANTY OF INDIVIDUAL LIBERTY.

The idea. Individual liberty has a front and a reverse, a positive and a negative side. Regarded upon the negative side, it contains immunities, upon the positive, rights; *i.e.* viewed from the side of public law, it contains immunities, from the side of private law, rights. The whole idea is that of a domain in which the individual is referred to his own will and upon which government shall neither encroach itself, nor permit encroachments from any other quarter. Let the latter part of the definition be carefully remarked. I said it is a domain into which *government* shall not penetrate. It is not, however, shielded from the power of the *state.* This will be easily understood by those who have carefully perused the previous pages, and will be further explained when we come to consider the source of this liberty.

There is no point in regard to which the modern state presents so marked a contrast to the antique and the mediæval as in the recognition of a province within whose limits government shall neither intrude itself nor permit intrusion from any other quarter. This is entirely comprehensible from the standpoint of the reflection that the theocracy crushes the individual will at every point by the divine will; that the despotism confounds the state with the government, and

vests the whole power of the state in the government; and that the feudal state confounds property in the soil with dominion over the inhabitants thereof, substituting thus the petty despotism for the grand. Not until the rise of the modern monarchic governments upon the ruins of feudalism do we become aware of the fact that a new constitutional principle had found lodgment in the consciousness of the age. To this period individual liberty had existed only in so far as the government allowed. It had no defence against the government itself. Now the understanding tacitly reached between the King and the people was: that while the people would lend their strength to the King in subjecting the nobles to the royal law, the King would deliver the people from the feudal oppression; *i.e.* while all governmental power should be consolidated in the King's hands, the people should have a sphere of autonomy, not only against the nobles, but against the King's government itself. The weak point in the system was that there existed no organization back of the King's government to define and defend this sphere against that government. Legally the conscience of the King was the ultimate resort. The organization of the state back of the King was then the indispensable necessity. This is the chief point in what is termed by the political historians the constitutionalization of monarchy. In the so-called constitutional state, *i.e.* in the state which is organized back of the government, which limits the powers of the government, and which creates the means for restraining the government from violating these limitations, individual liberty finds its first real definer and its defender.

The source. Therefore we affirm that the state is the source of individual liberty. The revolutionists of the eighteenth century said that individual liberty was natural right; that it belonged to the individual as a human being, without regard to the state or society in which, or the government under which, he lived. But it is easy to see that this view is

utterly impracticable and barren; for, if neither the state, nor the society nor the government defines the sphere of individual autonomy and constructs its boundaries, then the individual himself will be left to do these things, and that is anarchy pure and simple. The experiences of the French revolution, where this theory of natural rights was carried into practice, showed the necessity of this result. These experiences drove the more pious minds of this period to formulate the proposition that God is the source of individual liberty. "*Dieu et mon droit*" was the mediæval motto made new again. But who shall interpret the will of God in regard to individual liberty? If the individual interprets it for himself, then the same anarchic result as before will follow. If the state, or the church, or the government interprets it, then the individual practically gives up the divine source of his liberty; for the question of the interpretation and legal formulation of individual rights and immunities is the only part of the question which has any practical value. These two theories embodied a natural and necessary revulsion of sentiment against the practical system of the pre-revolutionary period, which accorded to the individual only such liberty as the *government* might, at the moment, permit. But they overshot the mark; and a reaction of view as well as practice naturally resulted.

The present moment is much more favorable to an exact and scientific statement of these relations. We may express the most modern principle as follows: The individual, both for his own highest development and the highest welfare of the society and state in which he lives, should act freely within a certain sphere; the impulse to such action is a universal quality of human nature; but the state, the ultimate sovereign, is alone able to define the elements of individual liberty, limit its scope and protect its enjoyment. The individual is thus defended in this sphere *against* the government, by the power that makes and maintains and can destroy the government; and by the same power, *through* the government,

against encroachments from every other quarter. Against that power itself, however, he has no defence. It can give and it can take away. The individual may ask for liberties which it has not granted, and even prove to the satisfaction of the general consciousness that he ought to have them; but until it grants them he certainly has them not. The ultimate sovereignty, the state, cannot be limited either by individual liberty or governmental powers; and this it would be if individual liberty had its source outside of the state. This is the only view which can reconcile liberty with law, and preserve both in proper balance. Every other view sacrifices the one to the other.

The content. The elements of individual liberty cannot be generally stated for all states and for all times. All mankind is not to be found, or has not yet been found, upon the same stage of civilization. The individual liberty of the Russian would not suffice for the Englishman, nor that of the Englishman at the time of the Tudors for the Englishman of to-day. As man develops the latent elements of his own civilization he becomes conscious of the need of an ever-widening sphere of free action, and the state finds its security and well-being in granting it. It must be remarked, on the other hand, however, that the elements of individual or civil liberty are much more generally and uniformly recognized than the elements of political rights. The brotherhood of man is much more distinctly expressed through the former than through the latter. We can, therefore, approach nearer, at the present time, to a universal system of individual liberty than of political liberty. In fact, in the modern states the realm of individual liberty is almost identical, no matter whether the governmental executive holds by election or hereditary right. In the four states, whose constitutions it is the purpose of this work to compare, the disagreement as to the essence of the rights and immunities which constitute individual liberty is really but slight. The divergence is chiefly in the character of the

organs which guarantee the enjoyment of these rights and immunities.

We may say, generally, that in all these states individual liberty consists in freedom of the person, equality before the courts, security of private property, freedom of opinion and its expression, and freedom of conscience. The rights of the individual in respect thereto are the powers conferred upon him by the state to exercise certain prerogatives, and to call upon the government, or some branch thereof, for the employment of sufficient force to realize these prerogatives, to the full extent as defined by the state. The immunities of the individual in respect thereto are his exemptions from the power of the government itself, or any branch thereof, to enter or encroach upon this sphere, except in the manner and to the extent prescribed by the state.

The guaranties. The means for protecting individual liberty, on the contrary, as I have already indicated, differ radically in the four states whose constitutional law we are examining. This difference appears most prominently on that side of individual liberty which I term immunities. In the system of the United States, it is the sovereignty back of the government which defines and defends individual liberty, not only against all forces extra-governmental, but also against the arbitrary encroachments of the government itself. The sovereignty back of the government vests the courts of the central government with the power to interpret the prescripts of the constitution in behalf of individual rights and immunities, and to defend the same against the arbitrary acts of the legislature or executive.[1] It is the constitutional duty of the executive to obey these final decisions of the United States judiciary in regard to private rights and immunities, and to execute the laws in accordance therewith. Should he refuse, however, and insist upon exercising, in

[1] Constitution of the United States, Art. III, sec. 2, § 1.

this sphere, powers denied him by judicial decision, or upon exercising his rightful powers in a manner forbidden by such decision, there is no remedy provided in the constitution unless it be impeachment.[1] Should the legislative and executive powers conspire against the judiciary, or the legislature fail to hold the executive to his duty by impeachment, the sovereignty within the constitution may be appealed to, so to amend the constitution as to prevent the nullification of its intent by its governmental servants. It is difficult to see how the guaranty of individual liberty against the government itself could be made more complete. Its fundamental principles are written by the state in the constitution; the power to put the final and authoritative interpretation upon them is vested by the state in a body of jurists, holding their offices independently of the political departments of the government and during their own good behavior; while finally, recourse to the sovereign itself is open if all other defenses fail.

This is the special point in which the constitutional law of the United States is far in advance of that of the European states. Of the three European constitutions which we are examining, only that of Germany contains, in any degree, the guaranties of individual liberty which the constitution of the United States so richly affords. The German imperial constitution has made a beginning in this direction, but only a beginning. A few of the rights and immunities belonging in this domain are written in the constitution itself by the act of the sovereign, the state.[2] No department of the imperial government, therefore, can legally violate them. But the ultimate power of interpreting these rights and immunities is not vested by the constitution in the imperial judiciary.[3] In fact, the imperial judiciary is not created by

[1] Constitution of the United States, Art. II, sec. 4.

[2] Reichsverfassung, Art. 3.

[3] Laband, Das Staatsrecht das deutschen Reiches, I. Band, S. 551 ff.

the constitution at all. It owes its existence to a statute of the imperial legislature.[1] It is therefore unable to stand between the legislature and the individual in the interpretation of the constitution. The legislative interpretation is the more ultimate. It is not certain that it can stand between the executive and the individual in the interpretation of the constitution. The most reliable commentator upon the German constitution ascribes to the Emperor the power of final interpretation of the constitutionality of the laws.[2] Neither, again, has the imperial legislature the power to impeach the executive for encroaching upon the sphere of individual liberty guaranteed by the constitution. Lastly, there is no way provided in the constitution for the initiation of an amendment to the constitution, save through the agency of the imperial legislature itself.[3] Constitutionally, then, the immunities of the individual as against the *powers* of the imperial legislature and executive taken together are nothing; as against the *acts* of the legislature and executive they are what these bodies resolve to allow them to be. This does not mean that the individual has no liberty in the German state. The legislature and executive have created for him a sphere of freedom, and have made it very nearly coextensive with the same domain in the United States. It simply means that the guaranties to the individual against the government itself are still wanting. It means that he is still exposed to the possible caprice and tyranny of the legislative and executive powers. It means that almost the whole power of the state over against the individual is still vested in the government. It means that the distinction between state and government is still in its infancy in this system.

In the French system there is not the slightest trace of a

[1] Gerichtsverfassungsgesetz, 1877.

[2] Laband, Das Staatsrecht des deutschen Reiches, I. Band, S. 549 ff.

[3] Reichsverfassung, Art. 78.

constitutional guaranty of individual liberty.[1] The legislative power is the ultimate interpreter of the constitution;[2] and the machinery for amending the constitution can be set in motion only by the legislature.[3] Moreover, the executive power appoints and removes at pleasure those quasi-judicial persons who decide controversies which arise between the individual and the government in the course of the administration of the law.[4] The regular judicial power in France is created by the legislature, and the judges hold by a tenure and for a term designated by the legislature. The legislature may, therefore, abolish the judicial department or modify the tenure and term of the judges in any manner which it may choose or fancy. Moreover, the ordinary judiciary has, as above indicated, no general jurisdiction over controversies in which the administration is a party. The individual has thus generally but one recourse in case of a denial of his liberty by the administration, and that is to the legislature. The legislature cannot impeach the President in defense of the individual immunity, unless the act of the administration in violating the same amounts to high treason in the President;[5] but it may cause a change of ministry at its will, and it may impeach the ministers in case their acts in violation of the said immunities amount to crimes. Against the legislature itself, however, the individual has no defense. This does not mean that the individual has no liberty in France. In fact, the individual enjoys very nearly the same liberty there as here. It means simply that the guaranties of individual liberty against the powers of the government itself are entirely wanting. It means that in regard to this

[1] Lebon, Das Staatsrecht der französischen Republik, S. 27.

[2] *Ibid.* S. 23.

[3] Loi relative à l'organisation des pouvoirs publics, 25–28 fevrier, Art. 8.

[4] Lebon, Das Staatsrecht der französischen Republik, S. 78.

[5] Loi relative à l'organisation des pouvoirs publics, 25–28 fevrier, 1875, Art. 6, §§ 1 and 2; Loi constitutionelle sur les rapports des pouvoirs publics, 16–18 juillet, 1875, Art. 12, § 2.

subject the whole power of the state is vested in the government. It means that the distinction between state and government is, in this respect, wholly wanting.

In the English system, while there are no constitutional guaranties of individual liberty against the Parliament, either when it acts as constituent assembly or when it acts simply as legislature, the individual has the defense of the regular courts, *i.e.* of the independent judiciary, against executive encroachments upon his liberty. The Parliament is the source both of individual liberty and of the courts, and cannot be limited or restrained by either. The Parliament has by statutes marked out a large domain of liberty for the individual; and has made the judiciary the special guardian of this domain, by freeing the judicial tenure from the executive power. But the Parliament may by statute sweep away every vestige of this liberty, if it will, and abolish the judiciary; and it may, furthermore, cause the removal of any judge either by impeachment or by address to the Crown. It is true, as I have demonstrated, that the Parliament, when acting as the state, is somewhat differently organized than when acting simply as legislature; *i.e.* that the Commons have a supremacy over the Lords and the King in the former case, while in the latter there is parity of powers between them; but this difference does not furnish the individual with an independent way of appeal to the state against the legislature. The appeal must be made *through* the body *against* which it is made. The trouble here again is that the whole power of the state is vested in the government, and that no sufficient distinction is made between the state and the government.

It will thus be seen that individual liberty is really a part of constitutional law in the system of the United States only. In all the other systems it is substantially statutory, Germany alone having made any progress, in this respect, out of the old system of governmental absolutism. I dwell

upon this point, for it is *the* point in which the great advance of the American idea over the European, in the development of constitutional law, is most distinctly manifested. I dwell upon it, furthermore, because I desire to explain, at the outset, why in the discussion of this topic I shall devote myself almost exclusively to the consideration of the constitution of the United States.

CHAPTER II.

THE SYSTEM OF INDIVIDUAL LIBERTY PROVIDED IN THE CONSTITUTION OF THE UNITED STATES.

When the constitution of the United States issued from the convention of 1787, it contained several provisions touching the domain of individual liberty, and when this instrument was submitted for adoption, much was said in the legislatures of the commonwealths, in the ratifying conventions and by the press of the day concerning a bill of rights, as it was then called, which should make the domain of individual liberty more complete. The idea was not that the United States government should be made by the constitution the positive defender of this sphere of individualism, but that that government should itself be more expressly restrained from trenching upon this sphere. What was proposed was, therefore, rather a bill of immunities than of rights. I think it cannot be doubted that the view of that day was that the so-called "States" were in the main the proper definers and defenders of individual rights.

The opposition to the adoption of the "bill of rights," by way of amendment to the original draft of the constitution, did not attempt to stand upon any principle worth naming. The argument of the opposition was, in brief: that the United States government being one of limited powers, the principle of constitutional interpretation in reference to its powers must be that what is not granted, expressly or impliedly, is denied; and that, therefore, the "bill of rights" excepting anything was not necessary. But the answer to this: that the powers granted might, if pressed to the utmost

in all directions, conflict at some point or other with individual liberty, proved the more convincing. The first ten amendments, in the nature of such a bill, were framed and passed by the first Congress and subsequently ratified by the legislatures of the commonwealths in sufficient number to make them parts of the constitution.

But if the political history of the United States from 1790 to 1860 taught anything, it was this: That the so-called States were not sufficient guarantors, to say the least, of individual liberty, and that the United States government must be authorized to change its position from a passive non-infringer of individual liberty to an active defender of the same against the tyranny of the commonwealths themselves. The thirteenth and fourteenth amendments express this change in the organic law.

We may now proceed to the analysis in detail of the immunities guaranteed to the individual by the constitution of the United States.

A. *The Immunities against the Central Government.*

An immunity is, as I have above indicated, a defense established by the constitution in behalf of the individual against the powers of the government. The chief means of encroaching upon the domain of individual liberty which necessarily lay within the hands of government are the powers of criminal legislation, of taxation and of eminent domain. The restric tions placed by the constitution upon the exercise of these powers by the government are, when regarded from the standpoint of the individual thus protected, immunities.

I. *The Personal Immunities.*

The central government has no general power of criminal legislation in those parts of the United States which enjoy the dual or federal system of government; *i.e.* in the commonwealths. Its powers in this regard, in and for these parts, extend to only three species of crime, *viz;* treason,[1]

[1] United States Constitution, Art. III, sec. 3.

counterfeiting the securities and current coin of the United States, and offences against the Law of Nations.[1] The judicial department of the central government has criminal jurisdiction only so far as it is conferred by the constitution and the statutes of Congress made in accordance therewith.[2] The executive power is, of course, confined within the same boundaries. On the other hand, upon the high seas,[3] and in those parts of the United States not enjoying the dual system of government, general powers of legislation and administration in respect to crime are conferred upon the central government by the constitution.[4] But the powers of the central government in regard both to crimes committed within the commonwealths and those committed upon the high seas and within those parts of the United States not yet erected into commonwealths are placed under many important limitations, all of which are of the character of individual immunities, as follows:

1. The Congress can pass no bill of attainder or *ex post facto* law;[5] *i.e.* the legislative department shall not act as a court and convict any one of common crime by its resolutions; nor pass a law making an act, innocent at the time of its committal, criminal; or, if the act be already a crime, a law increasing the penalty or lessening the evidence necessary to conviction or altering in any manner the situation of the accused to his disadvantage.[6]

2. The government cannot issue or authorize general warrants of search or arrest; but all warrants must rest upon

[1] United States Constitution, Art. I, sec. 8, § 6 and 10.

[2] *Ex parte* Bollman, U. S. Reports, 4 Cranch, 75; United States *v.* Hudson, U S. Reports, 7 Cranch, 32; United States *v.* Coolidge, U. S. Reports, 1 Wheaton, 415; United States *v.* Bevans, U. S. Reports, 3 Wheaton, 336.

[3] United States Constitution, Art. I, sec. 8, § 10.

[4] *Ibid.* Art. IV, sec. 3, § 2.

[5] *Ibid.* Art. I, sec. 9, § 3.

[6] Calder *v.* Bull, U. S. Reports, 3 Dallas, 386; *Ex parte* Garland, U. S. Reports, 4 Wallace, 333; Kring *v.* Missouri, 107 U. S. Reports, 221.

A law simply enlarging the class of persons who may testify in a given case is not, however, *ex post facto* in its application to offenses committed previous to its enactment. Hopt *v.* Utah, 110 U. S. Reports, 574.

probable cause; must be supported by an oath or an affirmation on the part of some reliable person; must particularly describe the place to be searched and the person or thing to be seized; must contain the name of the person; and must state with reasonable certainty the time, place and nature of the offense.[1]

3. The government cannot, except in time of war, suspend the writ of habeas corpus; *i.e.* it cannot prevent a person, under arrest and detention, from having his body brought immediately before a judge, in order that judicial determination of the question of his further detention may be had.[2]

4. The government cannot require a bail so excessive in amount as to be practically a denial of the privilege of bail.[3]

5. The government cannot authorize any unreasonable delay in the trial of an individual legally held.[4]

6. The government cannot authorize prosecution for any crime, the punishment of which is so grievous as the deprivation of personal liberty, except by way of grand jury presentment or indictment; *i.e.* except upon accusation by at least twelve men of the country, who, it is presumed from their being men of the country or citizens, have no governmental interest in the oppression of their fellow-citizens, and will not seek to make criminal accusation a pretext for disposing of political opponents.[5] Military persons do not enjoy this immunity.

7. The government cannot authorize the trial of any person for a crime or for a misdemeanor, the punishment of which is

[1] Constitution, Amendments, Art. IV; *Ex parte* Burford, U. S. Reports, 3 Cranch, 448.

[2] Constitution, Art. I, sec. 9, § 2.

[3] Constitution, Amendments, Art. VIII.

[4] *Ibid.* Art. VI.

[5] *Ibid.* Art. V; *Ex parte* Wilson, 114 U. S. Reports, 417; Mackin *v.* United States, 117 U. S. Reports, 348.

so grievous as the deprivation of personal liberty, except by way of the jury process; *i.e.* except by the participation of the community, whose peace shall have been violated, in the trial; and except the rendering of the verdict be by the unanimous agreement of the representatives of the community.[1]

8. The government cannot authorize any arbitrary procedure in the trial. It cannot deport the accused for trial from the commonwealth and district in which the crime charged shall have been committed, or from the place already assigned by the legislation of Congress for the trial, in case the crime charged shall have been committed outside of the commonwealths.[2] It cannot authorize a secret trial.[3] It cannot deprive the accused of the right to have counsel.[4] It cannot deny to the accused information of the nature and cause of his arraignment.[5] It cannot prevent him from confronting the witnesses against him.[6] It cannot refuse him compulsory process for obtaining witnesses in his favor.[7] It cannot compel him to give testimony against himself, either by word of mouth or by the production of his private papers.[8] It cannot prosecute him a second time for the same offense, after a verdict either of conviction or acquittal shall have been pronounced upon him by a lawful jury proceeding upon a good indictment.[9] And it cannot deprive him of his life or liberty without fulfilling all of the requirements of a due process of law;[10] *i.e.* without a course of legal proceedings according to those rules and principles definitely contained in these very provisions of the constitution which we have just been considering, and upon points not covered by these, if any, according to those rules and principles "existing in the common and statute law of England, before the emigration of our ances-

[1] Constitution, Amendments, Art. VI; Callan *v.* Wilson, 127 U. S. Reports, 540.
[2] Constitution, Art. III, sec. 2, § 3; Amendments, Art. VI.
[3] Constitution, Amendments, Art. VI. [4] *Ibid.*
[5] *Ibid.* [6] *Ibid.* [7] *Ibid.*
[8] *Ibid.* Art. V; Boyd *v.* United States, 116 U. S. Reports, 616.
[9] Constitution, Amendments, Art. V. [10] *Ibid.*

tors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

9. The criminal concept most liable to abuse, *viz;* that of treason, cannot be fixed by the government. The constitution itself defines it as the "levying of war against the United States, or adhering to the enemies of the United States, giving them aid and comfort." Nor can the government so fashion the rules of evidence in a trial for treason as to secure an easy conviction nor attach a penalty to the crime which may fall upon innocent persons. The constitution requires the testimony of two witnesses to the same overt act or confession in open court in order to conviction, and ordains that no attainder of treason shall prevent inheritance of property from or through the attainted person, or work the forfeiture of the real estate belonging to the attainted person longer than during his or her life.[1]

10. The government cannot authorize the imposition of excessive fines or the infliction of cruel or unusual punishments;[2] *i.e.* the criminal legislation of Congress upon the subjects assigned to it by the constitution must, in the fixing of penalties, follow the precedents of the common law.

11. If the constitution had created no express immunity of the individual against governmental power in respect to the liberty of opinion and its expression, it must certainly have been inferred as existing within those parts of the United States enjoying the federal system of government, *i.e.* within the commonwealths, from the fact that the constitution confers no power upon the government to make the free exercise of opinion and its expression by the individual either a crime, or a misdemeanor, or a tort. The constitu-

[1] Constitution, Art. III, sec. 3, § 1, 2; *Ex parte* Bollman & Swartwout, U. S Reports, 4 Cranch, 75; Bigelow *v.* Forrest, U. S. Reports, 9 Wallace, 339.

[2] Constitution, Amendments, Art. VIII.

tion, however, makes the principle doubly sure by giving expression to the immunity. It ordains that Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for redress of grievances; or respecting an establishment of religion, or prohibiting the free exercise thereof.[1] These restrictions require a little more minute treatment, since they, in some respects, go beyond the well-understood principles of the common law.

First. *The freedom of speech and of the press.* Since the constitution confers, neither expressly nor impliedly, any power upon the general government to control these subjects, except in the provisions authorizing the making of all needful rules and regulations respecting the territory or other property belonging to the United States, it must be concluded that this immunity is complete, within the commonwealths, as against the general government; *i.e.* the general government can infringe it neither by way of censorship or prevention nor by way of punishment for its use or abuse. Nevertheless the Congress did, in the year 1798, pass an act for the whole United States, making the writing, printing, uttering or publishing of any false, scandalous and malicious writing or writings against the government of the United States a crime punishable by fine and imprisonment;[2] and several persons were tried and convicted under this act.[3] This was one of the most unpopular statutes which the Congress ever enacted. Its constitutionality was doubted by a very large proportion of the citizens of the country. It evoked the noted Kentucky and Virginia resolutions.[4] It was allowed to expire in 1801, without any attempt to renew it. It certainly cannot be defended except from the stand-

[1] Constitution, Amendments, Art. I.

[2] United States Statutes at Large, vol. i, chap. lxxiv, sec. 2, pp. 596–7.

[3] Cooper's Case, Wharton's State Trials, 659; Haswell's Case, *Ibid.*, 684; Callender's Case, *Ibid.*, 688.

[4] Elliot's Debates, vol. iv, pp. 528 ff.

point of the extraordinary or war powers of the government. It is true that war with France threatened, but it was hardly so imminent as to justify the assumption of war powers; still, the Congress is the body in our system which has the power of ultimately determining that question.[1]

In the district of Columbia, in the territories, and in places within a commonwealth the jurisdiction over which shall have been ceded by the commonwealth to the general government, this immunity is far less extensive than in those parts of the United States enjoying the dual system of government. The general government is vested by the constitution with general as distinguished from enumerated powers in the above-mentioned district, territories and places.[2] The rule of interpretation as regards such powers is, that what is not denied is granted. The general government may, therefore, control the expression of opinion within these places, in so far as the government is not restrained therefrom by some provision of the constitution. The restriction contained in article first of the amendments is expressed in general language. It is not limited to the commonwealths, as to the scope of its action. This restriction upon the power of the government extends therefore to the district, the territories and other places subject to the exclusive jurisdiction of the general government. The question then is: whether in such parts the immunity is, as in the commonwealths, total or, for the reasons just cited, less than total. In seeking the reply to this question we must certainly be allowed to assume as point of departure that this restriction was not intended to prevent the government of the United States from introducing and administering the law of slander and libel for the protection of individual reputation in these parts. The common law never held the freedom of speech and of the press to be in any measure infringed by

[1] Constitution, Art. I, sec. 8, § 11. [2] *Ibid.*, Art. IV, sec. 3, § 2.

this law; and the common law is the great source from which we draw the principles of interpretation of all provisions of our constitutions relating to private rights and immunities. If such power be not conceded to the general government, then these parts and places would be without any law of slander and libel, which would be an unendurable condition in a society professing to exist under the reign of law. It would inevitably lead to the re-establishment in practice of the duel — self-help — for the maintenance of personal honor and character. I hold, therefore, that the restriction can only mean that the general government shall create no *unusual* law of slander and libel in those parts of the United States subject to its exclusive jurisdiction, but must follow, in respect to these subjects, the general principles of our jurisprudence as derived from the common law; *i.e.* for example, the government shall not make criticisms upon itself or upon the public character of its officials slander or libel, nor undertake by way of censorship and prevention to prohibit the utterance or publication of anything. This I take to be the extent of the immunity guaranteed by the constitution to the individual against the government in those parts of the United States subject to the exclusive jurisdiction of the general government. The immunity is in such parts, therefore, not total, as in the commonwealths, for the simple reason that in the commonwealths the law of slander and libel is fixed and administered by the commonwealths, while in these other places, where the dual system of government does not prevail, the general government must fix and administer that law.

Second. *The freedom of assembly and of petitioning the government for the redress of grievances.* Here again the distinction must be made between those parts of the United States enjoying the dual system of government, *viz;* the commonwealths, and those parts subject to the exclusive jurisdiction and authority of the general government.

Within the commonwealths this immunity is almost total. The general government can exercise no powers whatsoever in regard to the assembling of persons within a commonwealth, unless the assembling be for a treasonable purpose, simply because the constitution does not confer upon the government any such powers; and the principle of interpretation which must be applied in determining the extent of powers possessed by the general government within the commonwealths is that what is not granted by the constitution is denied, — is reserved either to the commonwealths or to the people.[1]

On the other hand, the grant of general powers, as distinguished from enumerated powers, in the government of those parts of the United States not under the dual or federal form, must be interpreted, as I have above maintained, upon the principle that what is not denied is accorded. This principle of interpretation would allow the general government to limit the immunity in question, as to such parts, by laws distinguishing between a peaceable and a riotous assembly, forbidding the latter and permitting only the former. In such parts the immunity against the general government is therefore not so complete as in the commonwealths. The reason for this is obviously the same as in the case of the freedom of speech and of the press. From whatever place the petition may come, however, the duty of the government to receive, and hear the prayer of the petition is the same.

Third. *The freedom of religion and worship.* Here again the same distinction is to be made between those parts of the United States in which the federal system of government prevails, and those parts subject to the exclusive authority of the general government.

In the former this immunity is total against the general

[1] Constitution, Amendments, Art. X; The Collector *v.* Day, U. S. Reports, 11 Wallace, 113.

government. In the commonwealths the general government has no power whatsoever to touch this subject. The control of the same is assigned, in our system, exclusively to the commonwealths. This is, therefore, a sphere upon which the general government has no authority to intrude.

On the other hand, in those parts in which the dual system does not prevail, the central government has general powers in regard to this subject as to all other subjects, except where these powers are denied to it by the constitution. The sole restriction upon the power of the general government, as to this subject, is contained in the first two lines of the first amendment and reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] The existence, in parts of the United States subject to the exclusive jurisdiction of the general government, of a system of worship calling itself religion and asserting the practice of polygamy to be one of its exercises, has put this restriction upon the power of that government in reference to this subject to the actual test, and has given us an authoritative interpretation of the restriction. In the great case of Reynolds *v.* United States, the constitutional immunity of the individual in respect to the freedom of religion and worship was fixed and defined.[2] The court declared that by this constitutional restriction Congress is deprived of legislative power over opinion merely, but is left free to reach actions which it may regard as violations of social duties or as subversive of good order. The free exercise of religion secured by the constitution to the individual against the power of the government is, therefore, confined to the realm of purely spiritual worship; *i.e.* to relations between the individual and an extra-mundane being.

[1] The principle of the constitution which denies to the government of the United States the power to make a religious test a qualification for holding office or public trust (Art. VI, sec. 3) creates a political immunity rather than one coming under the category of individual or civil liberty. For this reason I do not treat of it in this connection.

[2] 98 U. S. Reports, 145.

So soon as religion seeks to regulate relations between two or more individuals, it becomes subject to the powers of the government and to the supremacy of the law; *i.e.* the individual has in this case no constitutional immunity against governmental interference.

II. *The Immunities in respect to Private Property.* The other principal avenue of approach to the sphere of individual autonomy is through the powers of taxation and of eminent domain necessarily possessed by the government. Let us now examine the defenses of private property erected by the constitution in behalf of the individual against the government.

So far as the constitution of the United States is concerned, private property may extend to everything but man. Man alone cannot be made the subject of property.[1] The general government cannot, therefore, as the constitution now stands, narrow the sphere of private property within those parts of the United States enjoying the federal system of government, *i.e.* within the commonwealths, by declaring anything, except only man, not a proper subject of private property. In the parts under its exclusive jurisdiction, the case is different, as I have already repeatedly explained. In these parts it may determine freely in what private property shall consist, within the single limitation that it cannot make man a subject of property. In these parts the constitution creates no other immunity for the individual upon this point.

But, both in the commonwealths and in the districts and places subject to the exclusive jurisdiction of the general government, the defenses of the individual created by the constitution against the governmental powers of taxation and eminent domain are the same.

1. The constitution requires that all bills for the raising of revenue shall originate in the lower house of the Congress;[2]

[1] Constitution, Amendments, Art. XIII.

[2] Art. I, sec. 7, § 1.

that all appropriations of money shall be made by law;[1] that private property shall not be taken for public use, without just compensation;[2] and that no one shall be deprived of property without due process of law.[3] I have brought here together the general restrictions upon the powers of the government, and after briefly explaining them, I will proceed to the more specific limitations.

First. The vesting of the power to originate tax levies exclusively in the more popular branch of the legislative department of the government is not a defense against the whole government, and therefore is not, strictly speaking, an immunity. Its advantage to the security of private property springs from the fact that the people, *i.e.* the suffrage-holders, have a more direct influence over this branch of the government than any other, rather than from any restriction imposed by the constitution upon the government as to the extent of its power of taxation. The real immunity is to be found in the negative side of this provision, *viz;* that the power of taxation shall not be exercised at all in any other way than as thus prescribed. The House of Representatives itself has not the power, either by separate resolution or by joining with the Senate and the President in a law to that effect, to permit the Senate, or any other branch of the government, to originate a bill for the raising of revenue; and I think it is at least a question whether, should the Senate or the President undertake to assume this power and the House acquiesce in the usurpation, the individual may not defend himself in the courts of the United States against the collection from him of any tax so levied, on the ground of its unconstitutionality. It does not seem to me that the judicial power could excuse itself from taking jurisdiction under the plea that this is a political question. As a general principle, the distribution of powers by the constitu-

[1] Art. I, sec. 9, § 7. [2] Amendments, Art. V. [3] *Ibid.*

tion between the different departments of the government is a political question; but in this particular instance private property would be directly involved, and the United States courts have never declined jurisdiction where private property was immediately affected, on the ground that the question was political.

Second. The constitutional restriction upon the power of the government in the appropriation of money, *viz;* that it can be done only by law, *i.e.* not by order of the executive, creates no immediate immunity for the individual, but by preventing waste of money it keeps down the requirements of the treasury. If, however, the President should make appropriations of money, and the treasurers of the government funds should honor his orders, there is no way provided by the constitution whereby an individual could prevent the same. The only remedy is a political one, *viz;* impeachment of the President and the treasurers by the Congress. If, again, the government should make wasteful appropriations by law, there is no way provided by the constitution whereby an individual could prevent the same. This is wholly a question of policy, and in our system the Congress is the final determiner of such questions.[1] This provision of the constitution creates, then, a probable defense of private property, but no actual immunity; and I have referred to it at this point simply for the sake of giving a complete *résumé* of all the defenses of private property, both actual and possible, under the same division.

Third. The constitutional restriction upon the government's power of eminent domain is, however, a real immunity. The government may not take any property from the individual for public use without rendering just compensation therefor, and the government must always follow due process of law in depriving the individual of any property.

[1] Georgia *v.* Stanton, U. S. Reports, 6 Wallace, p. 51.

Due process of law in exercising the right of eminent domain means that the expropriation shall be for a public purpose, and shall be made by an act of the legislative department of the government; that this act shall provide a fair and just means of determining the value of the property to be taken, giving opportunity for the owner to present evidence and be heard as to the value, and shall provide a just compensation to the expropriated owner.[1]

The due process of law for the taking of private property by the government in any other manner than by the exercise of the power of eminent domain must be determined by looking, first, to "the constitution itself," and second, to "those settled usages and modes of proceeding" for the taking of private property by the government "existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." [2]

The individual is protected by the constitution against governmental encroachments upon his private property through any other forms of procedure than those above described.

2. The constitution more particularly describes the due process which the government must follow in the exercise of the power of taxation.

First. The government cannot levy any tax upon things exported from any commonwealth; *i.e.* from those parts of the United States in which the federal system of government exists.[3] The court has defined exports to be articles "actually in course of transportation to the state of their destination, or delivered to a common carrier for transportation." [4]

[1] United States *v.* Jones, 109 U. S. Reports, 513.

[2] Murray's Lessee *v.* Hoboken Land & Improvement Co., U. S. Reports, 18 Howard, 272.

[3] Constitution, Art. I, sec. 9, § 5.

[4] Coe *v.* Errol, 116 U. S. Reports, 517; Turpin *v.* Burgess, 117 U. S. Reports, 504.

On the other hand, the constitution does not forbid the government to tax exports from those parts of the United States which are subject to the exclusive jurisdiction of the general government. In such parts, therefore, this immunity does not exist for the individual.

Second. The constitution provides that no direct tax shall be levied except in proportion to the population.[1] The constitution declares a capitation or poll-tax to be a direct tax,[2] and the Court has declared that a tax on any kind of property or on the income from property is a direct tax.[3]

Third. The constitution provides that all duties, imposts and excises shall be uniform throughout the United States; *i.e.* looked at from the side of the individual immunity, none can be levied with partiality or lack of uniformity. The Court has defined uniformity in taxation to be its operation "with the same force and effect in every place where the subject of it is found";[4] *i.e.* the same rate of taxation upon the same article wherever found.

Fourth. Judicial interpretation of the general spirit and principles of the constitution has declared that the general government cannot tax any of the necessary means and instrumentalities for the legitimate governmental acts and operations of the commonwealths.[5] I suppose, therefore, that the property of individuals in any such necessary means and instrumentalities, such, for example, as bonds of the commonwealths, is shielded from the tax-power of the general government.[6]

3. I have said that the chief means possessed by the government for encroaching upon the constitutional domain of private property are the powers of taxation and eminent domain; but these are not the exclusive means. The government might

[1] Constitution, Art. I, sec. 9, § 4. [2] *Ibid.*

[3] Pollock *v.* Farmers Loan and Trust Co., 157 and 158 U. S. Reports, pp. 429, 601. [4] Head Money Cases, 112 U. S. Reports, 580.

[5] The Collector *v.* Day, U. S. Reports, 11 Wallace, 113.

[6] This is now so held in Pollock *v.* The Farmers Loan and Trust Co., 157 and 158 U. S. Reports, pp. 429, 601.

construct by legislation a system of judicial procedure, which would greatly expose the property of the individual. The constitution creates some immunities for the individual against the powers of the government in this respect.

First. It prohibits the use of general search-warrants in the seizure of property by the officers of the government, in that it requires that all warrants shall rest upon oath or affirmation and shall describe particularly the place to be searched and the things to be seized;[1] *i.e.* the individual has a constitutional immunity against the use of any other form of warrant by the government in the searching of his premises and the seizure of his papers and effects.

Second. The constitution secures to the individual, in suits prosecuted in the courts of the general government where the value in controversy exceeds twenty dollars, an immunity against any other form of trial than the trial by jury.[2]

Third. The constitution secures to the individual an immunity against the quartering of any soldier in his house in time of peace and also, except in a manner to be prescribed by law, in time of war.[3]

This is, in outline, the domain of immunity against the powers of the general government expressly marked out for the individual by the constitution and expressly guaranteed to him by the constitution. It must be added, however, that the individual is impliedly exempted from the powers of that government in regard to all subjects not brought by the constitution within the realm of its authority. The domain of immunity is thus increased against the general government so as to correspond with the whole field of powers left by the constitution exclusively to the commonwealths. Within this field the general government has no authority to intrude at all, nor to bring the individual under its jurisdiction in respect to subjects contained therein. The United States

[1] Constitution, Amendments, Art. IV. [2] *Ibid.*, Art. VII.
[3] *Ibid.*, Art. III.

judiciary is obligated to defend the individual against any attack made by the general government upon this sphere of autonomy, — a sphere created by direct implication from the general principles of the constitution.

B. *The Immunities against the Commonwealths.*

The sphere of individual liberty is, in a federal system of government, threatened from two quarters, *viz;* from the central government and from the commonwealths. In some respects and under some circumstances the danger from the latter quarter is more to be dreaded than from the former, and therefore more to be guarded against by the constitution.

Following the same order as before, I will treat first of personal immunities, and then of immunities in respect to property.

I. *Personal Immunities.*

1. The constitution prescribes that "no State" (commonwealth) "shall pass any bill of attainder or *ex post facto* law."[1] The word "State" evidently means here both the people resident in, and the legislature of, a commonwealth. The language of the constitution is apparently preventive, but the constitution furnishes the general government with no means of anticipating any such acts upon the part of the commonwealths. These bodies may therefore, in spite of this prohibition, pass such acts, and the general government cannot deal with them until some person has been aggrieved by them and calls upon the judicial department of the government for defense.[2] The court will then nullify them in the particular case before it; but the commonwealths are deterred from continuing to execute such measures in other cases only by the knowledge that if any person has the courage and the means to resist them, he will be sustained by the judicial department of the general government. When the constitutional convention of 1787 began its work of framing the

[1] Constitution, Art. I, sec. 10, § 1.

[2] Cummings *v.* Missouri, U. S. Reports, 4 Wallace, 277.

present constitution of the United States, and before it had been compelled to compromise its first conviction and judgment with the views of the upholders of the old system, it provided efficient means for the execution of this prohibition. The Randolph resolutions,[1] the Pinckney draft[2] and the report from the committee of the whole house presented by Mr. Gorham[3] contain the provision that the laws enacted by the States, *i.e.* the commonwealths, shall be subject to veto by the legislature of the United States, when, in the opinion of the latter, they contravene the constitution and laws of the United States. Through the determined opposition of the particularists, this practical, though rather radical, solution of this knotty question was stricken out, and in place of it we have the plan which first allows the mischief to happen, and then undertakes to cure it in each separate case by a long and expensive process. I have already explained the meaning of these terms, bill of attainder and *ex post facto* law, and will not here repeat the explanation.

2. The constitution provides that "neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or in any place subject to their jurisdiction."[4] The language is not "in any place subject to their" exclusive "jurisdiction," but simply "their jurisdiction." The constitution then empowers Congress to enforce, by appropriate legislation, this provision in behalf of personal freedom everywhere within the United States, and especially therefore, from the nature of the case, against attempts to infringe it by the commonwealths, or by persons or combinations of persons resident within the commonwealths. It is, therefore, a constitutional right of the individual to call upon the government of the United States to defend him against

[1] Elliot's Debates, vol. I, p. 144.
[2] *Ibid.*, p. 149. [3] *Ibid.*, pp. 181, 182.
[4] Constitution, Amendments, Art. XIII.

any attempt, from any quarter, to enslave him or to subject him to any of the legal incidents of slavery. And in this case he may be protected by other means than the judicial. The government is not obliged to let the injury happen to the individual and then apply a remedy. The ninth section of the Civil Rights Act of April 9, 1866, which provides the means and measures for the execution of this mandate of the constitution, declares, "that it shall be lawful for the President of the United States, or such person as he may empower for this purpose, to employ such part of the land and naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act." [1]

I do not find either in the constitution, the laws or the judicial decisions any direct and formal definition of slavery or of involuntary servitude. The language of the constitution would, I think, imply that they are not intended as co-extensive terms simply, but rather as cumulative terms. I infer from the language of the Civil Rights Act of 1866, and of the decision in the Civil Rights Cases in 1883, that the meaning of these two terms is: that no involuntary personal servitude, either for life or for any period of time, nor any of the civil incidents or private law incidents of the same, shall be allowed to exist in any part of the United States, or in any place subject to the jurisdiction of the United States.[2] It will be noticed that I employ the expression "civil incidents." I do this in order to distinguish such incidents from political incidents, on the one side, and from social incidents, on the other. This provision of the constitution does not directly confer *political* rights upon anybody, though it is conceivable that it might do so indirectly; as, for example, if some other clause in the constitution of the United States,

[1] United States Statutes at Large, vol. 14, p. 29.

[2] United States Statutes at Large, vol. 14, p. 27; Civil Rights Cases, 109 U. S. Reports, 3.

or some provision in the constitution or laws of a commonwealth, should declare that all free men shall have the right to vote, then the secondary effect of the execution of the thirteenth amendment would be to confer suffrage. On the other hand, the social incidents of involuntary servitude cannot be regarded as legally abolished by this provision, either directly or indirectly. They may gradually die out in consequence of the abolition of the civil incidents, but this process is one which must accomplish itself outside of the realm of law and in the domain of social disposition. It is indeed conceivable that law may be so expanded as to dominate the whole intercourse of society; but this provision of the constitution does not authorize the legislature of the United States so to expand the laws of the United States in regard to this subject, and we trust that the legislatures of the commonwealths will not enter upon any such tyrannic course. In the Civil Rights Cases above cited, the Supreme Court of the United States, the ultimate interpreter of the constitution in our system in regard to private rights, plainly declares that the thirteenth amendment has not abolished what may be termed the social incidents of slavery. These cases decide that acts of discrimination made by innkeepers, theatre-managers, and carriers of passengers, as regards the accommodations furnished by them to different individuals, do not impose upon the persons, against whom such discriminations may be made, any incident of slavery or involuntary servitude within the meaning of the provision of the constitution abolishing slavery and involuntary servitude; and that the act of Congress of March 1, 1875, which undertook to secure to "all persons within the jurisdiction of the United States the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres and other places of public amusements, subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color,

regardless of any previous condition of servitude,"[1] is not warranted by the constitution, and is, therefore, null and void.[2] Of course, then, all relations more distinctly social than these mentioned stand still more completely, if possible, outside of the pale of the legal operation of this constitutional provision.

The Civil Rights Act of April 9, 1866, indicates, I think, correctly the incidents of involuntary servitude, which this thirteenth article of the amendments to the constitution abolishes. They are inequality of rights in the making and enforcing of contracts; in suing; in being parties and giving evidence in a suit; in inheriting, purchasing, leasing, selling, holding, and conveying real and personal property; in the benefit of all laws and proceedings for the security of person and property, as enjoyed by white citizens; and, finally, the suffering of more grievous pains, penalties, and punishments than those inflicted upon white persons for the same offenses.[3] The Supreme Court evidently approves of this view.[4] It is undoubtedly the true view.

Two avenues of approach to this immunity, as thus defined, are still open to the commonwealths; two means of infringing upon the same still exist, which may be easily abused by the commonwealths. The first is the law of apprenticeship, which, in our system of federal government, is a subject that comes under the control of the commonwealths. The general incidents of apprenticeship are, that only a minor may be apprenticed; that the apprenticeship shall not run beyond the date of the attainment of majority; that the consent of the father, mother or guardian of the minor shall be given to the apprenticeship; that the minor shall enter voluntarily into the same or, if the minor be a pauper, that the officers of the poor

[1] United States Statutes at Large, vol. 18, part 3, sec. 1, p. 336.
[2] Civil Rights Cases, 109 U. S. Reports, 3.
[3] United States Statutes at Large, vol. 14, p. 27.
[4] 109 U. S. Reports, 22.

shall execute the indenture at their own discretion for the minor; that the apprenticeship shall be made by way of an unassignable indenture; and that the master shall be held to provide the apprentice with reasonable support, proper instruction and proper care in case of sickness.[1] This law may, however, be modified at will by the legislature of each commonwealth in our system. It is easy to see how a species of slavery could thus be introduced under its cloak by the legislature of any commonwealth which might be so disposed. If, for example, the consent of the person to be bound should not be required, or if the indenture should be made generally assignable, or if no instruction should be made necessary, so that the apprentice should grow up in utter ignorance of his or her rights, there would certainly result an involuntary servitude. This question came to a practical test very soon after the passage of the Civil Rights Act. A law of Maryland, distinguishing between white and colored apprentices, by allowing the assignment of indentures of the latter to any one within the county and by making no provision for the education of colored apprentices, was reviewed by Chief Justice Chase in the case of Turner.[2] The Chief Justice pronounced this law to be one creating an involuntary servitude, and declared it null and void, as contravening the thirteenth amendment to the constitution and the Civil Rights Act of the Congress made in accordance therewith.

The second means still in the hands of the commonwealths which may be so abused as to produce involuntary servitude is reserved in the constitutional provision itself. The plain inference to be drawn from the words "except as a punishment for crime whereof the party shall have been duly convicted" is: that the commonwealths may still establish slavery and involuntary servitude as a punishment for crime, and that the individual suffering such punishment will not be accorded

[1] Kent's Commentaries, vol. II, p. 262 ff.

[2] United States Circuit Court Reports, 1 Abbott, 84.

the aid of the general government to deliver him from the same. Now, in our federal system of government, the legislatures of the commonwealths, unless prevented or limited by the constitutions of the commonwealths respectively, have plenary power to define crime and fix the penalties of crime. They may define petty offenses as grievous crime, and punish the same with life-servitude. According to the terms of this exception in the constitutional provision under consideration it is only necessary that the person shall have been duly convicted; *i.e.* shall have been convicted by due process of law. If that shall have been followed, the general government has no further power of intervention. The commonwealths may thus first fill their prisons with convicts sentenced with grievous punishments for the commission of petty offenses, and then deliver these convicts over to individuals to be held in involuntary personal servitude for years or for life, by assignable indentures, or in any other way they may determine. This is not mere speculation. Actual procedures in certain commonwealths have come very nearly up to what I have indicated as possibilities. The difficulty lies in regarding criminal law as local law. The *administration* of the criminal law should be local, but the fundamental principles of the law, the definitions, the punishments, and the fundamental rules of procedure in trial and conviction, should be national. They are, in their nature, national.

3. When the readmission to the Congress of the United States of members from the reconstructed commonwealths became desirable and necessary, the party which had secured the abolition of slavery was obliged to consider the possibility of its opponents regaining a majority in both houses of the Congress and also the presidency. As yet the constitution expressed the gain of the great civil war only in the two lines abolishing slavery and involuntary servitude. The Civil Rights Act of April 9th, 1866, might be abolished by the vote simply of a hostile majority in the Congress with the

consent of a hostile President. It appeared wise, therefore, to elaborate the principles of the thirteenth amendment a little further in the constitution itself, and give the newly emancipated the status of citizenship by the constitution. Two advantages would thus be gained. First, the Congress could not by legislation abolish the constitutional provisions; and, second, if the Congress should fail to enact the proper measures for executing them, they would be so nearly complete and self-executing that the judiciary might be able to apply them to each individual case. These were the reasons which led to the adoption of the fourteenth amendment, so far, at least, as the question of individual or civil liberty is concerned. Subsequent events have shown the wisdom of the precaution, and have also demonstrated, in large degree, the shortsightedness of the wisest.

The first section of the fourteenth amendment contains all that there is upon the subject of civil liberty in the entire article. It defines, first, the qualifications of citizenship; second, it declares certain rights of citizenship; and third, it declares certain rights of persons. As the last concept is the wider, I will deal with it first.

First. The amendment ordains that no "State" (commonwealth) "shall 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."[1] If any commonwealth should undertake to do any of these things, the injured individual may call the government of the United States to his defense by means of judicial decision and its execution. It is true that had Congress passed no laws to enforce this provision, (as it is empowered to do by the fifth section of the amendment,) there might be room for argument that the provision is only declaratory of the moral duty of the commonwealth,[2] and if this view had prevailed the most

[1] Constitution, Amendments, Art. XIV, sec. 1.

[2] *Ex parte* Virginia, 100 U. S. Reports, 339.

that the Court could have done would have been to free the individual from the force of the commonwealth, — it could not have forced the commonwealth in his behalf. It is also true that the Congress might provide other instrumentalities than the courts for the vindication of the individual immunities here established. We have seen that the Congress did do so in regard to the execution of the thirteenth amendment.

The Congress has enacted laws in enforcement of this provision;[1] but it is extremely doubtful whether it has created any other means of meeting the hostile acts of the commonwealths than the judicial. In section thirteenth of the first of these acts, *viz;* that of May 31, 1870, it is provided "that it shall be lawful for the President of the United States to employ such part of the land or naval forces of the United States or of the militia as shall be necessary to aid in the execution of judicial process issued under this act." This is certainly only declaratory of the constitutional power of the President in such a case, and does not create any new power for the President. The same act also re-enacts the Civil Rights Act of April 9th, 1866, (which, as I have pointed out, does contain other means of enforcement than the judicial,) and in the re-enacting clause the act of 1870 provides that its sixteenth and seventeenth sections shall be enforced according to the provisions of the measure of 1866.[2] These sections of the act of 1870 are but little more than a repetition of the first and second sections of the act of 1866. The act of 1875 provides no other means than the judicial for its enforcement.

The supreme judicial power has interpreted the meaning of those terms employed in this clause of the constitutional provision upon which all the important issues under the same

[1] United States Statutes at Large, vol. 16, 140; United States Statutes at Large, vol. 18, part 3, 336.

[2] United States Statutes at Large, vol. 16, 144, sec. 18.

turn. In the case of *Ex parte* Virginia,[1] the Court held that the word "state" (commonwealth) signifies any of the officers or agents by whom the powers of the commonwealth are exerted. The exact language of the Court is "that whoever, by virtue of public position under a State" (commonwealth) "government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name of and for the State" (commonwealth), "and is clothed with the State's" (commonwealth's) "power, his act is that of the State" (commonwealth). "This must be so or the constitutional prohibition has no meaning. Then the State" (commonwealth) "has clothed one of its agents with the power to annul or to evade it." That is to say, a commonwealth cannot avoid the interference of the general government in behalf of an individual, whose immunity under this provision of the constitution shall have been infringed by some agent or officer of the commonwealth, upon the plea that that agent or officer has acted *ultra vires*. The Court will not go into that question. It is enough that the commonwealth has clothed its agent with official power, and that he, by means of it, has infringed the immunity of the individual established by this constitutional provision. The later case of Arrowsmith *v.* Harmoning[2] seems to modify this doctrine somewhat, in that it declares a commonwealth guiltless of a violation of "due process of law" when one of its courts renders an erroneous decision under a commonwealth statute, which statute, if correctly interpreted, would furnish the parties with the necessary constitutional protection. The rule would thus seem to be that when a commonwealth clothes an officer with *discretionary* power, and he, in the exercise of such power, violates due process of law, then the commonwealth itself is guilty. Of course it is guilty if

[1] 100 U. S. Reports, 339. [2] 118 U. S. Reports, 194.

a legislative enactment violates due process. I shall treat of this point a little more fully further on.

In the case of Yick Wo *v.* Hopkins,[1] the Court defines the word "person" to be any human being, whether citizen or alien, without regard to race, color or nationality; and in the case of the Pembina Mining Co. *v.* Pennsylvania,[2] it places under the term persons also private corporations legally existing within the commonwealth. It is the widest possible term of private law for designating parties who may be affected by any governmental act or the act of any governmental agent or official.

The words "life," and "liberty," refer to physical freedom from violence and restraint, inflicted or imposed by government or the agents or officials thereof. The first of these words is self-defining, and the second has been defined in the discussion of the terms slavery and involuntary servitude. The meaning of the word "property" will be considered under division II.

The phrase, "due process of law," which we here, for the first time, find directed against the commonwealths occurs, as we know, in another part of the constitution as descriptive of an immunity of the individual against the general government. In that case we know from the constitution itself exactly what it means: *viz;* the special warrant for arrest; the privilege of habeas corpus and of bail; indictment by grand jury; trial by petty jury in open court; full knowledge of the subject of the accusation; opportunity to confront witnesses supporting the accusation; power to compel the attendance of witnesses rebutting the accusation, etc. The question here is: does the phrase have the same significance when directed against the commonwealths? The first general definition given to it by the Supreme Court when aimed at the commonwealths is to be found in the case of Pennoyer *v.*

[1] 118 U. S. Reports, 356. [2] 125 U. S. Reports, 181.

Neff.[1] The exact words of the Court are that due process of law, as required by the fourteenth amendment, means, when applied to judicial proceedings, "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." We should not be able to determine from this definition whether all the specifications of due process contained in the immunity against the general government were also requisite in the proceedings of the commonwealth courts; but the Supreme Court of the United States has at last cleared up this question definitely in the case of Hurtado *v.* California,[2] by deciding that due process of law, as required of the commonwealths by the constitution does not prevent a commonwealth from authorizing its courts to prosecute for crime by information; *i.e.* to prosecute without the intervention of the grand jury. Due process of law as directed against the commonwealths is, then, not to be considered as defined at all in the constitution of the United States or in the laws of the United States made in accordance therewith, but as defined in the constitution, laws and customs of the commonwealths, subject, however, to review in each case by the courts of the United States. It will be, therefore, as defensive of individual liberty as the disposition of those courts, acting with full discretion, may choose to make it. This is an immense power, and the hands into which it is entrusted should be selected with the most scrupulous care. No narrow spirit can be endured in such a position. Civil liberty is in its nature, at the narrowest, national, and manifests, with the widening of political organization, the tendency to become human. The local control of this subject must be placed under strongest limitations if we would hold our public law up to the demands of our political science, *i.e.* of our true political conditions.

[1] 95 U. S. Reports, 714.

[2] 110 U. S. Reports, 516.

Again, the supreme judicial power has decided, in the case of Barbier *v.* Connolly,[1] that the fourteenth amendment was not designed to interfere with the police power of the commonwealths. This opens a very wide field of discussion. What is the police power? Who is authorized to fix its final limitations? Who is to decide how far it shall be permitted to infringe individual rights before the defense of "due process of law" can be successfully invoked against it? I can find no satisfactory definition of this phrase, "police power," in the decisions of the Supreme Court itself. The earlier decisions make it identical with the whole internal government of the commonwealth. In the case of the City of New York *v.* Miln[2] the Court declared, "we should say that every law came within this description which concerned the welfare of the whole people of a State" (commonwealth), "or any individual within it, whether it related to their rights or their duties; whether it respected them as men, or as citizens of the State" (commonwealth); "whether in their public or private relations; whether it related to the rights of persons, or of property, of the whole people of a State" (commonwealth) "or of any individual within it, and whose operation was within the territorial limits of the State" (commonwealth), "and upon the persons and things within its jurisdiction." The recent case of Barbier *v.* Connolly, cited above, does not evince very great advance in the analysis of this subject. The Court, in this case, defines the police power of the commonwealth to be its power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State" (commonwealth), "develop its resources, and add to its wealth and prosperity." The distinction between the two definitions consists in this: that while the former identifies the police power with the whole power of internal

[1] 113 U. S. Reports, 27.
[2] U. S. Reports, 11 Peters, 102.

government, the latter excepts from its domain the power to fix and administer the law of private rights. The latter distinguishes the whole power of internal government into two parts, *viz;* the jural and the police. Under the jural power it would place the development and administration of the common law, or, better, of private law. Under the police power it would place everything else. This is certainly some advance in thought upon the subject. It is the conclusion to which one of Europe's greatest publicists has arrived.[1] The scientific thought of the day has, however, gone much beyond this. It makes many further distinctions, which, however, cannot be clearly understood except by following briefly the historical development of the conception of the police power.

The etymology of the word is Greek, *πολιτεία*. In its Greek home it was the term which designated the whole internal government of the state as distinguished from its foreign relations. It came into the political science of modern Europe at the epoch when the absolute monarchy was slowly developing its powers out of the *regalia* of the feudal monarchy. The revival of Greek and Latin learning was one of the chief forces contributing to this development, in that it furnished the contrast of a brilliant and powerful civilization, produced largely by the consolidation of governmental power, over against the dissolution, anarchy and poverty of the middle ages and the feudal system. The royal power began to expand its authority and activity beyond the limits of the royal *regalia*, or prerogatives recognized in the feudal compacts, and to interfere in the local affairs of the manors, bishoprics, abbeys and free cities in behalf of the individual subject. The struggle was long and bitter, but the crown was in favor with the masses, who, as tenants of manors and religious corporations, or as servants of city guilds, had had enough of petty tyranny. The result was the

[1] Robert *v.* Mohl, Die Polizei-Wissenschaft, I. Bd. SS. 5, 6. Dritte Auflage.

assumption by the crown of all governmental powers within the localities, and the administration of them through its own appointed agents. Under the conditions of the age, *viz;* hatred of the petty lord by the common man, and yet no capacity in the mass of the people to assume sovereignty and organize government, the principle was rapidly developed by the civilians about the throne that the King knew best what would promote the security and welfare of the people, and that to him belonged the duty and the power to invent and apply, at his discretion, the means for the attainment of the same; *i.e.* the police power of the crown became absolute and identical with what we now term the sphere of internal government. Among the states of western Europe, this development was most thorough-going in France and Germany, especially in France, under whose Grand Monarch it reached a degree of absoluteness, which sacrificed the individual to the government; *i.e.* the King's government became despotic. This result of the development produced the Revolution, the main purpose of which was to win for the individual man the constitutional power of seeking, in some degree, his own welfare in his own way; and to secure the constitutional recognition to him of the domain of free action necessary for the attainment of the same.

With this new thought and purpose, the political science of the present century has resurveyed the field of the police power, and has brought out four very fundamental distinctions in regard to it. The first is, that the police power is, in its nature, administrative, not legislative nor judicial; the second is, that it is not co-extensive with the whole scope of internal administration, as distinguished from external, but is only a branch of internal administration; the third is, that, in the exercise of the police functions, the executive discretion should move within the lines of general principles prescribed either by the constitution or the legislature; and the fourth is, that the community in its most local organiza-

tion should participate, so far as possible, in the exercise of the police power. The purpose of these distinctions is to secure the individual against the tyranny of the government and, at the same time, to secure the public welfare against the selfishness of the individual; and the function which they assign to the police power, in so far as it is directed against the actions of men as distinguished from the processes of nature, is that of restraining the individual in the exercise of his rights when exaggerated by him to the point of becoming a danger to the community. Every right acknowledged to the individual by the state may be abused by him to the detriment of the state. The state must therefore confer upon the government the power to *watch for and prevent* such abuse. This is the police power. Its realm is, therefore, the counterpart of the realm of individual liberty. It is the guard which the state sets upon the abuse of individual liberty. It does not prescribe the method according to which that liberty may be enjoyed, but it fixes the point past which it may not be pursued, and contains summary governmental authority for preventing its abuse.[1]

The narrowing of the sphere of the police power is thus seen to be the general trend of the history of the theory of that power. I do not see how it can now be further narrowed without danger to public security. But the Supreme Court has not yet brought its definitions to the standard of the latest formulation of the theory. It gives, in its practice, a much wider range to the police power of the commonwealths than the latest thought upon the subject warrants. Its theory of the extent of the police power is, in the political science of to-day, obsolete. The practice of the Court, however, warrants us in holding it to be the doctrine of our public law that the constitutions and laws of the commonwealths fix, in first instance, the domain of the police power of the respec-

[1] L. von Stein, Verwaltungslehre, S. 186 ff.

tive commonwealths; but that these constitutions and laws are subject to revision, in any case of their application, by the United States judiciary, upon appeal made thereto by any individual under the plea that "due process of law" has not been observed in the deprivation inflicted upon him by the act of the commonwealth. This is again an immense power in the hands of the general judiciary. It is proper that it should be so placed; but in its exercise, again, no narrow spirit can be endured. The largest wisdom, the broadest patriotism and the most exalted humanity are the qualities of character absolutely necessary to the personnel of a body vested with such a power.

Lastly, the phrase "equal protection" of the laws has been defined by the Court to mean exemption from legal discriminations on account of race or color.[1] This provision would probably, therefore, not be held to cover discriminations in legal standing made for other reasons; as, for example, on account of age or sex, or mental, or even property, qualifications. The Court distinctly affirms that the history of the provision shows it to have been made to meet only the unnatural discriminations springing from race and color. If a discrimination should arise from any previous condition of servitude, I think the Court would regard this as falling under the inhibition. The language of the decision implies this certainly, if it does not exactly express it.

The Court has been generous in the application of the principle of its definition to the details of practice. It has declared, under the direct issue, that where the custom exists of a participation of the community in the administration of justice, *i.e.* where the custom of trial by jury exists, the exclusion of persons from the jury service on account of race or color or previous condition of servitude falls within the constitutional inhibition.[2] It seems to me that the reasoning

[1] Strauder *v.* West Virginia, 100 U. S. Reports, 303. [2] *Ibid.*

of this case would prohibit a commonwealth from making race, color or previous condition of servitude a disqualification for holding judicial office. The decision of the Court seems to me to cover all discriminations in legal status or in the administration of justice arising from race, color or previous condition of servitude, and to interpret the constitutional provision as conferring upon the individual the power to invoke the interference of the judicial department of the general government against any attempts made upon his liberty by the commonwealths with this purpose.

Second. The constitutional provision under consideration ordains that "no State" (commonwealth) "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[1] It will be observed at the outset that the language of this part of the provision differs somewhat from that employed in the part which we have just reviewed. It does not read, "no State" (commonwealth) "shall abridge the privileges and immunities," etc., as it would if it followed the language of the clause just referred to, but "no State" (commonwealth) "shall *make or enforce any law* which shall abridge," etc.; and it does not read, "no State" (commonwealth) "shall make or enforce any law which shall abridge the privileges and immunities of *any person*, as established by the constitution and laws of the United States," but, "the privileges and immunities of any *citizen* of the United States."

What do these differences of expression signify? Who are citizens of the United States as distinguished from persons within the jurisdiction of the United States? Against what organization or power or procedure of the commonwealths is the right of the citizen of the United States protected? And what are the privileges and immunities of citizens of the United States?

The constitution itself declares that "all persons born or

[1] Constitution, Amendments, Art. XIV, sec. 1.

naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State" (commonwealth) "wherein they reside."[1] Before the adoption of the fourteenth amendment the constitution contained no definition of citizenship, either of the United States or of a commonwealth. It referred to a citizenship of the United States as a qualification for membership in the two houses of Congress and for the presidential office, but it did not declare what should constitute such citizenship. Before the adoption of this amendment the leaders of the states-rights party held that citizenship of the United States was but the consequence of citizenship in some State (commonwealth).[2] Finally, before the adoption of this amendment, the Supreme Court itself indicated that it was inclining to the same view in the famous decision which declared that a man of African descent could not be a citizen of a State (commonwealth) or of the United States; *i.e.* that the United States government had not the power to make him so.[3]

This amendment, therefore, reverses the previously established principle. According to it, citizenship is primarily of the United States; and secondarily and consequently, of the locality in which the citizen of the United States may reside. Citizenship, both of the United States and of the commonwealths, is thus conferred by the constitution of the United States and the laws of Congress made in accordance therewith. The commonwealths can neither confer nor withhold citizenship.[4] A citizen of the United States is now, *ipso jure*, a citizen of the commonwealth in which he may fix his residence; and if any commonwealth should undertake to defeat the spirit of this provision by the enactment of hostile laws in regard to the gaining of residence within its limits, any individual suffering injury from

[1] Constitution, Amendments, Art. XIV, sec. 1.

[2] Calhoun's Works, vol. II, p. 242.

[3] Dred Scott *v.* Sanford, U. S. Reports, 19 Howard, 393.

[4] Minneapolis *v.* Raum, U. S. C. C. of Appeals XII, 448.

the same may invoke the interpretation of the term residence by the United States judiciary, and the aid of the general government in the protection of his liberty under that interpretation. There is nothing in this provision, indeed, which would prevent a commonwealth from permitting an alien to exercise the privileges of a citizen within the commonwealth so far as that particular commonwealth is concerned. The provision was meant to enlarge the enjoyment of these privileges, not to contract them. It is easy to see, however, that a commonwealth may abuse this power to the detriment of the whole people of the United States. For example, a commonwealth might permit aliens to hold real estate in such quantities and under such tenures as to introduce a very disturbing element into our general system of ownership of land. I will say nothing at this point concerning the possible, nay, actual, abuse of this power by the commonwealths in permitting aliens to exercise the suffrage, since the suffrage cannot be classed among the civil or private rights.

I think a great deal of the confusion of thought which prevails in reference to this subject, wherever a federal system of government exists, is occasioned by the failure to distinguish between the state and the two governments. The individual is not a citizen of either *government*, but of the *state* back of both. He derives his citizenship, with all its immunities and rights, from the state; and the two governments have only the duty and the power of observing and protecting those immunities and rights, each in the sphere assigned to it by the state. I will endeavor to expand this view still further when I come to inquire what are "the privileges and immunities of a citizen of the United States."

Before leaving the subject of citizenship, however, I must call attention to the fact that this provision of the fourteenth amendment does not cover every possible case. Children born in foreign countries, of parents who are citizens of the Uni-

ted States, and becoming, afterwards, subject to the jurisdiction of the United States without being naturalized, do not have their status expressly determined by this clause. Neither do persons born or naturalized in the United States and temporarily out of the jurisdiction of the United States. Neither do alien women married to citizens of the United States. Two of these cases had been already provided for by a statute of Congress before the adoption of the fourteenth amendment, *viz;* the first and the third. The statute confers citizenship in the first case, provided the father has resided in the United States, and, in the third case, provided the woman is capable of naturalization.[1] As to the second case, our custom regards citizenship as continuing through any temporary absence, *i.e.* any absence which contemplates a resumption of permanent residence in the United States; although the person, unless enjoying diplomatic extra-territoriality, becomes temporarily subject to the civil, police and criminal jurisdiction of the foreign power, and any protection which our government may exercise over him, at such time, must be through the forms of diplomacy.[2]

I must also call attention to the fact that the Supreme Court of the United States, in its first interpretation of this clause, excludes children born in the United States, of parents who are citizens or subjects of foreign states, from United States citizenship.[3] The language of Mr. Justice Miller, who delivered the opinion of the Court, is as follows: "The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States." Now, consuls and the citizens and subjects of foreign states, unless they are of the family or suite of an

[1] United States Statutes at Large, vol. 10, 604.

[2] Wheaton, International Law, Boyd's edition, Chap. II; Bluntschli, Das Moderne Völkerecht, 338.

[3] Slaughter House Cases, U. S. Reports, 16 Wallace, 36.

ambassador or minister, are themselves subject, while in the United States, to the jurisdiction of the United States and of the commonwealths wherein they sojourn. Certainly, then, their children are. The learned justice seems to have had some other meaning in his mind for the phrase "subject to its jurisdiction" than that commonly held. The general understanding in regard to this phrase is that it signifies being within the territorial limits of the state concerned, and not enjoying the extra-territoriality of international custom. Certainly under such a definition the children born within the United States, of parents who are foreign consuls or subjects of foreign states, but who do not belong to the family or suite of an ambassador or minister or of the diplomatic head of a foreign state, are not, by the words of the fourteenth amendment, excluded from the citizenship of the United States, but are included among those enjoying the same. The Civil Rights Act of April 9th, 1866, declared, "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed," to be citizens of the United States.[1] If Mr. Justice Miller's interpretation of the law rested upon the language of this act, no fault could be found with it; but, of course, the constitutional provision overrides the act wherever they differ, and it is the constitutional provision upon which he rests his explanation. I think the dictum of the Court is wiser law than the constitution, but I do not think it is the law as expressed in the constitution.

In a later case Mr. Justice Gray, expressing the opinion of the Court, upholds the view of this subject advanced by Mr. Justice Miller, and gives a definition to the phrase "subject to the jurisdiction thereof." He says: "The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but com-

[1] United States Statutes at Large, vol. 14, p. 27.

pletely subject to their political jurisdiction, and owing them direct and immediate allegiance."[1] According to this definition the constitutional provision should read: All persons born or naturalized within the United States, and owing the United States direct and immediate allegiance, are citizens of the United States, etc. But to whom does a person born in a given state owe direct and immediate allegiance? This is a question as yet for each state to determine for itself. The juristic world has found two principal answers to it. They are called in legal language the *jus soli* and the *jus sanguinis*. The English common law contained the *jus soli* at the time of our separation from the motherland; it is therefore the law of the United States, unless changed by constitutional or statutory provision. This has not happened. Now, what is the doctrine of the *jus soli* upon this point? It is that any person born within the territory of a given state, and over which the state has established government, owes direct and immediate, or better, primary and natural, allegiance to that state, no matter whether his parents be citizens or subjects of, or aliens in, the said state.[2] There is one case only of exception to this rule, *viz;* children born of parents who are extra-territorial persons; *i.e.* who are the diplomatic heads or the diplomatic agents of foreign states. I do not think that the dictum of Mr. Justice Gray logically sustains the doctrine of Mr. Justice Miller. The point actually decided in the case of Elk *v.* Wilkins was that an Indian, belonging to an organized tribe recognized by the government of the United States, could become a citizen of the United States under the fourteenth amendment only by way of naturalization. This is doubtless a sound interpretation of that provision, but it does not rest at all for its validity upon the dictum that children born in the United States, of parents who are sub-

[1] Elk *v.* Wilkins, 112 U. S. Reports, 94.

[2] Munroe Smith, Nationality, in Cyclopædia of Political Science &c. (Ed. Lalor) vol. 2, p. 941 ff.

jects of foreign states, are not citizens of the United States. The dictum is therefore in both cases obiter, and the meaning of the constitutional provision has not been settled by the supreme interpreting organ in a case directly in point.

What now are the privileges and immunities of citizens of the United States for the abridgment of which no commonwealth may make or enforce any law? Two principal views may be taken of this subject. The first is, that they cover the whole civil liberty of the individual, as recognized in our constitutional system; the whole domain of individual autonomy, as protected by constitutional law against governmental encroachment proceeding from either the general government or the commonwealths. The second is, that they cover only a part of this liberty, a section of this domain; the other part or division being determined wholly by the commonwealths and protected only by the commonwealths. There is no doubt that the latter was the legal view of our system down to the time of the incorporation of the thirteenth and fourteenth amendments in the constitution. There is no doubt that, from the adoption of the constitution of 1781 to the civil war of 1861, the commonwealths held the position, in our system, of chief definers and protectors of individual liberty; and that the general government, while forbidden to invade this sphere itself, was intrusted with the defense of it against the commonwealths at but few points. It is just as true, on the other hand, that the history of those eighty years demonstrated the error and the danger of this distribution of power. If history ever taught anything, it is that civil liberty is national in origin, content and sanction. Not all mankind, indeed, are capable of enjoying the same degree of civil liberty; and when the state is composed of different nationalities, occupying distinct portions of its territory, it may be a sound public policy to make the degree of civil liberty accorded correspond with the degree of general civilization which each may have attained; but this again is only saying that civil liberty

is national where the state is a conglomerate of different nations. On the other hand, where the population of the state is substantially national, *i.e.* where the population of the state speaks a common language and has attained a substantial consensus of opinion in regard to the fundamental principles of rights and wrongs, there the nationalization of civil liberty has become complete in fact, and, if it has not already become so in law, the impulse to adjust the form to the reality will never rest until it forces the public law of the state, upon this subject, into correspondence with its political science.

I say that if history has taught anything in political science, it is that civil liberty is national in its origin, content and sanction. I now go further, and I affirm that if there is but a single lesson to be learned from the specific history of the United States, it is this. Seventy years of debate and four years of terrible war turn substantially upon this issue, in some part or other; and when the Nation triumphed in the great appeal to arms, and addressed itself to the work of readjusting the forms of law to the now undoubted conditions of fact, it gave its first attention to the nationalization in constitutional law of the domain of civil liberty. There is no doubt that those who framed the thirteenth and fourteenth amendments intended to occupy the whole ground and thought they had done so. The opposition charged that these amendments would nationalize the whole sphere of civil liberty;[1] the majority accepted the view;[2] and the legislation of the Congress for their elaboration and enforcement proceeded upon that view.[3] In the face of all of these well-known facts, it was hardly to be doubted that, when a case involving this question should be presented to the Supreme Court of the

[1] Congressional Globe, 1st session, 39th Congress, part 3, pp. 2530–38.

[2] *Ibid.*, p. 2542.

[3] United States Statutes at Large, vol. 14, p. 27 ff.; vol. 16, p. 140 ff.; vol. 18 part 3, p. 336 ff.

United States, the final interpreting organ of the constitution upon all issues touching directly individual liberty, this great body would unanimously declare the whole domain of civil liberty to be under its protection against both the general government and the commonwealths. Great, therefore, was the surprise felt by the scientific students of our political history when, in the December term of 1872, the decision in the Slaughter House Cases[1] was announced, taking the other ground, *viz;* that still only a part of civil liberty has been nationalized, and that by far the larger and more important part is still subject, without appeal, to the power of the commonwealths. This opinion was concurred in by only a bare majority of the court. Both the chief justice, who had been one of the principal actors in the great conflict through which it was supposed that the thorough-going settlement of this question had been reached, and Mr. Justice Field, who was regarded as the sturdy defender of the powers of the commonwealths against centralization, dissented. Mr. Justice Field wrote the dissenting opinion, which was concurred in by Chief Justice Chase and Justices Swayne and Bradley. He held, to quote his own language, that the fourteenth amendment "does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State" (commonwealth) "legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the constitution, or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and

[1] U. S. Reports, 16 Wallace, 36.

most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no State" (commonwealth) "could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the constitution and the laws of the United States always controlled any State" (commonwealth) "legislation of that character. . . . What, then, are the privileges and immunities which are secured against abridgment by State" (commonwealth) "legislation? In the first section of the Civil Rights Act Congress has given its interpretation to these terms, or at least has stated some of the rights which, in its judgment, these terms include; it has there declared that they include the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property. That act, it is true, was passed before the fourteenth amendment was adopted, but the amendment was adopted, as I have already said, to obviate objections to the act, or, speaking more accurately, I should say, to obviate objections to legislation of a similar character, extending the protection of the national government over the common rights of all citizens of the United States. Accordingly, after its ratification, Congress reenacted the act, under the belief that whatever doubts may have previously existed of its validity, they were removed by the amendment. . . . The privileges and immunities designated are those *which of right belong to the citizens of all free governments.*"

Expressed in the nomenclature which I have adopted in this treatise, Mr. Justice Field and his three learned colleagues held that the fourteenth amendment had nationalized the common law in regard to civil liberty, and had placed its protection and development under the power and guardian-

ship of the United States judiciary. Mr. Justice Miller, who delivered the opinion of the majority, should have no objection to that view. Upon what other principle can his own opinion and that of the majority of the Court stand in the case of Watson *v.* Jones?[1] In that case, decided before the Slaughter House Cases, he affirmed a decision and decree of the Circuit Court of the United States, which overturned a decision of the highest court of law of the commonwealth of Kentucky, upon a question which, according to all previous canons of interpretation and practice, could come before the courts of the United States only because of the fact that the parties to the controversy were residents of different commonwealths, and which, therefore, should have been decided by the United States courts in accordance with the law as determined by the highest court of law of the commonwealth. There is only one other possible principle upon which it can stand, *viz;* that the common law in reference to the fundamental principles of individual liberty was always national, both before as well as after the enactment of the thirteenth and fourteenth amendments. But this Mr. Justice Miller would doubtless deny even more strenuously than that it was made so by the thirteenth and fourteenth amendments.

From whatever point of view I regard the opinion of the Court in the Slaughter House Cases, — from the historical, political, or juristic, — it appears to me entirely erroneous. It appears to me to have thrown away the great gain in the domain of civil liberty won by the terrible exertions of the nation in the appeal to arms. I have perfect confidence that the day will come when it will be seen to be intensely reactionary and will be overturned. But until then it is the law of the land, and as such I must state it in detail.

The opinion declares that "there is a citizenship of the

[1] U. S. Reports, 13 Wallace, 679.

United States and a citizenship of a State" (commonwealth), "which are distinct from each other and which depend upon different characteristics and circumstances in the individual"; that "there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State" (commonwealth) "as such"; that "the latter must rest for their security and protection where they have heretofore rested," and the former only "are placed under the protection of the Federal Constitution"; that the privileges and immunities of a citizen of the United States are free access to the seat of government of the United States in order "to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in its administrative functions; free access to the seaports, the sub-treasuries, land offices, and courts of justice in the several States" (commonwealths); protection over "life, liberty, and property, when on the high seas or within the jurisdiction of a foreign government"; the "right to assemble peaceably and petition for redress of grievances; the privilege of the writ of habeas corpus; the right to use the navigable waters of the United States; all rights secured to our citizens by treaties with foreign nations; the right to become a citizen of any State" (commonwealth) "of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State" (commonwealth). "To these may be added the rights secured by the thirteenth and fifteenth articles of amendment and by the other clauses of the fourteenth." I do not find in this enumeration the privilege of United States citizenship, created by article IV, section 2, paragraph 1 of the constitution, that "citizens of each State" (commonwealth) "shall be entitled to all privileges and immunities of citizens in the several States" (commonwealths). Of course this is mere oversight, since the court has relieved a citizen of one common-

wealth going into another from any discriminations which the latter may have sought to make against him.[1] I shall not enter upon any further criticism of this most ominously important decision. I will only add that, coming at the time when the reaction had begun to set in against the pronounced nationalism of the preceding decade, it partook of the same, and set the direction towards the restoration of that particularism in the domain of civil liberty, from which we suffered so severely before 1861, and from which we are again suffering now.

Lastly, against what power is the inhibition in this clause of the constitutional provision directed? The language upon this point is a little different from that employed in the clause which I have considered on pages 209 and 210. In the case which I am now discussing it is declared that "no State" (commonwealth) "shall make or enforce any law which shall abridge," etc.; in the other case the provision reads: "nor shall any State" (commonwealth) "deny," etc. The two expressions, however, have one and the same signification. The commonwealth can act only through the making and enforcing of laws; in fact, it can act upon the individual only by the process of enforcing the laws. The phrase "no State" (commonwealth) "shall make or enforce any law" means, therefore, practically, that no commonwealth shall, through any of the instrumentalities employed by it in the administration of government, do anything or omit anything which will abridge the privileges and immunities of a citizen of the United States.[2] The inhibition is therefore directed against any of the agents or officers of the commonwealth authorized to exercise its governmental powers. I have already pointed out the fact that a late decision of the Supreme Court of the United States has modified this sound rule somewhat, and, as I think, injuriously.[3] The commonwealth may escape

[1] Ward *v.* Maryland, U. S. Reports, 12 Wallace, 163.
[2] *Ex parte* Virginia, 100 U. S. Reports, 339. [3] p. 210.

the charge of a violation of "due process" and, by parity of reasoning, of abridging "the privileges and immunities of a citizen of the United States," if the injury to the individual should occur through an erroneous decision made by one of the courts of the commonwealth under a commonwealth statute which, if properly interpreted, would not inflict the injury.[1] By parity of reasoning, again, I do not see why the commonwealth may not escape responsibility for the erroneous interpretation of such a statute by one of its executive officers in the course of its enforcement. In fact, this would not be at all so dangerous to the liberty of the individual, since he might apply to the commonwealth courts for protection against the same; while, in case the erroneous interpretation should be made by the highest court of the commonwealth, he can find no relief, should the United States courts be shut against him, except, perchance, through an appeal to the commonwealth legislature itself. Should he go there, however, he would meet another difficulty, *viz.;* the principle in our system that the judicial interpretations of law stand, in the order of supremacy, above the legislative. If the court should adhere to its interpretation, the legislature can defeat it only through impeachment of the judges. In short, it is practically impossible for the individual to secure the protection of his immunities and privileges as a citizen of the United States against such erroneous interpretation of a commonwealth statute by the highest court of the commonwealth unless he can take his case to the bar of the United States courts.

Such, however, is the law upon the subject; and, reiterated briefly, it is that the inhibition in this clause of the constitutional provision is directed against the law-making power of the commonwealths, those governmental agents of the commonwealths executing its laws under correct interpretation

[1] Arrowsmith *v.* Harmoning, 118 U. S. Reports, 194.

thereof, and those officials and agents whom the law-making power of the commonwealth clothes with discretionary powers, and who, in the exercise of these powers, abridge any of the privileges and immunities of a citizen of the United States. *These* are the commonwealth organs which are comprehended in the term "State" as employed in this provision, and whose acts are to be regarded as the acts of the "State." The acts of any other organs, when coming into conflict with the privileges and immunities of a citizen of the United States, are *ultra vires*, and the commonwealth is not responsible for them; *i.e.* their correction cannot be assumed by the courts of the United States, but must be left with the commonwealth.

4. Finally, the Court has decided that the constitutional provision vesting in the Congress of the United States the power "to regulate commerce with foreign nations, and among the several States" (commonwealths), "and with the Indian tribes,"[1] is an inhibition upon the commonwealths in behalf of the individual, and renders any attempt of the commonwealths to restrict the ingress and egress of persons, or in any manner to regulate the same beyond police necessities, null and void.[2] What the police necessities of the commonwealths in this respect are, the Court, as in other cases, reserves to itself to determine in detail. I have treated of the general character of the police power and will make reference to what I have already said rather than indulge in repetition.[3]

II. *The Immunities in respect to Private Property.*

The individual is authorized by the constitution to invoke the aid of the United States government, in certain cases against the general power of controlling property, attributed in our system to the commonwealths.

[1] Art. I, sec. 8, § 3.

[2] Henderson *et al. v.* Mayor of N. Y. *et al.*, 92 U. S. Reports, 259; Welton *v.* Missouri, 91 U. S. Reports, 275; Wabash &c. Railway Co. *v.* Illinois, 118 U. S. Reports, 557.

[3] p. 213 ff.

1. The commonwealths are inhibited, without the consent of the legislature of the United States, from levying and collecting any imposts or duties upon any article in the hands of the person who sends it directly to, or receives it directly from, a foreign country, except in so far as this shall be necessary to defray the expenses incurred by the commonwealth in examining the article and making certification as to its quality or fitness for use;[1] from levying and collecting any charge upon any vessel according to its tonnage, as an instrument of commerce, for entering or leaving a port or navigating the public waters of the country;[2] and from levying and collecting any tax upon the property and lawful agencies and instrumentalities of the general government, no matter in whose hands they may be found,[3] or upon franchises conferred by Congress,[4] or upon receipts of a telegraph company from inter-commonwealth business,[5] or upon receipts from any inter-commonwealth business carried on by anybody.[6] Finally, the legislatures of the commonwealths are inhibited from exercising their general powers of legislation in regard to taxation or eminent domain in such a manner as to take, or to authorize anybody to take, private property, without the owner's consent, for any but a public object.[7] It is not said that the legislature of a commonwealth is thus inhibited, should it be specifically authorized thereto by a provision of the constitution of the commonwealth.

[1] Constitution, Art. I, sec. 10, § 2; Brown *v.* Maryland, U. S. Reports, 12 Wheaton, 419; Turner *v.* Maryland, 107 U. S. Reports, 38.

[2] Constitution, Art. I, sec. 10, § 3; Huse *v.* Glover, 119 U. S. Reports, 543.

[3] McCulloch *v.* Maryland, U. S. Reports, 4 Wheaton, 316; Dobbins *v.* The Commissioners of Erie County, *Ibid.* 16 Peters, 435; Bank Tax Cases, *Ibid.* 2 Wallace, 200; Van Brocklin *v.* Tennessee, 117 *Ibid.* 151.

[4] California *v.* Central Pacific R. R. Co., 127 U. S. Reports, 1.

[5] Rotterman *v.* Western Union Telegraph Co., 127 U. S. Reports, 411.

[6] Wabash &c. Railway Co. *v.* Illinois, 118 U. S. Reports, 557; Robbins *v.* Shelby Taxing District, 120 *Ibid.* 489.

[7] Loan Association *v.* Topeka, U. S. Reports, 20 Wallace, 655; Parkersburg *v.* Brown, 106 U. S. Reports, 487; Cole *v.* La Grange, 113 U. S. Reports, 1.

2. The commonwealths are inhibited from depreciating the property of their creditors, or aiding individual debtors to depreciate the property of their creditors, by making anything a legal tender in the payment of debts except the gold and silver coin of the United States.[1]

3. The commonwealths are inhibited from restricting or regulating the transmission of property or messages by persons in the United States to persons in foreign states, or by persons in one commonwealth to persons in another.[2]

4. The commonwealths are inhibited from passing any law impairing the obligation of contracts.[3] This provision demands a more minute examination and explanation.

First. The power against which the inhibition is directed is not exactly the same as that comprehended under the word "State" (commonwealth), as employed in the foregoing clauses and as explained at the close of subdivision I, of this subject. The language of the constitution, in this clause, is that "no State shall . . . pass any . . . law impairing," etc.; and the Court has decided that "the prohibition is aimed at the legislative power of the State" (commonwealth), "and not at the decisions of its courts or the acts of administrative or executive boards or officers."[4] The impairing of the obligation must be made by a provision of the constitution of the commonwealth, or by some act passed by the legislature of the commonwealth,[5] in order to warrant the intervention of the United States judiciary in behalf of the individual against the same.[6]

[1] Constitution, Art. I, sec. 10, § 1.

[2] Henderson *et al. v.* Mayor of N. Y. *et al.*, 92 U. S. Reports, 259; Welton *v.* Missouri, 91 *Ibid.* 275; Wabash &c. Railway Co. *v.* Illinois, 118 *Ibid.* 557.

[3] Constitution, Art. I, sec. 10, § 1.

[4] New Orleans Waterworks Co. *v.* Louisiana Sugar Refining Co., 125 U. S. Reports, 18.

[5] New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. Reports, 650.

[6] It does not matter, however, whether the act or provision be original or adopted. Williams *v.* Bruffy, 96 U. S. Reports, 176.

Second. The term "contract" has, in this connection, been made subject to exhaustive definition by the courts. It is held to mean a legally binding agreement in respect to property, either expressed or implied, executory or executed, between private parties, or between a commonwealth and a private party or private parties; or a grant from one party to another; or a grant, charter, or franchise from a commonwealth to a private party or private parties.[1]

Third. The term "obligation" has received an equally exact and exhaustive definition. It is held to mean the existing body of law, defining, regulating, securing and giving sanction to the contract.[2] In fact, we may say that the chief element in the obligation is the existing remedy provided by law for its enforcement.[3] Any distinction, therefore, between the obligation and the remedy, in this connection, is unsound.[4]

Fourth. The most important term of the clause is the word "impair." Any alteration of the substance of the contract, or of the law governing the contract at the time it was entered into, would be, in popular definition, an impairment. There are, however, some grave difficulties in the way of accepting this as the legal definition of the term. Shall, for example, a commonwealth be regarded as impairing the obligation of a contract by simply changing its judicial procedure for the enforcement of the same, or by defending the public health or morals against any baleful influence or

[1] Fletcher *v.* Peck, U. S. Reports, 6 Cranch, 87; Vanhorne *v.* Dorrance, *Ibid.* 2 Dallas, 304; Dartmouth College *v.* Woodward, *Ibid.* 4 Wheaton, 518; The Binghampton Bridge, *Ibid.* 3 Wallace, 51; Hall *v.* Wisconsin, 103 U. S. Reports, 5; New Orleans Water Works Co. *v.* Rivers, 115 *Ibid.* 674; St. Tammany Water Works *v.* New Orleans Water Works, 120 *Ibid.* 64.

[2] Bronson and Kinzie, U. S. Reports, 1 Howard, 311; McCracken *v.* Hayward, *Ibid.* 2 Howard, 608.

[3] Walker *v.* Whitehead, U. S. Reports, 16 Wallace, 314; Tennessee *v.* Sneed, 96 U. S. Reports, 69; Edwards *v.* Kearzey, 96 *Ibid.* 595; Louisiana *v.* New Orleans, 102 *Ibid.* 203.

[4] Nelson *v.* St. Martin's Parish, 111 U. S. Reports, 716.

effect, which might arise by a strict adherence to the same? In other words, is the power of the commonwealth to control its public policy in matters pertaining to judicial and police regulations limited by the body of contracts existing at any particular moment?

The first part of this question was answered in an early case, and to the position then taken the Court has substantially adhered ever since. The Court held that the commonwealth may change its judicial procedure without making any distinction between past and future contracts in the application of the new forms; but must not, under the cloak of the same, so change the nature and extent of existing remedies as materially to impair the rights and interests of any of the parties.[1] In re-affirming this opinion, twenty years later, the Court said: "It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy" under the power to regulate the modes of procedure, "and provisions . . . which impair the right"; but the Court entirely concurred in the rule of the former case.[2] The Court has pointed out the chief things which may not be done by a commonwealth, under its power to regulate its judicial procedure. It may not pass an insolvent law which shall apply to past contracts.[3] It may not suspend the remedy as to past contracts.[4] It may not so shorten the period of a statute of limitations as not to leave a reasonable time for the commencement of a suit.[5] It may not substitute any other means of payment than that expressed or implied in the contract,[6] or any other measure

[1] Green *v.* Biddle, U. S. Reports, 8 Wheaton, 1.

[2] Bronson *v.* Kinzie, U. S. Reports, 1 Howard, 311.

[3] Sturgis *v.* Crowningshield, U. S. Reports, 4 Wheaton, 122.

[4] Cooley, Constitutional Limitations, 357, fourth edition.

[5] Hawkins *v.* Barney, U. S. Reports, 5 Peters, 457; Sohn *v.* Waterson, *Ibid.* 17 Wallace, 596; Terry *v.* Anderson, 95 U. S. Reports, 628.

[6] McCracken *v.* Hayward, U. S. Reports, 2 Howard, 608.

of values.[1] It may not make such subsequent exceptions of property from sale in execution of judgment for satisfaction of debt upon contract as shall substantially weaken the general security upon which the contract rested when it was made.[2] It may not withdraw from the lien of the judgment property which, when judgment was obtained, was bound thereby.[3] It may not subsequently prohibit the sale of property, on execution for debt upon contract, for less than an appraised value or percentage of an appraised value.[4] It may not subsequently authorize a redemption of property, after sale, by a mortgagor or his creditors, nor extend the period for redemption, if any, which was legal at the time the contract was made,[5] etc.

The Court has given a very distinct, though more recent, answer to the second part of our question. It holds that not only is the police power of a commonwealth unlimited by the body of contracts existing at any given moment of time, but that a commonwealth cannot by any contract divest itself of the police power or limit the exercise of the same according to its own discretion.[6] What the boundaries and content of the police power of a commonwealth are the Court has not clearly defined, as I have elsewhere explained. As I have shown, the Court has given it an excessively wide range.[7] It has treated it as nearly identical with the whole internal government of the commonwealth, less the jural power. I believe this to be extravagant, as I have elsewhere said.[8]

The Court has, however, excluded in detail from the police

[1] Effinger *v.* Kenney, 115 U. S. Reports, 566.

[2] Edwards *v.* Kearzey, 96 U. S. Reports, 595.

[3] Gunn *v.* Barry, U. S. Reports, 15 Wallace, 610.

[4] McCracken *v.* Hayward, U. S. Reports, 2 Howard, 608.

[5] Bronson *v.* Kinzie, U. S. Reports, 1 Howard, 310; Howard *v.* Bugbee, *Ibid.* 24 Howard, 461.

[6] Boyd *v.* Alabama, 94 U. S. Reports, 645; Beer Co. *v.* Massachusetts, 97 *Ibid.* 25.

[7] p. 212. [8] p. 213 ff.

power, when brought into conflict with existing contracts, some things which, according to its general definition, would appear to be included in it.

It has decided, for example, that a commonwealth cannot rescind an agreement, made by itself, not to exercise the power of taxation, or to exercise it only within certain limits.[1] In other words, it is law in our system that a commonwealth legislature may bargain away the tax power of the commonwealth, unless prohibited therefrom by the commonwealth constitution, and that, if it does do so, the United States government will protect the rights of individuals established under the contract. In still other words, it is law in our system that a commonwealth may create a property right in an individual to an exemption from the operation of a governmental power. What is this but the negative side of the feudal system? It seems to me that a sound interpretation of the constitution of the United States would not accord to the commonwealths the power to divest themselves by contract of the power of taxation; and this for two reasons. The first is that, according to the true history and spirit of our system, the commonwealths are simply local governments, entrusted by the sovereign behind both the local and the general governments with governmental powers only, and that their discretion in the exercise of these powers cannot extend to the point of conferring upon any person or body of persons a right to an exemption from their exercise. The power to do this is not a governmental power merely. It is a power to change the system of government. It is a sovereign power. The commonwealth may of course exempt certain persons or property from taxation, but that is altogether another thing from an irrevocable exemption from its *power* of taxation. A temporary or a permanent suspension of the employment of a power is not at all the same thing as

[1] The Jefferson Branch Bank *v.* Skelly, U. S. Reports, 1 Black, 436; University *v.* People, 99 U. S. Reports, 309.

the creation of a disability to employ the power. This, I say, the sovereign alone can do, and the sovereign in our system is not the commonwealth. The second reason is that the constitution expressly provides that the United States shall guarantee to every commonwealth a republican form of government.[1] It is not easy to define the republican form; but it seems to me that one of its prominent characteristics is the preservation of all governmental powers by the government and their divestment only by the act of the sovereign. The most direct antithesis to republican government is the feudal form, because republican government is above all things representative government;[2] because it regards government as public business purely and condemns *in toto* any property rights in governmental powers or in exemptions from their operation. The absolute monarchy stands in far less blunt contradiction to the republican form. The most truly absolute monarch of modern times declared himself to be but the "first servant of the state," *i.e.* the first representative of the state; but the feudal form, upon both its negative and positive sides, is thoroughly unrepresentative, and deals with public powers as with private rights.

On the other hand, the Court has decided that a commonwealth cannot so grant away its power of eminent domain that the constitution of the United States will vest in an individual a right against the future exercise of that power upon the same property.[3] I must say that I do not comprehend the reasoning which, upon general principles, concedes the power to a commonwealth to create a right to an exemption from one of its governmental powers and not from another; nor is there any such distinction between the powers in question as to justify such discrimination. Governmental powers are, in all cases, public trusts; and the exemption of

[1] Constitution, Art. IV, sec. 4.

[2] The Federalist, No. XXXVIII, University edition, p. 259.

[3] Boom Co. *v.* Patterson, 98 U. S. Reports, 403.

an individual from the operation thereof, as well as the investment of an individual with the exercise thereof, should always be subject to withdrawal at the pleasure of the government which exempts or which invests. This is, at least, the dictum of sound political science, though our public law does not yet fully correspond thereto. Our public law exaggerates private rights upon this point.

The power of the United States government to defend the domain of contractual obligation against impairment by commonwealth law might, however, be made nugatory in many cases, if the principle that the United States has no common law, within the commonwealths, should be adhered to. That principle, strictly applied, would require that, when the contract relates to a matter subject to the exclusive jurisdiction of the commonwealth, the United States courts should follow the decisions of the highest courts of the commonwealth in interpreting the question both of the obligation and the impairment. This, however, the Supreme Court has absolutely and expressly refused to do.[1] It has asserted its independent power to interpret for itself the law of the commonwealth in reference to contracts and to determine for itself the question of impairment. This is certainly sound jurisprudence. Let it only be so expanded in application as to break down the old and, now certainly erroneous, principle that the United States has no common law within the commonwealths.[2]

The constitution itself, however, interposes a technical difficulty in the way of an individual attempting to hold a commonwealth by the obligation of its contract with him. The well-known eleventh article of the amendments provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States" (commonwealths)

[1] The Jefferson Branch Bank *v.* Skelley, U. S. Reports, 1 Black, 406.

[2] Political Science Quarterly, vol. 3, no. 1, p. 136 ff.

"by citizens of another State" (commonwealth) "or by citizens or subjects of any foreign state." This provision has been interpreted as applying also to the case of a suit against a commonwealth by a citizen thereof.[1]

The Supreme Court of the United States has, however, shown a most wise and commendable spirit in the interpretation of this limitation upon individual rights. It has assumed jurisdiction in behalf of the individual, wherever this could be accomplished without making the commonwealth the original and direct defendant in the suit. For example, it has decided that, if the commonwealth begins the suit, the individual may always appeal to the United States courts without being regarded as the prosecutor;[2] that where property of the commonwealth, or property in which the commonwealth has an interest, comes before the Court and under its control, in the regular course of judicial administration, without being forcibly taken from the possession of the commonwealth, the Court will proceed to discharge its duty, in behalf of the individual party, in regard to that property;[3] that an individual may bring an action in tort against an officer of the commonwealth, and that said officer cannot oust the jurisdiction of the Court by merely proving himself to be an officer and asserting his official authority to do the act complained of, but must prove that his authority is sufficient in law to protect him;[4] that an individual may bring suit against an officer of a commonwealth to compel him to perform a well-defined duty, imposed upon him by law, in regard to a specific matter, in the performance of which the individual may have a distinct interest capable of enforcement by judicial process;[5] and that an individual

[1] Cooley, Principles of Constitutional Law, p. 118.
[2] Cohens *v.* Virginia, U. S. Reports, 6 Wheaton, 264.
[3] Clark *v.* Barnard, 108 U. S. Reports, 436.
[4] U. States *v.* Lee, 106 U. S. Reports, 196.
[5] U. States *v.* Schurz, 102 U. S. Reports, 378.

may bring suit against an official of a commonwealth to prevent him from violating his official duty to the injury of the plaintiff, when "adequate compensation for the injury cannot be had at law."[1] In the recent case of Poindexter *v.* Greenhow,[2] the Court introduced distinctions in behalf of individual rights so refined as to be almost fanciful. This was an action in detinue brought by an individual against an officer of the commonwealth of Virginia to recover possession of property seized by the officer in payment of taxes. The individual had tendered to the officer coupons of Virginia bonds made receivable by an act of the commonwealth for taxes. The commonwealth had by a subsequent act ordered the collection of all taxes in gold, silver, United States treasury notes, national bank currency, and nothing else. The officer made defendant in this suit sought, therefore, to oust the jurisdiction of the Court by making the suit appear to be directed against the commonwealth itself, but the Court said that the commonwealth "is a political, corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State" (commonwealth) "which constitutes his commission as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State" (commonwealth) "of Virginia. The State" (commonwealth) "has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The constitution of the United States, and its

[1] Davis *v.* Gray, U. S. Reports, 16 Wallace, 203. Board of Liquidation *v.* McComb, 92 U. S. Reports, 531.

[2] 114 U. S. Reports, 270.

own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defense." This reasoning seems sophistical in several respects. For example, the distinction between the commonwealth as state and the commonwealth as government is impossible, since the commonwealth is not state, *i.e.* sovereignty, at all, but only government. Again, the dictum that an act of the commonwealth legislature, not repugnant to the constitution of the commonwealth, is not law *of* the commonwealth, if it conflicts with a provision of the constitution of the United States, but that the latter is the law *of* the commonwealth, seems to me an extraordinary confusion of prepositions and an absurd statement of propositions. The constitution of the United States is the law *of* the United States *within* the commonwealth, not the law *of* the commonwealth, and an officer *of* the commonwealth is bound to obey and execute the law *of* the commonwealth until it has been decided by the courts to be abrogated by the law *of* the United States *within* the commonwealth. The officer of the commonwealth cannot, therefore, in such a case, be personally responsible as a wrong doer. His act is the act of the commonwealth. Notwithstanding the fact that I consider this reasoning to be erroneous, I approve the spirit of the Court which prompts it to the invention of such fictions in order to uphold the property rights of individuals against the too often manifested dishonesty of the commonwealths. I should prefer to see the eleventh amendment abolished; but if this cannot be, I shall not regret to see it perforated by legal fictions.

5. The commonwealths are inhibited from depriving any

person of property without due process of law, and from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States as to property.[1] That is, in all the acts of a commonwealth, when dealing with the property of individuals through the exercise of the powers of taxation and of eminent domain and through the procedures of its courts, due process must be followed, and none of the property privileges and immunities of United States citizenship may be encroached upon at all. I have explained these terms and phrases under the division of personal immunities; and I have there also pointed out the means for vindicating all immunities guaranteed by the constitution of the United States against the possible attempts of the commonwealths to violate them. I will therefore not occupy space with repetition of the same in this connection.

6. Lastly, the commonwealths are of course inhibited from exercising their powers over individuals in regard to matters placed by the constitution under the exclusive control of the general government, such as the waging of offensive war, the making of treaties and alliances, the conducting of diplomatic relations, the regulation of commerce with foreign states and between the commonwealths, the fixing of the monetary system, the military system, the patent and copyright systems, and the system of naturalization. The individual is exempted by the constitution from the powers of the commonwealths in this entire domain of the exclusive jurisdiction of the central government, and may always call upon the United States judiciary to relieve him from injuries resulting from any attempts of the commonwealths to intrude upon this domain.

Such is the sphere, the content and the guaranty of civil liberty in our constitutional law. It must be confessed that

[1] Constitution, Amendment XIV, sec. 1.

its boundaries are ragged and that its protection is, in many respects, incomplete, but it is the best which the world has yet devised, and it contains in it the principle and the process for a far more perfect development.

C. *The Suspension of the Immunities.*

In the foregoing pages I have endeavored to present the system of individual liberty, both as to content and sanction, as clearly and distinctly as the existing status permits. There is, however, another most important question to be considered before we can dismiss this great subject. It is the inquiry as to whether there is any contingency under which the central government may temporarily suspend the constitutional guaranties of individual liberty and rule absolutely; *i.e.* assume the whole power of the state, the sovereignty.

From the standpoint of political science we should be obliged to answer this inquiry in the affirmative. In time of war and public danger, when the life of the state is threatened, the government must have command of every element of power for its defense. This has been the experience of all states. I will not cite the example of the great Roman state, because the objection may be made that it is anti-Teutonic. Neither will I rely wholly upon the experience of the Teutonic states, formed out of the amalgamation of Teutonic and Roman ideas, lest it may again be said that this element of their constitutions was drawn from a Roman source. I will take the pure Germanic state, as described by Cæsar.[1] He tells us that in time of war a *dux* was chosen, and invested with power over life and death. Tacitus does not put it so strongly. He says the dukes led rather by their influence and example than by their power.[2] However that may be, the fact is well established that, in time of war and migration, the ancient liberty-loving Germans followed the custom of suspending government by the assemblies of

[1] De bello Gallico, VI, 23. [2] Germania, c. 7.

the freemen, and of living under the more or less complete dictatorship of the duke. From the earliest period of Germanic history to the formation of the constitution of the United States, the system of every Teutonic state has admitted the temporary dictatorship, when the necessities of war and public danger require its existence and activity. Does now the constitution of the United States contain any such provision? or were our forefathers able to invent any other means, less dangerous to individual liberty, for the preservation of the life of the state in periods of mortal peril?

The clauses of the constitution bearing upon this question are contained in sections 8 and 9, of Article I, and in section 2, of Article II. They read: "The Congress shall have power to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States" (commonwealths), "when called into the actual service of the United States."

It is very evident that Congress has the power to ordain universal military duty in the United States, and provide for calling the entire population into the service of the United States, after which the entire population would be made subject to the rules and regulations governing the army and navy, which Congress may fashion at pleasure, without regard to the system of civil liberty. This would indeed be an extraordinary procedure, but its constitutionality could not

be doubted. The constitution places no limitation upon the power of the Congress in the construction and the government of the military system. The whole power of the state is certainly vested in the government upon this point.

But the question which we have propounded is a more difficult one than this. It is whether, in the absence of any acts of Congress bringing the whole population of the United States into its military service, there is any exigency under which the government may suspend the guaranties of civil liberty as to persons not within that service. This question has received both a practical and a judicial answer in our history, and the one contradicts in some respects the other. I will not go farther back in our experience than the great civil war, since the precedents set before that period are incomplete and indistinct. Neither will I, at this point, undertake to make any distinction between the different departments of the government in respect to the extraordinary powers of war. The question at this juncture is as to the powers of the whole government over against individual liberty.

1. The practical answer. On the 19th of April, 1861, the President of the United States issued a proclamation, declaring the ports of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas in a state of blockade.[1] That is, the President declared that civil war existed. There is no question that the government of the United States may declare war or the existence of war. The only question is whether the Congress or the President is vested with the power, and, as I have said, that question is not at issue under this topic of our treatise.

On the 10th of May, 1861, the President of the United States issued a proclamation suspending the writ of habeas corpus in certain islands upon the coast of Florida.[2] In his message of July 4, 1861, the President informed the

[1] United States Statutes at Large, vol. 12, p. 1258.
[2] *Ibid.* vol. 12, p. 1260.

Congress that he had authorized the commanding general to suspend the writ of habeas corpus, without limitation as to place.[1] There is no question that the central government may suspend the writ of habeas corpus, when it deems the act necessary to the public safety. The only questions in regard to the subject are whether the Congress or the President is vested with this power, and whether the suspension introduces the reign of martial law, or simply authorizes detention without remedy. The first question is not at issue under this topic. I will simply say at this point that the Congress fully indemnified the President by the law of March 3, 1863, declaring the President authorized "to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof." [2]

As to the second question, I will only say that the government, though inclined to interpret the suspension of the privilege of habeas corpus as the introduction of martial law, *i.e.* as the suspension of *all* the constitutional guaranties of individual liberty,[3] rested also upon its power to make war and regulate the results thereof, in proclaiming the reign of martial law.[4] The fact is, then, that the government did assert and exercise the power to introduce martial law throughout the whole United States, both upon the immediate theatre of the conflict, and at points territorially far removed from it.[5]

2. The judicial answer. This was finally reached, for the first time, after the close of the civil war, in the famous Milligan case.[6] The Court decided, in the first place, that "the suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of

[1] McPherson, History of the Rebellion, p. 126.
[2] United States Statutes at Large, vol. 12, p. 755.
[3] *Ibid.* vol. 12, p. 1260.
[4] Dunning, Political Science Quarterly, vol. 1, no. 2, p. 187.
[5] *Ibid.* p. 191.
[6] U. S. Reports, 4 Wallace, 2.

this writ in order to obtain his liberty." That is, the Court held that the suspension of the writ does not work the introduction of martial law generally, does not suspend all the constitutional guaranties of individual liberty, but simply authorizes detention of the person once legally arrested, simply prevents the arrested person from being brought before a regular judge for the purpose of having the question of his further detention determined by the judge. The constitutional forms of arrest and trial are still preserved. The Court decided in the second place, however, that there are occasions upon which the government can establish martial law, *i.e.* suspend all the constitutional guaranties of individual liberty. It holds that "if, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this government is continued *after* the courts are re-instated, it is a gross usurpation of power. Martial law can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so, in the case of a foreign invasion, martial rule may become a necessity in one State" (commonwealth), "when in another it would be mere lawless violence."

In fewer words, the Court holds that the government has

the power, in time of war, to introduce martial law as consequence of its power to make war, but that the government cannot extend the reign of martial law to places "where the courts are open, and in the proper and unobstructed exercise of their jurisdiction," and cannot protract the reign of martial law, once rightfully established, beyond the moment when the courts shall have been re-instated. It seems to me that this is a claim on the part of the Court that the judiciary shall determine when and where war exists. It is even more than this. It is a claim, not that the judiciary as a single body, not that the Supreme Court alone, but that each judge — or, at least, each United States judge, has this power. I cannot find the warrant for this proposition anywhere in the constitution, and it is certainly very bad political science. It would place in the hands of a relatively insignificant and irresponsible official the power of life and death over the state, in times of its greatest peril. War is the solution of a question by force; and this proposition would introduce into the process, at its most critical point, the pettiest kind of legalism. Scientifically, the view is weak and narrow; practically, it cannot be realized. The commander has only to close the court-room, and place a guard at the door, and this criterion of war or peace will be made to conform to the determinations of power.

Political science would confer, and, as it appears to me, the constitution does confer, the power of determining when and where war exists upon those bodies who represent the whole United States, who wield the power of the United States, and upon whom the constitution casts the responsibility of the public defence against both the foreign and the domestic foe. The opinion of the Court, which has fixed the other view as the law of our system, was delivered by Mr. Justice Davis, and concurred in by but a bare majority. Chief Justice Chase, on the other hand, delivered a vigorous dissent from the opinion, and was sustained therein by Justices

Wayne, Swayne and Miller. The Chief Justice said: "When the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what States" (commonwealths) "or districts such great and imminent public danger exists, as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army, or against the public safety." Again: martial law may be "called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights." And again: "The fact that the Federal Courts were open could not deprive Congress of the right to exercise" martial law. "These courts might be open and undisturbed in the exercise of their functions, and yet wholly incompetent to avert threatened danger, or to punish with adequate promptitude and certainty the guilty conspirators. . . . In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies. . . . We are unwilling to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and rebellion."

This is undoubtedly the sound view. It is the only view which can reconcile jurisprudence with political science, law with policy, upon this subject.

It is devoutly to be hoped that the decision of the Court may never be subjected to the strain of actual war. If, however, it should be, we may safely predict that it will necessarily be disregarded. In time of war and public danger the whole

power of the state must be vested in the general government, and the constitutional liberty of the individual must be sacrificed so far as the government finds it necessary for the preservation of the life and security of the state. This is the experience of political history and the principle of political science.

CHAPTER III.

CIVIL LIBERTY AS PROVIDED IN THE GERMAN IMPERIAL CONSTITUTION.

A. *The Immunities of the Individual against the Powers of the General Government.*

There are no express exemptions contained in this constitution in behalf of the individual against the powers of the general government. The principle, however, that the general government is a government of enumerated powers, leads us to the conclusion that the individual is exempt from the exercise of any powers over him by that government impliedly denied to it by not being conferred upon it in the constitution, or expressly or impliedly reserved by the constitution to the exclusive jurisdiction of the commonwealths. For example, in the realm of civil liberty :

1. The fact that the constitution fixes the period of active military service and vests no power in the government to change the same must be construed to create an exemption from the power of the government to demand, under ordinary circumstances, any longer period of service from the individual.[1]

2. The fact that the constitution confers upon the general government the power of taxing imports and exports and the home production of salt, tobacco, distilled liquors, beer, sugar, and syrup, and makes mention of no other subjects of taxation, must be construed as exempting the individual from the power of this government to tax any other species of property in his hands. In Bavaria, Württemberg and Baden the im-

[1] Reichsverfassung, Art. 59.

munity is still wider. Distilled liquors and beer are not subject to the tax power of the general government in these commonwealths.[1] The fact also that the power to levy these taxes is conferred upon the legislative department of the government, implies an immunity of the individual from the power of the government to tax him in any other manner than by legislation.[2]

3. The fact that the constitution confers no power upon the general government to restrict the freedom of conscience must be construed as creating an immunity for the individual in this domain against that government.

These three examples constitute in substance the extent of the immunity against the central government. It may, if it will, intrude at about every other point by legislation and administration. Neither has the constitution created any judicial body to defend this narrow domain against the imperial legislature and executive. The constitution regards the imperial legislature as the chief creator and supporter of civil liberty, and casts upon it the most wide-reaching powers and responsibilities in this sphere; but, after all, this can produce only a statutory liberty which can, at any moment, be modified or destroyed by a legislative act, while we are seeking a constitutional liberty, and a constitutional guarantor of its maintenance which is not swayed by popular passion nor by a despotic will.

In the imperial territory of Alsace-Lorraine there exists no constitutional immunity, either express or implied, for the individual against the powers of the general government.[3]

B. *The Immunities of the Individual against the Commonwealths.*

Upon this side the constitution is somewhat more generous in the exemption of the individual from the powers of government.

[1] Reichsverfassung, Art. 35. [2] *Ibid.* Art. 4, sec. 2, and Art. 69.
[3] Schulze, Lehrbuch des deutschen Staatsrechtes, Zweites Buch, S. 365.

1. The constitution creates a common citizenship, in the sense that a citizen or subject of any commonwealth of the Empire shall be dealt with as a citizen or subject in every other; *i.e.* he shall have the equal protection of the laws, shall be equal before the courts in the seeking of justice and the suffering of prosecution, shall have the equal right to acquire a residence, pursue any business, purchase and sell real estate, attain to citizenship and to the enjoyment of all civil rights with the citizens or subjects of the commonwealth into which he may go, and shall be in nowise restricted in the exercise of these rights and privileges either by the commonwealth in which he resides or any other, except in so far as reasonable regulations in respect to communal membership may require.[1]

This is not to be understood as the creation of an imperial citizenship antecedent to and separate from citizenship in a commonwealth. Whether there be any such imperial citizenship is doubtful. The commentators rather pronounce against it.[2] I think myself that there is; but it cannot be derived from this article of the constitution. It is to be drawn from the whole spirit and nature of the constitution. This article only requires that no discrimination shall be made as to civil rights and privileges by a commonwealth of the Empire between its own citizens or subjects and those of another commonwealth.[3] This provision abolishes all existing discriminations of this nature, and makes the creation of any such discriminations in the future unconstitutional. It establishes equality in the domain of civil liberty in each commonwealth for every citizen and subject of the Empire; but it does not imperialize, nationalize, this domain. So far as this article is concerned, the commonwealth might refuse to recognize any

[1] Reichsverfassung, Art. 3.

[2] Schulze, Lehrbuch des deutschen Staatsrechtes, Zweites Buch, SS. 24, 26; Laband, Das Staatsrecht des deutschen Reichs, S. 29; Marquardsen's Handbuch

[3] Schulze, Lehrbuch des deutschen Staatsrechtes, Zweites Buch, S. 25.

civil liberty, provided only it were as tyrannic over its own citizens as over those of other commonwealths.

This is simply the old provision of article fourth, section second, of the constitution of the United States, that "the citizens of each State" (commonwealth) "shall be entitled to all privileges and immunities of citizens in the several States" (commonwealths). It was fashioned from this provision.[1] It was discovered and demonstrated in the constitutional assembly of 1867 that this provision would not secure the civil liberty throughout the German state which that body intended to establish.[2] The difficulty was solved not by fixing the immunities and privileges of citizenship in the constitution, but by vesting the legislature of the general government with the power to deal with all these subjects by statutory provisions. Sections 1–6, 13, 15 and 16 of the fourth article of the constitution vest in the legislature of the Empire the power to nationalize civil liberty at about every point. The legislature has already made very large use of this power,[3] the result of which is to make the principle of the third article, in great degree, unnecessary.

The citizenship of the Empire as thus established, with its immunities and privileges, is statutory, while, as I have explained before, we are seeking a constitutional civil liberty and have in this treatise nothing to do with that which is merely statutory. So long as the individual is at the mercy of any part of the government, we are still, as to principle, within the system of absolutism, although the government may be never so liberal and benevolent.

2. The constitution expressly exempts the individual from the power of the commonwealths to impose upon him any tax on account of commerce and trade between the commonwealths.[4]

[1] Schulze, Lehrbuch des deutschen Staatsrechts, Zweites Buch, S. 24, Anmerkung, 1. [2] *Ibid.*

[3] Von Rönne, Das Staatsrecht des deutschen Reichs, Bd. I, S. 106 ff.

[4] Reichsverfassung, Art. 33.

3. The constitution creates an implied immunity against the powers of the commonwealths in respect to all matters which are made subject to the *exclusive* jurisdiction of the general government. The commonwealths are excluded from this domain whether the general government occupies it or not. This makes the immunity constitutional instead of statutory: the immunity would be simply statutory if the commonwealths were authorized to act in case of the inaction of the general government. I find but one article of the constitution in which the exclusive jurisdiction of the general government is expressly declared, *viz;* the thirty-fifth. In this article it is ordained that "legislation in regard to the customs system," *i.e.* in regard to foreign commerce, "in regard to the taxation of domestic salt, tobacco, distilled liquors, beer, sugar and syrup, in regard to securing just collections and returns of these excises to the imperial treasury by the respective commonwealths, and in regard to the measures necessary to secure the customs boundary of the Empire, shall be exclusively imperial." By implication, however, the exclusive jurisdiction of the general government reaches somewhat further. The commonwealths cannot deal, in any case, with the imperial constitution, or with the imperial official organization or relations, or the army, or with the navy, or the foreign merchant marine.[1] Consequently when the exercise of such powers would touch the civil autonomy of the individual, we may regard the individual as possessing a constitutional immunity against the powers of the commonwealths to impose any restriction or regulation upon him in respect to these subjects. The general government might refrain from occupying this ground by any action of its own, and yet the commonwealths would have no authority whatsoever to intrude upon it, under the otherwise valid plea of supplementing the governmental acts of the general government, or under any other plea.

[1] Laband, Das Staatsrecht des deutschen Reichs, S. 93; Marquardsen's Handbuch.

4. The immunities of the individual against the commonwealths are better *secured* than those against the general government. The constitution creates no independent judicial power vested with the authority to interpret the constitution in the domain of civil liberty against the legislature and executive of the general government itself. The judicial power in the German constitution is itself created by the legislature. It is a statutory body, not a constitutional body. It interprets the acts of the legislature, but cannot pronounce upon the constitutionality of its acts. There is no legal defense for the constitutional immunities of the individual against the general government, should the legislature of that government choose to disregard them. Their violation by the executive power might possibly be checked. The constitution creates a responsibility of the chancellor for every act of the Emperor.[1] It does not declare indeed to whom he is responsible, and it does not provide any means of enforcing his responsibility.

Against the commonwealths, on the other hand, every department of the general government may be appealed to by the individual. This is, of course, to be inferred from the fact that the violation by a commonwealth of the immunities of the individual against the commonwealth involves the violation of the imperial constitution and laws, which the general government must uphold. We are not, however, left wholly to inference in the establishment of this proposition. The constitution expressly provides, that "when justice is denied to any individual within or by a commonwealth, and no relief can be secured by ordinary legal process, the individual so injured may appeal to the Federal Council; and it shall be the duty of the Federal Council to receive the appeal and, if it be well grounded, to force the recusant commonwealth to the performance of its duty."[2] Thus, when the constitutional immunities of the individual against the common-

[1] Reichsverfassung, Art. 17. [2] *Ibid.* Art. 77 & 19.

wealths cannot be preserved through the ordinary legal supervision which the imperial judiciary exercises over the commonwealth judiciaries, this extraordinary remedy exists, which is intended and calculated to cover every possible case not otherwise provided for.[1]

C. *The Suspension of Civil Liberty.*

I have sufficiently explained in the previous chapter the necessity, under certain exigencies, for the temporary suspension of civil liberty by the general government, and for the assumption of the whole power of the state by the government. No constitution can claim completeness which does not make provision for such exigencies, and which does not regulate, so far as the nature of the case permits, the manner and the results of the suspension, and the conditions of its termination.

The German constitution vests the power to declare war in the Emperor, with the consent of the Federal Council;[2] the power to defend the Empire against attack in the Emperor;[3] the power to wage war in the Emperor;[4] the power to make peace in the Emperor;[5] the power to supervise the execution of the laws of the Empire in the Emperor;[6] and the power to coerce a commonwealth in the Emperor, with the consent of the Federal Council.[7]

We should be amply warranted in concluding generally, from these provisions, that the imperial government has the constitutional authority to assume a temporary military dictatorship in time of war or great public danger, and to determine when the exigency, justifying the exercise of dictatorial powers, arises, and when it ceases to exist. We should conclude specifically also from these provisions that the Emperor, with the consent of the Federal Council, determines when this exigency arises in the cases of offensive war and in

[1] Schulze, Lehrbuch des deutschen Staatsrechtes, Zweites Buch, S. 28.
[2] Reichsverfassung, Art. 11, § 2. [3] *Ibid.*
[4] *Ibid.* Art. 63. [5] *Ibid.* Art. 11, § 1. [6] *Ibid.* Art. 17. [7] *Ibid.* Art. 19.

the coercion of a commonwealth; that the Emperor alone determines when it arises in defensive war, or in the employment of the military power in the execution of the laws; and that the Emperor alone, in all cases, determines when the exigency requiring martial law ceases to exist. The constitution does not, however, leave us to inferential conclusions. It makes explicit declaration. It ordains that the Emperor may declare the state of siege to exist in any part of the Empire when the public security is threatened.[1] The Emperor may thus introduce the reign of martial law, and he alone can determine exactly when it shall terminate. This is distinct, exact and strong. It places the dictatorship just where a sound science of government would advise. It places it just where the logic of events will always finally fix it.

These last remarks, however, are a little aside from my purpose at this point. Here I am dealing only with the relation of the whole government to civil liberty. If the whole government may introduce martial law, then is my proposition established that there are exigencies, upon the happening of which the government may suspend the whole liberty of the individual, and assume to itself the whole powers of the state; and that the government is the sole determiner of the question as to when these exigencies arise and when they cease to exist.

From the provisions of the constitution which I have cited, there can be no doubt that the imperial government has this power.[2] The sixty-eighth article, which expressly confers this power upon the Emperor, ordains that, until an imperial law shall be passed, designating the conditions and prescribing the form and the effect of the declaration of a state of siege by the Emperor, the Prussian law of June 4, 1851, shall be regarded as the imperial law. This Prussian law is still

[1] Reichsverfassung, Art. 68.

[2] Laband, Das Staatsrecht des deutschen Reichs, S. 164; Marquardsen's Handbuch.

the law of the Empire. It designates both war and insurrection as the conditions warranting the declaration. It provides that, in the first case, the commander-in-chief, or the commanding officer on the scene of war, may make the declaration; while in the second case, the ministry must make it. It further provides that the first effect of the declaration shall be the suspension of the constitutional liberties of the individual.[1] The only modification which this law requires, to make it fit the machinery of the general government, is the substitution of the chancellor for the ministry, since there is no imperial ministry, and no minister except the chancellor. The Emperor, then, as commander-in-chief of the military and naval forces, may immediately, or through any of his military subordinates, declare the reign of martial law in any part of the Empire, when a war exists which in his opinion threatens the public security; and, as chief of the civil administration, he may make the like declaration through the chancellor, when an insurrection exists which in his opinion threatens the public security.[2] From whatever point of view the subject may be regarded, there is no question that the constitution vests in the general government full power to suspend temporarily the whole constitutional liberty of the individual and assume the whole power of the state, and to determine itself the existence of the exigencies which will warrant the assumption, and the moment of their cessation. The law of 1851, which the constitution adopts, provides, indeed, that the suspension can only be made in time of war and insurrection; but when the imperial government declares that there is war, then there is war legally, and when it declares that there is insurrection, then there is insurrection legally; and therewith the power of the government becomes constitutionally unlimited.

[1] Preussische Gesetz-Sammlung für 1851, S. 451 ff.

[2] Von Holtzendorff, Rechtslexicon, Bd. I, 1, S. 262. Dritte Auflage.

CHAPTER IV.

THE SCIENTIFIC POSITION AND THE TRUE RELATIONS OF CIVIL LIBERTY IN THE CONSTITUTION.

I PASS over the subject of civil liberty in the constitutional law of England and France, for the simple and entirely convincing reason that there is none in either. It may be said that, as to the English constitution, this fact results from its unwritten character; but the constitution of France is a written instrument, and yet it contains not a trace of what we call civil liberty. Every particle of civil liberty in both systems is at all times at the mercy of the government. There is a large domain of civil liberty in both of these states. In fact, that domain is nearly identical in both, and corresponds very nearly with the same sphere in the systems of the United States and of Germany; but it was not created by the state as distinct from the government, and it is not defended by the state against the government. When the English barons first constituted the Parliament as the state, and enacted Magna Charta, and established a committee to protect its provisions against the King, *i.e.* the government, there was then in England a constitutional civil liberty; *i.e.* a civil liberty created by the state and defended against the government. But when this baronial Parliament, this organization of the aristocratic state, became, half a century later, a part of the government, then the sovereign, the state, became merged in the government, so far as civil liberty was concerned, and civil liberty lost its supra-governmental source and support.

In France, also, the first work of the revolution of '89 was,

as we have seen, the organization of the state back of the King, *i.e.* back of the government, and then the creation of the constitution, in which civil liberty was defined and secured against the government. The constitutional character of civil liberty was preserved in all the changes of the French system, down to the present, except in the Napoleonic instruments. The fact that civil liberty has no place in the present democratic constitution is striking. It is to be explained largely, but not wholly, upon the ground of the fragmentary and incomplete character of the constitution. There is no doubt that the French Republic needs a revision of its constitutional law. It needs a constitutional civil liberty and a more independent executive power. It is to be confessed and regretted, however, that these are not the subjects which seem uppermost and most important in the minds of the revisionists. There is another reason, as I have indicated, for the omission of the charter of liberties from the constitution. It is the psychology of the Gallic mind, which confuses civil liberty with political equality, and which, therefore, is ready to confide everything to a government proceeding from universal suffrage. This is altogether unscientific in theory and unsatisfactory in practice.

I said, at the beginning of this chapter, that I would pass over the topic of civil liberty in the English and French systems, because it is no part of their constitutional law. I might, indeed, present its principles, as worked out in these systems by legislative enactments, or by custom subject to legislative action, or both; but that would tend to obscure the great fact which I wish to keep in mind: That upon this side of the Atlantic constitutional law has made advances far beyond anything which has been accomplished upon the other side. A true and perfect political science will require, as I have already pointed out, first, the organization of the state, *i.e.* the sovereignty back of the constitution; second, the continued organization of the sovereignty within the con-

stitution; third, the tracing out of the domain of civil liberty within the constitution, by the sovereignty, the state; fourth, the guaranty of civil liberty ordinarily against every power, except the sovereignty organized within the constitution; fifth, provisions for the temporary suspension of civil liberty by the government in time of war and public danger; sixth, the organization of government within the constitution, by the sovereignty, the state; and seventh, the security of the government against all changes, except by the sovereignty organized within the constitution. Of the constitutions which we have examined, only that of the United States contains all of these categories with any degree of completeness. And while it must be confessed that we can learn much from the European constitutions in the organization of government and in the details of administration, yet for a clearly defined and well secured civil liberty, — one which can defy government, and still be subject to the state, one which can do far more for civilization upon many sides, and upon many of its finer sides, than the best ordered government which the world has ever produced, — Europe must come to us, and take lessons in the school of our experience. We have not yet by any means perfected our system. Our conceptions in reference to civil liberty are still clouded by crude notions about the federal system, and its requirements as to citizenship, and the immunities of citizenship; but we have done by far the best in this direction which mankind has as yet accomplished; and while we feel the pressure upon all sides to expand the powers of government, in accordance with European practice, let us never forget that constitutional civil liberty is the peculiar product of our own political genius; and let us sacrifice no part of it, until the evidence becomes indisputable that, as to that part, individual autonomy has become either dangerous to the public security or detrimental to the general welfare.

APPENDIX I.

CONSTITUTION OF THE UNITED STATES OF AMERICA.

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We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, 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.

ARTICLE I.

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at

least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class, at the expiration of the fourth year, and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief-Justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any

office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION 4. The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person

holding any office under the United States, shall be a member of either house during his continuance in office.

SECTION 7. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; — And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended,

unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex-post-facto law shall be passed.

No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SECTION 10. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex-post-facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships-of-war, in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected, as follows

Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding any office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said house shall, in like manner, choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.]

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the

said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he

may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. 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; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more States; — between a State and citizens of another State; — between citizens of different States, — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of

them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

ARTICLE V.

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

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

The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

The ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention, by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven and of the independence of the United States of America the twelfth

In witness whereof we have hereunto subscribed our names

Go: WASHINGTON—
Presid. and deputy from Virginia.

NEW HAMPSHIRE.
JOHN LANGDON
NICHOLAS GILMAN

MASSACHUSETTS.
NATHANIEL GORHAM
RUFUS KING

CONNECTICUT.
WM. SAML. JOHNSON
ROGER SHERMAN

NEW YORK.
ALEXANDER HAMILTON

NEW JERSEY.
WIL: LIVINGSTON
DAVID BREARLEY
WM. PATERSON.
JONA: DAYTON

PENNSYLVANIA.
B FRANKLIN
THOMAS MIFFLIN
ROBT. MORRIS.
GEO. CLYMER
THOS. FITZSIMONS
JARED INGERSOLL
JAMES WILSON
GOUV MORRIS

DELAWARE.
GEO: READ
GUNNING BEDFORD JUN
JOHN DICKINSON
RICHARD BASSETT
JACO: BROOM

MARYLAND.
JAMES MCHENRY
DAN OF ST THOS. JENIFER
DAN CARROLL

VIRGINIA.
JOHN BLAIR—
JAMES MADISON JR.

NORTH CAROLINA.
WM. BLOUNT
RICHD DOBBS SPAIGHT
HU WILLIAMSON

SOUTH CAROLINA.
J. RUTLEDGE
CHARLES COTESWORTH PINCKNEY
CHARLES PINCKNEY
PIERCE BUTLER.

GEORGIA.
WILLIAM FEW
ABR BALDWIN

Attest WILLIAM JACKSON, *Secretary*

ARTICLES

IN ADDITION TO, AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE PROVISIONS OF THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

ARTICLE I. — Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II. — A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ARTICLE III. — No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV. — The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V. — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI. — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

ARTICLE VII. — In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII. — Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX. — The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X. — The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI. — The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.

ARTICLE XII. — The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be

necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII. — *Section* 1. 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.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV. — *Section* 1. 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. 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV. — *Section* 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

APPENDIX II.

VERFASSUNG DES DEUTSCHEN REICHS

APPENDIX II.

I.

GESETZ,

BETREFFEND

DIE VERFASSUNG DES DEUTSCHEN REICHS.

VOM 16. APRIL 1871.

(RGB. 1871. Nr. 16. S. 63.)

Wir WILHELM, von Gottes Gnaden Deutscher Kaiser, König von Preussen &c. verordnen hiermit im Namen des Deutschen Reichs, nach erfolgter Zustimmung des Bundesrathes und des Reichstages, was folgt:

§ 1. An die Stelle der zwischen dem Norddeutschen Bunde und den Grossherzogthümern Baden und Hessen vereinbarten Verfassung des Deutschen Bundes (RGB. vom J. 1870. S. 627 ff.), sowie der mit den Königreichen Bayern und Württemberg über den Beitritt zu dieser Verfassung geschlossenen Verträge v. 23. und 25. Nov. 1870 (RGB. vom J. 1871 S. 9. ff. und vom J. 1870 S. 654 ff.) tritt die beigefügte

Verfassungs-Urkunde für das Deutsche Reich.

§ 2. Die Bestimmungen in Art. 80 der in § 1 gedachten Verfassung des Deutschen Bundes (RGB. vom J. 1870 S. 647), unter III. § 8 des Vertrages mit Bayern v. 23. Nov. 1870 (RGB. vom J. 1871 S. 21. ff.), in Art. 2 Nr. 6 des Vertrages mit Württemberg v. 25. Nov. 1870 (RGB. vom J. 1870 S. 656), über die Einführung der im Norddeutschen Bunde ergangenen Gesetze in diesen Staaten bleiben in Kraft.

Die dort bezeichneten Gesetze sind Reichsgesetze. Wo in denselben von dem Norddeutschen Bunde, dessen Verfassung, Gebiet, Mitgliedern oder Staaten, Indigenat, verfassungsmässigen Organen, Angehörigen, Beamten, Flagge u. s. w. die Rede ist, sind das Deutsche Reich und dessen entsprechende Beziehungen zu verstehen.

Dasselbe gilt von denjenigen im Norddeutschen Bunde ergangenen

Gesetzen, welche in der Folge in einem der genannten Staaten eingeführt werden.

§ 3. Die Vereinbarungen in dem zu Versailles am 15. Nov. 1870 aufgenommenen Protokolle (RGB. vom J. 1870 S. 650 ff.), in der Verhandlung zu Berlin vom 25. Nov. 1870 (RGB. vom J. 1870 S. 657), dem Schlussprotokolle v. 23. Nov. 1870 (RGB. vom J. 1871 S. 23 ff.), sowie unter IV. des Vertrages mit Bayern v. 23. Nov. 1870 (a. a. O. S. 21 ff.) werden durch dieses Gesetz nicht berührt.

Urkundlich unter Unserer Höchsteigenhändigen Unterschrift und beigedrucktem Kaiserl. Insiegel.

Gegeben Berlin, d. 16. April 1871. (L.S.) WILHELM.
Fürst v. Bismarck.

II.

VERFASSUNG

DES

DEUTSCHEN REICHS.

Seine Majestät der König von Preussen im Namen des Norddeutschen Bundes, Seine Majestät der König von Bayern, Seine Majestät der König von Württemberg, Seine Königliche Hoheit der Grossherzog von Baden und Seine Königliche Hoheit der Grossherzog von Hessen und bei Rhein für die südlich vom Main belegenen Theile des Grossherzogthums Hessen, schliessen einen ewigen Bund zum Schutze des Bundesgebietes und des innerhalb desselben gültigen Rechtes, sowie zur Pflege der Wohlfahrt des Deutschen Volkes. Dieser Bund wird den Namen Deutsches Reich führen und wird nachstehende

VERFASSUNG

haben.

I. BUNDESGEBIET.

Art. 1. Das Bundesgebiet besteht aus den Staaten Preussen mit Lauenburg, Bayern, Sachsen, Württemberg, Baden, Hessen, Mecklenburg-Schwerin, Sachsen-Weimar, Mecklenburg-Strelitz, Oldenburg, Braunschweig, Sachsen-Meiningen, Sachsen-Altenburg, Sachsen-Koburg-Gotha, Anhalt, Schwarzburg-Rudolstadt, Schwarzburg-Sondershausen, Waldeck, Reuss älterer Linie, Reuss jüngerer Linie, Schaumburg-Lippe, Lippe, Lübeck, Bremen und Hamburg.

II. Reichsgesetzgebung.

Art. 2. Innerhalb dieses Bundesgebietes übt das Reich das Recht der Gesetzgebung nach Massgabe des Inhalts dieser Verfassung und mit der Wirkung aus, dass die Reichsgesetze den Landesgesetzen vorgehen. Die Reichsgesetze erhalten ihre verbindliche Kraft durch ihre Verkündigung von Reichswegen, welche vermittelst eines Reichsgesetzblattes geschieht. Sofern nicht in dem publicirten Gesetze ein anderer Anfangstermin seiner verbindlichen Kraft bestimmt ist, beginnt die letztere mit dem vierzehnten Tage nach dem Ablauf desjenigen Tages, an welchem das betreffende Stück des Reichsgesetzblattes in Berlin ausgegeben worden ist.

Art. 3. Für ganz Deutschland besteht ein gemeinsames Indigenat mit der Wirkung, dass der Angehörige (Unterthan, Staatsbürger) eines jeden Bundesstaates in jedem anderen Bundesstaate als Inländer zu behandeln und demgemäss zum festen Wohnsitz, zum Gewerbebetriebe, zu öffentlichen Aemtern, zur Erwerbung von Grundstücken, zur Erlangung des Staatsbürgerrechtes und zum Genusse aller sonstigen bürgerlichen Rechte unter denselben Voraussetzungen wie der Einheimische zuzulassen, auch in Betreff der Rechtsverfolgung und des Rechtsschutzes demselben gleich zu behandeln ist.

Kein Deutscher darf in der Ausübung dieser Vefugniss durch die Obrigkeit seiner Heimath, oder durch die Obrigkeit eines anderen Bundesstaates beschränkt werden.

Diejenigen Bestimmungen, welche die Armenversorgung und die Aufnahme in den lokalen Gemeindeverband betreffen, werden durch den im ersten Absatz ausgesprochenen Grundsatz nicht berührt.

Ebenso bleiben bis auf Weiteres die Verträge in Kraft, welche zwischen den einzelnen Bundesstaaten in Beziehung auf die Uebernahme von Auszuweisenden, die Verpflegung erkrankter und die Beerdigung verstorbener Staatsangehörigen bestehen.

Hinsichtlich der Erfüllung der Militairpflicht im Verhältniss zu dem Heimathslande wird im Wege der Reichsgesetzgebung das Nöthige geordnet werden.

Dem Auslande gegenüber haben alle Deutschen gleichmässig Anspruch auf den Schutz des Reichs.

Art. 4. Der Beaufsichtigung Seitens des Reichs und der Gesetzgebung desselben unterliegen die nachstehenden Angelegenheiten: 1) die Bestimmungen über Freizügigkeit, Heimaths- und Niederlassungsverhältnisse, Staatsbürgerrecht, Passwesen und Fremdenpolizei

und über den Gewerbebetrieb, einschliesslich des Versicherungswesens, soweit diese Gegenstände nicht schon durch den Art. 3 dieser Verfassung erledigt sind, in Bayern jedoch mit Ausschluss der Heimaths- und Niederlassungsverhältnisse, desgleichen über die Kolonisation und die Auswanderung nach ausserdeutschen Ländern; 2) die Zoll- und Handelsgesetzgebung und die für die Zwecke des Reichs zu verwendenden Steuern; 3) die Ordnung des Maass-, Münz- und Gewichtssystems, nebst Feststellung der Grundsätze über die Emission von fundirtem und unfundirtem Papiergelde; 4) die allgemeinen Bestimmungen über das Bank wesen; 5) die Erfindungspatente; 6) der Schutz des geistigen Eigenthums; 7) Organisation eines gemeinsamen Schutzes des Deutschen Handels im Auslande, der Deutschen Schifffahrt und ihrer Flagge zur See und Anordnung gemeinsamer konsularischer Vertretung, welche vom Reiche ausgestattet wird; 8) das Eisenbahnwesen, in Bayern vorbehaltlich der Bestimmung im Art. 46, und die Herstellung von Land- und Wasserstrassen im Interesse der Landesvertheidigung und des allgemeinen Verkehrs; 9) der Flösserei- und Schifffahrtsbetrieb auf den mehreren Staaten gemeinsamen Wasserstrassen und der Zustand der letzteren, sowie die Fluss- und sonstigen Wasserzölle;

1. RG. v. 3. März 1873, betr. einen Zusatz zu dem Art. 4 Nr. 9 der Reichs-Verfassung. (RGB. 1873 S. 47).

Wir Wilhelm von Gottes Gnaden Deutscher Kaiser, König von Preussen &c. verordnen im Namen des Deutschen Reichs, nach erfolgter Zustimmung des Bundesrathes und des Reichstages, was folgt:

EINZIGER PARAGRAPH.

Im Artikel 4 der Reichsverfassung ist der Nr. 9 hinzuzufügen:
desgleichen die Seeschifffahrtszeichen (Leuchtfeuer, Tonnen, Barken und sonstige Tagesmarken).

Urkundlich unter Unserer Höchsteigenhändigen Unterschrift und beigedrucktem Kaiserl. Insiegel.

Gegeben Berlin, d. 3. März 1873. (L. S.) WILHELM.
Fürst v. Bismarck.

10) das Post- und Telegraphenwesen, jedoch in Bayern und Württemberg nur nach Massgabe der Bestimmung im Art. 52; 11) Bestimmungen über die wechselseitige Vollstreckung von Erkenntnissen in Civilsachen und Erledigung von Requisitionen überhaupt; 12) sowie über die Beglaubigung von öffentlichen Urkunden; 13) die gemeinsame Gesetzgebung über das Obligationenrecht, Strafrecht, Handels- und Wechselrecht und das gerichtliche Verfahren;

1. RG. v. 20. Dec. 1873, betr. die Abänderung der Nr. 13 des Art. 4 der Verfassung des Deutschen Reichs. (RGB. 1873 S. 379).

Wir Wilhelm von Gottes Gnaden Deutscher Kaiser, König von Preussen &c. verordnen im Namen des Deutschen Reichs, nach erfolgter Zustimmung des Bundesraths und des Reichstags, was folgt:

EINZIGER PARAGRAPH.

An Stelle der Nr. 13 des Art. 4 der Verf. des Deutschen Reichs tritt die nachfolgende Bestimmung:

Die gemeinsame Gesetzgebung über das gesammte bürgerliche Recht, das Strafrecht und das gerichtliche Verfahren.

Urkundlich unter Unserer Höchsteigenhändigen Unterschrift und beigedrucktem Kaiserl. Insiegel.

Gegeben Berlin, d. 20. Dec. 1873. (L. S.) WILHELM.
Fürst v. Bismarck.

14) das Militairwesen des Reichs und die Kriegsmarine; 15) Massregeln der Medicinal- und Veterinärpolizei; 16) Die Bestimmungen über die Presse und das Vereinswesen.

Art. 5. Die Reichsgesetzgebung wird ausgeübt durch den Bundesrath und den Reichstag. Die Uebereinstimmung der Mehrheitsbeschlüsse beider Versammlungen ist zu einem Reichsgesetze erforderlich und ausreichend.

Bei Gesetzesvorschlägen über das Militairwesen, die Kriegsmarine und die im Art. 35 bezeichneten Abgaben giebt, wenn im Bundesrathe eine Meinungsverschiedenheit stattfindet, die Stimme des Präsidiums den Ausschlag, wenn sie sich für die Aufrechthaltung der bestehenden Einrichtungen ausspricht.

III. BUNDESRATH.

Art. 6. Der Bundesrath besteht aus den Vertretern der Mitglieder des Bundes, unter welchen die Stimmführung sich in der Weise vertheilt, dass Preussen mit den ehemaligen Stimmen von Hannover, Kurhessen, Holstein, Nassau und Frankfurt . . 17 Stimmen führt,

Bayern	6	-
Sachsen	4	-
Württemberg	4	-
Baden	3	-
Hessen	3	-
Mecklenburg-Schwerin	2	-
Sachsen-Weimar	1	-

Mecklenburg-Strelitz	1	Stimmen.
Oldenburg	1	-
Braunschweig	2	-
Sachsen-Meiningen	1	-
Sachsen-Altenburg	1	-
Sachsen-Koburg-Gotha	1	-
Anhalt	1	-
Schwarzburg-Rudolstadt	1	-
Schwarzburg-Sondershausen	1	-
Waldeck	1	-
Reuss älterer Linie	1	-
Reuss jüngerer Linie	1	-
Schaumburg-Lippe	1	-
Lippe	1	-
Lübeck	1	-
Bremen	1	-
Hamburg	1	-
zusammen	58	Stimmen.

Jedes Mitglied des Bundes kann so viel Bevollmächtigte zum Bundesrathe ernennen, wie es Stimmen hat, doch kann die Gesammtheit der zuständigen Stimmen nur einheitlich abgegeben werden.

Art. 7. Der Bundesrath beschleisst: 1) über die dem Reichstage zu machenden Vorlagen und die von demselben gefassten Beschlüsse; 2) über die zur Ausführung der Reichsgesetze erforderlichen allgemeinen Verwaltungsvorschriften und Einrichtungen, sofern nicht durch Reichsgesetz etwas Anderes bestimmt ist; 3) über Mängel, welche bei der Ausführung der Reichsgesetze oder der vorstehend erwähnten Vorschriften oder Einrichtungen hervortreten.

Jedes Bundesglied ist befugt, Vorschläge zu machen und in Vortrag zu bringen, und das Präsidium ist verpflichtet, dieselben der Berathung zu übergeben.

Die Beschlussfassung erfolgt, vorbehaltlich der Bestimmungen in den Art. 5, 37 und 78, mit einfacher Mehrheit. Nicht vertretene oder nicht instruirte Stimmen werden nicht gezählt. Bei Stimmengleichheit giebt die Präsidialstimme den Ausschlag.

Bei der Beschlussfassung über eine Angelegenheit, welche nach den Bestimmungen dieser Verfassung nicht dem ganzen Reiche gemeinschaftlich ist, werden die Stimmen nur derjenigen Bundesstaaten gezählt, welchen die Angelegenheit gemeinschaftlich ist.

Art. 8. Der Bundesrath bildet aus seiner Mitte dauernde Ausschüsse 1) für das Landheer und die Festungen; 2) für das Seewesen; 3) für Zoll- und Steuerwesen; 4) für Handel und Verkehr; 5) für Eisenbahnen, Post und Telegraphen; 6) für Justizwesen; 7) für Rechnungswesen.

In jedem dieser Ausschüsse werden ausser dem Präsidium mindestens vier Bundesstaaten vertreten sein, und führt innerhalb derselben jeder Staat nur Eine Stimme. In dem Ausschuss für das Landheer und die Festungen hat Bayern einen ständigen Sitz, die übrigen Mitglieder desselben, sowie die Mitglieder des Ausschusses für das Seewesen werden vom Kaiser ernannt; die Mitglieder der anderen Ausschüsse werden von dem Bundesrathe gewählt. Die Zusammensetzung dieser Ausschüsse ist für jede Session des Bundesrathes resp. mit jedem Jahre zu erneuern, wobei die ausscheidenden Mitglieder wieder wählbar sind.

Ausserdem wird im Bundesrathe aus den Bevollmächtigten der Konigreiche Bayern, Sachsen und Württemberg und zwei, vom Bundesrathe alljährlich zu wählenden Bevollmächtigten anderer Bundesstaaten ein Ausschuss für die auswärtigen Angelegenheiten gebildet, in welchem Bayern den Vorsitz führt.

Den Ausschüssen werden die zu ihren Arbeiten nöthigen Beamten zur Verfügung gestellt.

Art. 9. Jedes Mitglied des Bundesrathes hat das Recht, im Reichstage zu erscheinen und muss daselbst auf Verlangen jederzeit gehört werden, um die Ansichten seiner Regierung zu vertreten, auch dann, wenn dieselben von der Majorität des Bundesrathes nicht adoptirt worden sind. Niemand kann gleichzeitig Mitglied des Bundesrathes und des Reichstages sein.

Art. 10. Dem Kaiser liegt es ob, den Mitgliedern des Bundesrathes den üblichen diplomatischen Schutz zu gewähren.

IV. Präsidium.

Art. 11. Das Präsidium des Bundes steht dem Könige von Preussen zu, welcher den Namen Deutscher Kaiser führt. Der Kaiser hat das Reich völkerrechtlich zu vertreten, im Namen des Reichs Krieg zu erklären und Frieden zu schliessen, Bündnisse und andere Verträge mit fremden Staaten einzugehen, Gesandte zu beglaubigen und zu empfangen.

Zur Erklärung des Krieges im Namen des Reichs ist die Zustimmung des Bundesrathes erforderlich, es sei denn, dass ein Angriff auf das Bundesgebiet oder dessen Küsten erfolgt.

Insoweit die Verträge mit fremden Staaten sich auf solche Gegenstände beziehen, welche nach Art. 4 in den Bereich der Reichsgesetzgebung gehören, ist zu ihrem Abschluss die Zustimmung des Bundesrathes und zu ihrer Gültigkeit die Genehmigung des Reichstages erforderlich.

Art. 12. Dem Kaiser steht es zu, den Bundesrath und den Reichstag zu berufen, zu eröffnen, zu vertagen und zu schliessen.

Art. 13. Die Berufung des Bundesrathes und des Reichstages findet alljährlich statt und kann der Bundesrath zur Vorbereitung der Arbeiten ohne den Reichstag, letzterer aber nicht ohne den Bundesrath berufen werden.

Art. 14. Die Berufung des Bundesrathes muss erfolgen, sobald sie von einem Drittel der Stimmenzahl verlangt wird.

Art. 15. Der Vorsitz im Bundesrathe und die Leitung der Geschäfte steht dem Reichskanzler zu, welcher vom Kaiser zu ernennen ist.

Der Reichskanzler kann sich durch jedes andere Mitglied des Bundesrathes vermöge schriftlicher Substitution vertreten lassen.

Art. 16. Die erforderlichen Vorlagen werden nach Massgabe der Beschlüsse des Bundesrathes im Namen des Kaisers an den Reichstag gebracht, wo sie durch Mitglieder des Bundesrathes oder durch besondere von letzterem zu ernennende Kommissarien vertreten werden.

Art. 17. Dem Kaiser steht die Ausfertigung und Verkündigung der Reichsgesetze und die Ueberwachung der Ausführung derselben zu. Die Anordnungen und Verfügungen des Kaisers werden im Namen des Reichs erlassen und bedürfen zu ihrer Gültigkeit der Gegenzeichnung des Reichskanzlers, welcher dadurch die Verantwortlichkeit übernimmt.

Art. 18. Der Kaiser ernennt die Reichsbeamten, lässt dieselben für das Reich vereidigen und verfügt erforderlichen Falles deren Entlassung.

Den zu einem Reichsamte berufenen Beamten eines Bundesstaates stehen, sofern nicht vor ihrem Eintritt in den Reichsdienst im Wege der Reichsgesetzgebung etwas Anderes bestimmt ist, dem Reiche gegenüber diejenigen Rechte zu, welche ihnen in ihrem Heimathslande aus ihrer dienstlichen Stellung zugestanden hatten.

Art. 19. Wenn Bundesglieder ihre verfassungsmässigen Bundespflichten nicht erfüllen, können sie dazu im Wege der Exekution angehalten werden. Diese Exekution ist vom Bundesrathe zu beschliessen und vom Kaiser zu vollstrecken.

V. Reichstag.

Art. 20. Der Reichstag geht aus allgemeinen und direkten Wahlen mit geheimer Abstimmung hervor.

Bis zu der gesetzlichen Regelung, welche im § 5 des Wahlgesetzes v. 31. Mai 1869 (BGB. 1869 S. 145) vorbehalten ist, werden in Bayern 48, in Württemberg 17, in Baden 14, in Hessen südlich des Main 6 Abgeordnete gewählt, und beträgt demnach die Gesammtzahl der Abgeordneten 382.

Art. 21. Beamte bedürfen keines Urlaubs zum Eintritt in den Reichstag.

Wenn ein Mitglied des Reichstages ein besoldetes Reichsamt oder in einem Bundesstaate ein besoldetes Staatsamt annimmt oder im Reichs- oder Staatsdienste in ein Amt eintritt, mit welchem ein höherer Rang oder ein höheres Gehalt verbunden ist, so verliert es Sitz und Stimme in dem Reichstag und kann seine Stelle in demselben nur durch neue Wahl wieder erlangen.

Art. 22. Die Verhandlungen des Reichstages sind öffentlich.

Wahrheitsgetreue Berichte über Verhandlungen in den öffentlichen Sitzungen des Reichstages bleiben von jeder Verantwortlichkeit frei.

Art. 23. Der Reichstag hat das Recht, innerhalb der Kompetenz des Reichs Gesetze vorzuschlagen und an ihn gerichtete Petitionen dem Bundesrathe resp. Reichskanzler zu überweisen.

Art. 24. Die Legislaturperiode des Reichstages dauert fünf[1] Jahre. Zur Auflösung des Reichstages während derselben ist ein Beschluss des Bundesrathes unter Zustimmung des Kaisers erforderlich.

Art. 25. Im Falle der Auflösung des Reichstages müssen innerhalb eines Zeitraumes von 60 Tagen nach derselben die Wähler und innerhalb eines Zeitraumes von 90 Tagen nach der Auflösung der Reichstag versammelt werden.

Art. 26. Ohne Zustimmung des Reichstages darf die Vertagung desselben die Frist von 30 Tagen nicht übersteigen und während derselben Session nicht wiederholt werden.

[1] Reichsgesetzblatt. 1888. S. 110.

Art. 27. Der Reichstag prüft die Legitimation seiner Mitglieder und entscheidet darüber. Er regelt seinen Geschäftsgang und seine Disziplin durch eine Geschäfts-Ordnung und erwählt seinen Präsidenten, seine Vizepräsidenten und Schriftführer.

Art. 28. Der Reichstag beschliesst nach absoluter Stimmenmehrheit. Zur Gültigkeit der Beschlussfassung ist die Anwesenheit der Mehrheit der gesetzlichen Anzahl der Mitglieder erforderlich.

Bei der Beschlussfassung über eine Angelegenheit, welche nach den Bestimmungen dieser Verfassung nicht dem ganzen Reiche gemeinschaftlich ist, werden die Stimmen nur derjenigen Mitglieder gezählt, die in Bundesstaaten gewählt sind, welchen die Angelegenheit gemeinschaftlich ist.

EINZIGER ARTIKEL.

Der Absatz 2 des Art. 28 der Reichsverfassung ist aufgehoben.

Urkundlich unter Unserer Höchsteigenhändigen Unterschrift und beigedrucktem Kaiserl. Insiegel.

Gegeben Berlin, den 24, Febr. 1873. (L. S.) WILHELM.
Fürst v. Bismarck.

Art. 29. Die Mitglieder des Reichstages sind Vertreter des gesammten Volkes und an Aufträge und Instruktionen nicht gebunden.

Art. 30. Kein Mitglied des Reichstages darf zu irgend einer Zeit wegen seiner Abstimmung oder wegen der in Ausübung seines Berufes gethanen Aeusserungen gerichtlich oder disziplinarisch verfolgt oder sonst ausserhalb der Versammlung zur Verantwortung gezogen werden.

Art. 31. Ohne Genehmigung des Reichstages kann kein Mitglied desselben während der Sitzungsperiode wegen einer mit Strafe bedrohten Handlung zur Untersuchung gezogen oder verhaftet werden, ausser wenn es bei Ausübung der That oder im Laufe des nächstfolgenden Tages ergriffen wird.

Gleiche Genehmigung ist bei einer Verhaftung wegen Schulden erforderlich.

Auf Verlangen des Reichstages wird jedes Strafverfahren gegen ein Mitglied desselben und jede Untersuchungs- oder Civilhaft für die Dauer der Sitzungsperiode aufgehoben.

Art. 32. Die Mitglieder des Reichstages dürfen als solche keine Besoldung oder Entschädigung beziehen.

VI. Zoll- und Handelswesen.

Art. 33. Deutschland bildet ein Zoll- und Handelsgebiet, umgeben von gemeinschaftlicher Zollgrenze. Ausgeschlossen bleiben die wegen ihrer Lage zur Einschliessung in die Zollgrenze nicht geeigneten einzelnen Gebietstheile.

Alle Gegenstände, welche im freien Verkehr eines Bundesstaates befindlich sind, können in jeden anderen Bundesstaat eingeführt und dürfen in letzterem einer Abgabe nur insoweit unterworfen werden, als daselbst gleichartige inländische Erzeugnisse einer inneren Steuer unterliegen.

Art. 34. Die Hansestädte Bremen und Hamburg mit einem dem Zweck entsprechenden Bezirke ihres oder des umliegenden Gebietes bleiben als Freihäfen ausserhalb der gemeinschaftlichen Zollgrenze, bis sie ihren Einschluss in dieselbe beantragen.

Art. 35. Das Reich ausschliesslich hat die Gesetzgebung über das gesammte Zollwesen, über die Besteuerung des im Bundesgebiete gewonnenen Salzes und Tabaks, bereiteten Branntweins und Bieres und aus Rüben oder anderen inländischen Erzeugnissen dargestellten Zuckers und Syrups, über den gegenseitigen Schutz der in den einzelnen Bundesstaaten erhobenen Verbrauchsabgaben gegen Hinterziehungen, sowie über die Massregeln, welche in den Zollausschlüssen zur Sicherung der gemeinsamen Zollgrenze erforderlich sind.

In Bayern, Württemberg und Baden bleibt die Besteuerung des inländischen Branntweins und Bieres der Landesgesetzgebung vorbehalten. Die Bundesstaaten werden jedoch ihr Bestreben darauf richten, eine Uebereinstimmung der Gesetzgebung über die Besteuerung auch dieser Gegenstände herbeizuführen.

Art. 36. Die Erhebung und Verwaltung der Zölle und Verbrauchssteuern (Art. 35) bleibt jedem Bundesstaate, soweit derselbe sie bisher ausgeübt hat, innerhalb seines Gebietes überlassen.

Der Kaiser überwacht die Einhaltung des gesetzlichen Verfahrens durch Reichsbeamte, welche er den Zoll- oder Steuerämtern und den Direktivbehörden der einzelnen Staaten, nach Vernehmung des Ausschusses des Bundesrathes für Zoll- und Steuerwesen, beiordnet.

Die von diesen Beamten über Mängel bei der Ausführung der gemeinschaftlichen Gesetzgebung (Art. 35) gemachten Anzeigen werden dem Bundesrathe zur Beschlussnahme vorgelegt.

Art. 37. Bei der Beschlussnahme über die zur Ausführung der gemeinschaftlichen Gesetzgebung (Art. 35) dienenden Verwaltungs-

vorschriften und Einrichtungen giebt die Stimme des Präsidiums alsdann den Ausschlag, wenn sie sich für Aufrechthaltung der bestehenden Vorschrift oder Einrichtung ausspricht.

Art. 38. Der Ertrag der Zölle und der anderen in Art. 35 bezeichneten Abgaben, letzterer, soweit sie der Reichsgesetzgebung unterliegen, fliesst in die Reichskasse.

Dieser Ertrag besteht aus der gesammten von den Zöllen und den übrigen Abgaben aufgekommenen Einnahme nach Abzug:

1) der auf Gesetzen oder Allgemeinen Verwaltungsvorschriften beruhenden Steuervergütungen und Ermässigungen,
2) der Rückerstattungen für unrichtige Erhebungen,
3) der Erhebungs- und Verwaltungskosten, und zwar:
   a. bei den Zöllen der Kosten, welche an den gegen das Ausland gelegenen Grenzen und in dem Grenzbezirke für den Schutz und die Erhebuug der Zölle erforderlich sind;
   b. bei der Salzsteuer der Kosten, welche zur Besoldung der mit Erhebung und Kontrolirung dieser Steuer auf den Salzwerken beauftragten Beamten aufgewendet werden,
   c. bei der Rübenzuckersteuer und Tabakssteuer der Vergütung, welche nach den jeweiligen Beschlüssen des Bundesrathes den einzelnen Bundesregierungen für die Kosten der Verwaltung dieser Steuern zu gewähren ist,
   d. bei den übrigen Steuern mit fünfzehn Prozent der Gesammteinnahme.

Die ausserhalb der gemeinschaftlichen Zollgrenze liegenden Gebiete tragen zu den Ausgaben des Reichs durch Zahlung eines Aversums bei.

Bayern, Württemberg und Baden haben an dem in die Reichskasse fliessenden Ertrage der Steuern von Branntwein und Bier und an dem diesem Ertrage entsprechenden Theile des vorstehend erwähnten Aversums keinen Theil.

Art. 39. Die von den Erhebungsbehörden der Bundesstaaten nach Ablauf eines jeden Vierteljahres aufzustellenden Quartal-Extrakte und die nach dem Jahres- und Bücherschlusse aufzustellenden Finalabschlüsse über die im Laufe des Vierteljahres beziehungsweise während des Rechnungsjahres fällig gewordenen Einnahmen an Zöllen und nach Art. 38 zur Reichskasse fliessenden Verbrauchsabgaben werden von den Direktivbehörden der Bundesstaaten, nach vorangegangener Prüfung, in Hauptübersichten zusammengestellt, in welchen jede Abgabe gesondert nachzuweisen ist, und es werden diese Ueber-

sichten an den Ausschuss des Bundesrathes für das Rechnungswesen eingesandt.

Der letztere stellt aus Grund dieser Uebersichten von drei zu drei Monaten den von der Kasse jedes Bundesstaates der Reichskasse schuldigen Betrag vorläufig fest und setzt von dieser Feststellung den Bundesrath und die Bundesstaaten in Kenntniss, legt auch alljährlich die schliessliche Feststellung jener Beträge mit seinen Bemerkungen dem Bundesrathe vor. Der Bundesrath beschliesst über diese Feststellung.

Art. 40. Die Bestimmungen in dem Zollvereinigungsvertrage vom 8. Juli 1867 bleiben in Kraft, soweit sie nicht durch die Vorschriften dieser Verfassung abgeändert sind und so lange sie nicht auf dem im Art. 7, beziehungsweise 78 bezeichneten Wege abgeändert werden.

Art. 41. Eisenbahnen, welche im Interesse der Vertheidigung Deutschlands oder im Interesse des gemeinsamen Verkehrs für nothwendig erachtet werden, können kraft eines Reichsgesetzes auch gegen den Widerspruch der Bundesglieder, deren Gebiet die Eisenbahnen durchschneiden, unbeschadet der Landeshoheitsrechte, für Rechnung des Reichs angelegt oder an Privatunternehmer zur Ausführung koncessionirt und mit dem Expropriationsrechte ausgestattet werden.

Jede bestehende Eisenbahnverwaltung ist verpflichtet, sich den Anschluss neu angelegter Eisenbahnen auf Kosten der letzteren gefallen zu lassen.

Die gesetzlichen Bestimmungen, welche bestehenden Eisenbahn-Unternehmungen ein Widerspruchsrecht gegen die Anlegung von Parallel- oder Konkurrenzbahnen einräumen, werden, unbeschadet bereits erworbener Rechte, für das ganze Reich hierdurch aufgehoben. Ein solches Widerspruchsrecht kann auch in den künftig zu ertheilenden Koncessionen nicht weiter verliehen werden.

Art. 42. Die Bundesregierungen verpflichten sich, die Deutschen Eisenbahnen im Interesse des allgemeinen Verkehrs wie ein einheitliches Netz verwalten und zu diesem Behuf auch die neu herzustellenden Bahnen nach einheitlichen Normen anlegen und ausrüsten zu lassen.

Art. 43. Es sollen demgemäss in thunlichster Beschleunigung übereinstimmende Betriebseinrichtungen getroffen, insbesondere gleiche Bahnpolizei-Reglements eingeführt werden. Das Reich hat dafür Sorge zu tragen, dass die Eisenbahnverwaltungen die Bahnen jederzeit in einem die nöthige Sicherheit gewährenden baulichen Zustande

erhalten und dieselben mit Betriebsmaterial so ausrüsten, wie das Verkehrsbedürfniss es erheischt.

Art. 44. Die Eisenbahnverwaltungen sind verpflichtet, die für den durchgehenden Verkehr und zur Herstellung ineinander greifender Fahrpläne nöthigen Personenzüge mit entsprechender Fahrgeschwindigkeit, desgleichen die zur Bewältigung des Güterverkehrs nöthigen Güterzüge einzuführen, auch direkte Expedition im Personen- und Güterverkehr, unter Gestattung des Ueberganges der Transportmittel von einer Bahn auf die andere, gegen die übliche Vergütung einzurichten.

Art. 45. Dem Reiche steht die Kontrole über das Tarifwesen zu. Dasselbe wird namentlich dahin wirken: 1) dass baldigst auf allen Deutschen Eisenbahnen übereinstimmende Betriebsreglements eingeführt werden; 2) dass die möglichste Gleichmässigkeit und Herabsetzung der Tarife erzielt, insbesondere, dass bei grösseren Entfernungen für den Transport von Kohlen, Koaks, Holz, Erzen, Steinen, Salz, Roheisen, Düngungsmitteln und ähnlichen Gegenständen ein dem Bedürfniss der Landwirthschaft und Industrie entsprechender ermässigter Tarif, und zwar zunächst thunlichst der Einpfennig-Tarif eingeführt werde.

Art. 46. Bei eintretenden Nothständen, insbesondere bei ungewöhnlicher Theuerung der Lebensmittel, sind die Eisenbahnverwaltungen verpflichtet, für den Transport, namentlich von Getreide, Mehl, Hülsenfrüchten und Kartoffeln, zeitweise einen dem Bedürfniss entsprechenden, von dem Kaiser auf Vorschlag des betreffenden Bundesraths-Ausschusses festzustellenden, niedrigen Spezialtarif einzuführen, welcher jedoch nicht unter den niedriesten auf der betreffenden Bahn für Rohprodukte geltenden Satz herabgehen darf.

Die vorstehend, sowie die in den Art. 42 bis 45 getroffenen Bestimmungen sind auf Bayern nicht anwendbar.

Dem Reiche steht jedoch auch Bayern gegenüber das Recht zu, im Wege der Gesetzgebung einheitliche Normen für die Konstruktion und Ausrüstung der für die Landesvertheidigung wichtigen Eisenbahnen aufzustellen.

Art. 47. Den Anforderungen der Behörden des Reichs in Betreff der Benutzung der Eisenbahnen zum Zweck der Vertheidigung Deutschlands haben sämmtliche Eisenbahnverwaltungen unweigerlich Folge zu leisten. Insbesondere ist das Militair und alles Kriegsmaterial zu gleichen ermässigten Sätzen zu befördern.

VIII. Post- und Telegraphenwesen.

Art. 48. Das Postwesen und das Telegraphenwesen werden für das gesammte Gebiet des Deutschen Reichs als einheitliche Staatsverkehrs-Anstalten eingerichtet und verwaltet.

Die im Art. 4 vorgesehene Gesetzgebung des Reichs in Post- und Telegraphen-Angelenheiten erstreckt sich nicht auf diejenigen Gegenstände, deren Regelung nach den in der Norddeutschen Post- und Telegraphen-Verwaltung massgebend gewesenen Grundsätzen der reglementarischen Festsetzung oder administrativen Anordnung überlassen ist.

Art. 49. Die Einnahmen des Post- und Telegraphenwesens sind für das ganze Reich gemeinschaftlich. Die Ausgaben werden aus den gemeinschaftlichen Einnahmen bestritten. Die Ueberschüsse fliessen in die Reichskasse (Abschnitt XII.).

Art. 50. Dem Kaiser gehört die obere Leitung der Post-und Telegraphenverwaltung an. Die von ihm bestellten Behörden haben die Pflicht und das Recht, dafür zu sorgen, dass Einheit in der Organisation der Verwaltung und im Betriebe des Dienstes, sowie in der Qualifikation der Beamten hergestellt und erhalten wird.

Dem Kaisersteht der Erlass der reglementarischen Festsetzungen und allgemeinen administrativen Anordnungen, sowie die ausschliessliche Wahrnehmung der Beziehungen zu anderen Post- und Telegraphenverwaltungen zu.

Sämmtliche Beamte der Post- und Telegraphenverwaltung sind verpflichtet, den Kaiserlichen Anordnungen Folge zu leisten. Diese Verpflichtung ist in den Diensteid aufzunehmen.

Die Anstellung der bei den Verwaltungsbehörden der Post und Telegraphie in den verschiedenen Bezirken erforderlichen oberen Beamten (z. B. der Direktoren, Räthe, Ober-Inspektoren) ferner die Anstellung der zur Wahrnehmung des Aufsichts- u. s. w. Dienstes in den einzelnen Bezirken als Organe der erwähnten Behörden fungirenden Post- und Telegraphenbeamten (z. B. Inspektoren, Kontroleure) geht für das ganze Gebiet des Deutschen Reichs vom Kaiser aus, welchem diese Beamten den Diensteid leisten. Den einzelnen Landesregierungen wird von den in Rede stehenden Ernennungen, soweit dieselben ihre Gebiete betreffen, Behufs der landesherrlichen Bestätigung und Publikation rechtzeitig Mittheilung gemacht werden.

Die anderen bei den Verwaltungsbehörden der Post und Telegraphie erforderlichen Beamten, sowie alle für den lokalen und tech-

nischen Betrieb bestimmten, mithin bei den eigentlichen Betriebstellen fungirenden Beamten u. s. w. werden von den betreffenden Landesregierungen angestellt.

Wo eine selbstständige Landespost- resp. Telegraphenverwaltung nicht besteht, entscheiden die Bestimmungen der besonderrn Verträge.

Art. 51. Bei Ueberweisung des Ueberschusses der Postverwaltung für allgemeine Reichszwecke (Art. 49) soll, in Betracht der bisherigen Verschiedenheit der von den Landes-Postverwaltungen der einzelnen Gebiete erzielten Reineinnahmen, zum Zwecke einer entsprechenden Ausgleichung während der unten festgesetzten Uebergangszeit folgendes Verfahren beobachtet werden.

Aus den Postüberschüssen, welche in den einzelnen Postbezirken während der fünf Jahre 1861 bis 1865 aufgekommen sind, wird ein durchschnittlicher Jahresüberschuss berechnet, und der Antheil, welchen jeder einzelne Postbezirk an dem für das gesammte Gebiet des Reichs sich darnach herausstellenden Postüberschusse gehabt hat, nach Prozenten festgestellt.

Nach Massgabe des auf diese Weise festgestellten Verhältnisses werden den einzelnen Staaten während der auf ihren Eintritt in die Reichs-Postverwaltung folgenden acht Jahre die sich für sie aus den im Reiche aufkommenden Postüberschüssen ergebenden Quoten auf ihre sonstigen Beiträge zu Reichszwecken zu Gute gerechnet.

Nach Ablauf der acht Jahre hört jene Unterscheidung auf, und fliessen die Postüberschüsse in ungetheilter Aufrechnung nach dem im Art. 49 enthaltenen Grundsatz der Reichskasse zu.

Von der während der vorgedachten acht Jahre für die Hansestädte sich herausstellenden Quote des Postüberschusses wird alljährlich vorweg die Hälfte dem Kaiser zur Disposition gestellt zu dem Zwecke, daraus zunächst die Kosten für die Herstellung normaler Posteinrichtungen in den Hansestädten zu bestreiten.

Art. 52. Die Bestimmungen in den vorstehenden Art. 48 bis 51 finden auf Bayern und Württemberg keine Anwendung. An ihrer Stelle gelten für beide Bundesstaaten folgende Bestimmungen.

Dem Reiche ausschliesslich steht die Gesetzgebung über die Vorrechte der Post und Telegraphie, über die rechtlichen Verhältnisse beider Anstalten zum Publikum, über die Portofreiheiten und das Posttaxwesen, jedoch ausschliesslich der reglementarischen und Tarifbestimmungen für den internen Verkehr innerhalb Bayerns, beziehungsweise Württembergs, sowie, unter gleicher Beschränkung, die Feststellung der Gebühren für die telegraphische Korrespondenz zu.

Ebenso steht dem Reiche die Regelung des Post- und Telegraphenverkehrs mit dem Auslande zu, ausgenommen den eigenen unmittelbaren Verkehr Bayerns, beziehungsweise Württembergs mit seinen dem Reiche nicht angehörenden Nachbarstaaten, wegen dessen Regelung es bei der Bestimmung im Art. 49 des Postvertrages v. 23. Nov. 1867 bewendet.

An den zur Reichskasse fliessenden Einnahmen des Post- und Telegraphenwesens haben Bayern und Württemberg keinen Theil.

IX. Marine und Schifffahrt.

Art. 53. Die Kriegsmarine des Reichs ist eine einheitliche unter dem Oberbefehl des Kaisers. Die Organisation und Zusammensetzung derselben liegt dem Kaiser ob, welcher die Offiziere und Beamten der Marine ernennt, und für welchen dieselben nebst den Mannschaften eidlich in Pflicht zu nehmen sind.

Der Kieler Hafen und der Jadehafen sind Reichskriegshäfen.

Der zur Gründung und Erhaltung der Kriegsflotte und der damit zusammenhängenden Anstalten erforderliche Aufwand wird aus der Reichskasse bestritten.

Die gesammte seemännische Bevölkerung des Reichs, einschliesslich des Maschinenpersonals und der Schiffshandwerker, ist vom Dienste im Landheere befreit, dagegen zum Dienste in der Kaiserlichen Marine verpflichtet.

Die Vertheilung des Ersatzbedarfes findet nach Massgabe der vorhandenen seemännischen Bevölkerung statt, und die hiernach von jedem Staate gestellte Quote kommt auf die Gestellung zum Landheere in Abrechnung.

Art. 54. Die Kauffahrteischiffe aller Bundesstaaten bilden eine einheitliche Handelsmarine.

Das Reich hat das Verfahren zur Ermittelung der Ladungsfähigkeit der Seeschiffe zu bestimmen, die Ausstellung der Messbriefe, sowie der Schiffscertifikate zu regeln und die Bedingungen festzustellen, von welchen die Erlaubniss zur Führung eines Seeschiffes abhängig ist.

In den Seehäfen und auf allen natürlichen und künstlichen Wasserstrassen der einzelnen Bundesstaaten werden die Kauffahrteischiffe sämmtlicher Bundesstaaten gleichmässig zugelassen und behandelt. Die Abgaben, welche in den Seehäfen von den Seeschiffen oder deren Ladungen für die Benutzung der Schifffahrtsanstalten er-

hoben werden, dürfen die zur Unterhaltung und gewöhnlichen Herstellung dieser Anstalten erforderlichen Kosten nicht übersteigen.

Auf allen natürlichen Wasserstrassen dürfen Abgaben nur für die Benutzung besonderer Anstalten, die zur Erleichterung des Verkehrs bestimmt sind, erhoben werden. Diese Abgaben, sowie die Abgaben für die Befahrung solcher künstlichen Wasserstrassen, welche Staatseigenthum sind, dürfen die zur Unterhaltung und gewöhnlichen Herstellung der Anstalten und Anlagen erforderlichen Kosten nicht übersteigen. Auf die Flösserei finden diese Bestimmungen insoweit Anwendung, als dieselbe auf schiffbaren Wasserstrassen betrieben wird.

Auf fremde Schiffe oder deren Ladungen andere oder höhere Abgaben zu legen, als von den Schiffen der Bundesstaaten oder deren Ladungen zu entrichten sind, steht keinem Einzelstaate, sondern nur dem Reiche zu.

Art. 55. Die Flagge der Kriegs- und Handelsmarine ist schwarz-weiss-roth.

X. Konsulatwesen.

Art. 56. Das gesammte Konsulatwesen des Deutschen Reichs steht unter der Aufsicht das Kaisers, welcher die Konsuln, nach Vernehmung des Ausschusses des Bundesrathes für Handel und Verkehr, anstellt.

In dem Amtsbezirk der Deutschen Konsuln dürfen neue Landeskonsulate nicht errichtet werden. Die Deutschen Konsuln üben für die in ihrem Bezirk nicht vertretenen Bundesstaaten die Funktionen eines Landeskonsuls aus. Die sämmtlichen bestehenden Landeskonsulate werden aufgehoben, sobald die Organisation der Deutschen Konsulate dergestalt vollendet ist, dass die Vertretung der Einzelinteressen aller Bundesstaaten als durch die Deutschen Konsulate gesichert von dem Bundesrathe annerkannt wird.

XI. Reichskriegswesen.

Art. 57. Jeder Deutsche ist wehrpflichtig und kann sich in Ausübung dieser Pflicht nicht vertreten lassen.

Art. 58. Die Kosten und Lasten des gesammten Kriegswesens des Reichs sind von allen Bundesstaaten und ihren Angehörigen gleichmässig zu tragen, so dass weder Bevorzugungen, noch Prägravationen einzelner Staaten oder Klassen grundsätzlich zulässig sind. Wo die gleiche Vertheilung der Lasten sich *in natura* nicht herstellen lässt,

ohne die öffentliche Wohlfahrt zu schädigen, ist die Ausgleichung nach den Grundsätzen der Gerechtigkeit im Wege der Gesetzgebung festzustellen.

Art. 59. Jeder wehrfähige Deutsche gehört sieben Jahre lang, in der Regel vom vollendeten 20. bis zum beginnenden 28. Lebensjahre, dem stehenden Heere — und zwar die ersten drei Jahre bei den Fahnen, die letzten vier Jahre in der Reserve — die folgenden fünf Lebensjahre der Landwehr ersten aufgebots und sodann bis zum 31. März desjenigen Kalenderjahres, in welchem das neununddreisigste Lebensjahr vollendet wird, der Landwehr zweiten Aufgebots an.[1]

Art. 60. Die Friedenspräsenzstärke des Deutschen Heeres wird bis zum 31. Dez. 1871 auf Ein Prozent der Bevölkerung von 1867 normirt, und wird *pro rata* derselben von den einzelnen Bundesstaaten gestellt. Für die spätere Zeit wird die Friedens-Präsenzstärke des Heeres im Wege der Reichsgesetzgebung festgestellt.

Art. 61. Nach Publikation dieser Verfassung ist in dem ganzen Reiche die gesammte Preussische Militairgesetzgebung ungesäumt einzuführen, sowohl die Gesetze selbst, als die zu ihrer Ausführung, Erläuterung oder Ergänzung erlassenen Reglements, Instructionen und Reskripte, namentlich also das Militair-Strafgesetzbuch v. 3. April 1845, die Militair-Strafgerichts-Ordnung v. 3. April 1845, die Verordnung über die Ehrengerichte v. 20. Juli 1843, die Bestimmungen über Aushebung, Dienstzeit, Servis- und Verpflegungswesen, Einquartierung, Ersatz von Flurbeschädigungen, Mobilmachung u. s. w. für Krieg und Frieden. Die Militair-Kirchenordnung ist jedoch ausgeschlossen.

Nach gleichmässiger Durchführung der Kriegsorganisation des Deutschen Heeres wird ein umfassendes Reichs-Militairgesetz dem Reichstage und dem Bundesrathe zur verfassungsmässigen Beschlussfassung vorgelegt werden.

Art. 62. Zur Bestreitung des Aufwandes für das gesammte Deutsche Heer und die zu demselben gehörigen Einrichtungen sind bis zum 31. Dec. 1871 dem Kaiser jährlich sovielmal 225 Thaler, in Worten zweihundert fünf und zwanzig Thaler, als die Kopfzahl der Friedensstärke des Heeres nach Art. 60 beträgt, zur Verfügung zu stellen. Vergl. Abschnitt XII.

Nach dem 31. Dec. 1871 müssen diese Beiträge von den einzelnen Staaten des Bundes zur Reichskasse fortgezahlt werden. Zur Berech-

[1] Reichsgesetzblatt. 1888. S. 11.

nung derselben wird die im Art. 60 interimistisch festgestellte Friedens-Präsenzstärke so lange festgehalten, bis sie durch ein Reichsgesetz abgeändert ist.

Die Verausgabung dieser Summe für das gesammte Reichsheer und dessen Einrichtungen wird durch das Etatsgesetz festgestellt.

Bei der Feststellung des Militair-Ausgabe-Etats wird die auf Grundlage dieser Verfassung gesetzlich feststehende Organisation des Reichsheeres zu Grunde gelegt.

Art. 63. Die gesammte Landmacht des Reichs wird ein einheitliches Heer bilden, welches in Krieg und Frieden unter dem Befehle des Kaisers steht.

Die Regimenter &c. führen fortlaufende Nummern durch das ganze Deutsche Heer. Für die Bekleidung sind die Grundfarben und der Schnitt der Koniglich Preussischen Armee massgebend. Dem betreffenden Kontingentsherrn bleibt es überlassen, die äusseren Abzeichen (Kokarden &c.) zu bestimmen.

Der Kaiser hat die Pflicht und das Recht, dafür Sorge zu tragen, dass innerhalb des Deutschen Heeres alle Truppentheile vollzählig und kriegstüchtig vorhanden sind und dass Einheit in der Organisation und Formation, in Bewaffnung und Kommando, in der Ausbildung der Mannschaften, sowie in der Qualifikation der Offiziere hergestellt und erhalten wird. Zu diesem Behufe ist der Kaiser berechtigt, sich jederzeit durch Inspectionen von der Verfassung der einzelnen Kontingente zu überzugen und die Abstellung der dabei vorgefundenen Mängel anzuordnen.

Der Kaiser bestimmt den Präsenszstand, die Gliederung und Eintheilung der Kontingente des Reichsheeres, sowie die Organisation der Landwehr, und hat das Recht, innerhalb des Bundesgebietes die Garnisonen zu bestimmen, sowie die kriegsbereite Aufstellung eines jeden Theils des Reichsheeres anzuordnen.

Behufs Erhaltung der unentbehrlichen Einheit in der Administration, Verpflegung, Bewaffnung und Ausrüstung aller Truppentheile des Deutschen Heeres sind die bezüglichen künftig ergehenden Anordnungen für die Preussische Armee den Kommandeuren der übrigen Kontingente, durch den Art. 8 Nr. 1 bezeichneten Ausschuss für das Landheer und die Festungen, zur Nachachtung in geeigneter Weise mitzutheilen.

Art. 64. Alle Deutsche Truppen sind verpflichtet, den Befehlen des Kaisers unbedingte Folge zu leisten.

Diese Verpflichtung ist in den Fahneneid aufzunehmen.

Der Höchstkommandirende eines Kontingents, sowie alle Offiziere, welche Truppen mehr als eines Kontingents befehligen, und alle Festungskommandanten werden von dem Kaiser ernannt. Die von Demselben ernannten Offiziere leisten Ihm den Fahneneld. Bei Generalen und den Generalstellungen versehenden Offizieren innerhalb des Kontingents ist die Ernennung von der jedesmaligen Zustimmung des Kaisers abhängig zu machen.

Der Kaiser ist berechtigt, Behufs Versetzung mit oder ohne Beförderung für die von Ihm im Reichsdienste, sei es im Preussischen Heere, oder in anderen Kontingenten zu besetzenden Stellen aus den Offizieren aller Kontingente des Reichsheeres zu wählen.

Art. 65. Das Recht, Festungen innerhalb des Bundesgebietes anzulegen, steht dem Kaiser zu, welcher die Bewilligung der dazu erforderlichen Mittel, soweit das Ordinarium sie nicht gewährt, nach Abschnitt XII. beantragt.

Art. 66. Wo nicht besondere Konventionen ein Anderes bestimmen, ernennen die Bundesfürsten, beziehentlich die Senate die Offiziere ihrer Kontingente, mit der Einschränkung des Art. 64. Sie sind Chefs aller ihren Gebieten angehörenden Truppentheile und geniessen die damit verbundenen Ehren. Sie haben namentlich das Recht der Inspizirung zu jeder Zeit und erhalten, ausser den regelmässigen Rapporten und Meldungen über vorkommende Veränderungen, Behufs der nöthigen landesherrlichen Publikation, rechtzeitige Mittheilung von den die betreffenden Truppentheile berührenden Avancements und Ernennungen.

Auch steht ihnen das Recht zu, zu polizeilichen Zwecken nicht blos ihre eigenen Truppen zu verwenden, sondern auch alle anderen Truppentheile des Reichsheeres, welche in ihren Ländergebieten dislocirt sind, zu requiriren.

Art. 67. Ersparnisse an dem Militair-Etat fallen unter keinen Umständen einer einzelnen Regierung, sondern jederzeit der Reichskasse zu.

Art. 68. Der Kaiser kann, wenn die öffentliche Sicherheit in dem Bundesgebiete bedroht ist, einen jeden Theil desselben in Kriegszustand erklären. Bis zum Erlass eines die Voraussetzungen, die Form der Verkündigung und die Wirkungen einer solchen Erklärung regelnden Reichsgesetzes gelten dafür die Vorschriften des Preuss. Gesetzes v. 4. Juni 1851 (G.-S. für 1851 S. 451 ff.).

Schlussbestimmung zum XI. Abschnitt.

Die in diesem Abschnitt enthaltenen Vorschriften kommen in Bayern nach näherer Bestimmung des Bündnissvertrages v. 23. Nov. 1870 (B. G. B. 1871 S. 9) unter III. § 5, in Württemberg nach näherer Bestimmung der Militairkonvention v. 21./25. Nov. 1870 (B. G. B. 1870 S. 658) zur Anwendung.

1. Bündniss-Vertrag mit Bayern v. 23. Nov. 1870 (BGB. 1871 S. 9 ff.) unter III. § 5.

Anlangend die Art. 57 bis 68 von dem Bundes-Kriegswesen, so findet Art. 57 Anwendung auf das Königreich Bayern. Art. 58 ist gleichfalls für das Königreich Bayern gültig. Dieser Art. erhält jedoch für Bayern folgenden Zusatz:

Der in diesem Art. bezeichneten Verpflichtung wird von Bayern in der Art entsprochen, dass es die Kosten und Lasten seines Kriegswesens und den Unterhalt der auf seinem Gebiete belegenen festen Plätze und sonstigen Fortifikationen einbegriffen, ausschliesslich und allein trägt.

Art. 59 hat gleichwie der Art. 60 für Bayern gesetzliche Geltung.

Die Art. 61 bis 68 finden auf Bayern keine Anwendung. An deren Stelle treten folgende Bestimmungen:

I. Bayern behält zunächst seine Militairgesetzgebung nebst den dazu gehörigen Vollzugs-Instruktionen, Verordnungen, Erläuterungen u. s. w. bis zur verfassungsmässigen Beschlussfassung über die der Bundesgesetzgebung anheimfallenden Materien, desgl. bis zur freien Verständigung bezüglich der Einführung der bereits vor dem Eintritte Bayerns in den Bund in dieser Hinsicht erlassenen Gesetze und sonstigen Bestimmungen.

II. Bayern verpflichtet sich, für sein Kontingent und die zu demselben gehörigen Einrichtungen einen gleichen Geldbetrag zu verwenden, wie nach Verhältniss der Kopfstärke durch den Militair-Etat des Deutschen Bundes für die übrigen Theile des Bundesheeres ausgesetzt wird. Dieser Geldbetrag wird im Bundes-Budget für das Königlich Bayerische Kontingent in einer Summe ausgeworfen. Seine Verausgabung wird durch Special-Etat geregelt, deren Aufstellung Bayern überlassen bleibt. Hierfür werden im Allgemeinen diejenigen Etatsansätze nach Verhältniss zur Richtschnur dienen, welche für das übrige Bundesheer in den einzelnen Titeln ausgeworfen sind.

III. Das Bayerische Heer bildet einen in sich geschlossenen Bestandtheil des Deutschen Bundesheeres mit selbstständiger Verwaltung, unter der Militairhoheit S. Maj. des Königs von Bayern, im Kriege — und zwar mit Beginn der Mobilisirung — unter dem Befehle des Bundes-Feldherrn. In Bezug auf Organisation, Formation, Ausbildung und Gebühren, dann hinsichtlich der Mobilmachung wird Bayern volle Uebereinstimmung mit den für das Bundesheer bestehenden Normen herstellen. Bezüglich der Bewaffnung und Ausrüstung, sowie der Gradabzeichen behält sich die Königlich Bayerische Regierung die Herstellung der vollen Uebereinstimung mit dem Bundesheere vor. Der Bundes-Feldherr hat die Pflicht und das Recht, sich durch Inspektionen von der Uebereinstimmung in Organisation,

Formation und Ausbildung, sowie von der Vollzähligkeit und Kriegstüchtigkeit des Bayerischen Kontingents Ueberzeugung zu verschaffen und wird sich über die Modalitäten der jeweiligen Vornahme und über das Ergebniss dieser Inspektionem mit Sr. Maj. dem Könige von Bayern ins Vernehmen zu setzen. Die Anordnung der Kriegsbereitschaft (Mobilisirung) des Bayerischen Kontingents oder eines Theils desselben erfolgt auf Veranlassung des Bundes-Feldherrn durch Se. Maj. den König von Bayern. Zur steten gegenseitigen Information in den durch diese Vereinbarung geschaffenen militairischen Beziehungen erhalten die Militair-Bevollmächtigten in Berlin und Münehen über die einschlägigen Anordnungen entsprechende Mittheilung durch die resp. Kriegs-Ministerien.

IV. Im Kriege sind die Bayerischen Truppen verpflichtet, den Befehlen des Bundes-Feldherrn unbedingt Folge zu leisten. Diese Verpflichtung wird in den Fahneneid aufgenommen.

V. Die Anlage von neuen Befestigungen auf Bayerischem Gebiete im Interesse der gesammtdeutschen Vertheidigung wird Bayern im Wege jeweiliger specieller Vereinbarung zugestehen. An den Kosten für den Bau und die Ausrüstung solcher Befestigungsanlagen auf seinem Gebiete betheiligt sich Bayern in dem seiner Bevölkerungszahl entsprechenden Verhältnisse gleichmässig mit den anderen Staaten des Deutschen Bundes; ebenso an den für sonstige Festungsanlagen etwa Seitens des Bundes zu bewilligenden Extraordinarien.

VI. Die Voraussetzungen, unter welchen wegen Bedrohung der öffentlichen Sicherheit das Bundesgebiet oder ein Theil desselben durch den Bundes-Feldherrn in Kriegszustand erklärt werden kann, die Form der Verkündigung und die Wirkungen einer solchen Erklärung werden durch ein Bundesgesetz geregelt.

VII. Vorstehende Bestimmungen treten mit dem 1. Jan. 1872 in Wirksamkeit.

2. Die Bestimmungen der Militair-Konvention mit Württemberg v. 21. und 25. Nov. 1870 (BGB. 1870 S. 658 ff.) sind folgende:

Art. 1. Die Königl. Württembergischen Truppen als Theil des Deutschen Bundesheeres bilden ein in sich geschlossenes Armee-Korps nach der vereinbarten Formation nebst der entsprechenden Anzahl von Ersatz- und Befatzungs-Truppennach Preussischen Normen im Falle der Mobilmachung oder Kriegsbereitschaft.

Art. 2. Die hierdurch bedingte neue Organisation der Königl. Württembergischen Truppen soll in drei Jahren nach erfolgter Anordnung zur Rückkehr von dem gegenwärtigen Kriegsstand auf den Friedensfuss vollendet sein.

Art. 3. Von dieser Rückkehr an bilden, beginnend mit einem noch näher zu bestimmenden Tage, die Königl. Württembergischen Truppen das vierzehnte Deutsche Bundes-Armee-Korps mit ihren eigenen Fahnen und Feldzeichen und erhalten die Divisionen, Brigaden, Regimenter und selbstständigen Bataillone des Armee-Korps die entsprechende laufende Nummer in dem Deutschen Bundesheere neben der Numerirung im Königlich Württembergischen Verbande.

Art. 4. Die Unterstellung der Königl. Württembergischen Truppen unter den Oberbefehl Sr. Maj. des Königs von Preussen als Bundes-Feldherrn beginnt ebenfalls an einem noch näher zu bestimmenden Tage und wird in den bisherigen Fahneneid in der Weise aufgenommen, dass es an der betr. Stelle heisst: "dass ich Sr. Maj. dem Könige während meiner Dienstzeit als Soldat treu dienen, dem Bundes-Feldherrn und den Kriegsgesetzen Gehorsam leisten, und mich stets als tapferer und ehrliebender Sodat verhalten will. So wahr mir Gott helfe."

Art. 5. Die Ernennung, Beförderung, Versetzung u. s. w. der Officiere und Beamten des Königl. Württembergischen Armee-Korps erfolgt durch Se. Maj. den König von Württemberg, diejenige des Höchstcommandirenden für das Armee-Korps nach vorgängiger Zustimmung Sr. Maj. des Königs von Preussen als Bundes-Feldherr. Se. Maj. der König von Württemberg geniesst als Chef seiner Truppen die Ihm Allerhöchst zustehenden Ehren und Rechte und übt die entsprechenden gerichtsherrlichen Befugnisse sammt dem Bestätigungs- und Begnadigungsrecht bei Erkenntnissen gegen Angehörige des Armee-Korps aus, welche über die Befugnisse des Armee-Korps-Kommandanten, beziehungsweise des Königl. Württembergischen Kriegsministeriums hinausgehen.

Art. 6. Unbeschadet der dem Bundes-Feldherrn gemäss der Bundes-Verfassung zustehenden Rechte der Disponirung über alle Bundestruppen und ihrer Dislocirung soll für die Dauer friedlicher Verhältnisse das Württembergische Armee-Korps in seinem Verband und in seiner Gliederung erhalten bleiben und im eigenen Lande dislocirt sein; eine hiervon abweichende Anordnung des Bundes-Feldherrn, sowie die Dislocirung anderer Deutscher Truppentheile in das Königreich Württemberg soll in friedlichen Zeiten nur mit Zustimmung Sr. Maj. des Königs von Württemberg erfolgen, sofern es sich nicht um Besetzung Süddeutscher oder Westdeutscher Festungen handelt.

Art. 7. Ueber die Ernennung der Kommandanten für die im Königreiche Württemberg gelegenem festen Plätze, welche nach Art. 64 der Bundes Verf. dem Bundes-Feldherrn zusteht, sowie über die Demselben gleichermassen zustehende Berechtigung, neue Befestigungen innerhalb des Königreichs anzulegen, wird sich der Bundes-Feldherr eintretenden Falls mit dem Könige von Württemberg vorher in Vernehmen setzen; ebenso wenn der Bundes-Feldherr einen von Ihm zu ernennenden Officier aus dem Königl. Württembergischen Armee-Korps wählen will. Um der Beurtheilung dieser Ernennungen eine Grundlage zu gewähren, werden über die Officiere des Königl. Württembergishen Armee-Korps vom Stabsofficier aufwärts alljährlich Personal- und Qualificationsberichte nach Preussischem Schema aufgestellt und Sr. Maj. dem Bundes-Feldherrn vorgelegt.

Art. 8. Zur Beförderung der Gleichmässigkeit in der Ausbildung und dem inneren Dienst der Truppen werden nach gegenseitiger Verabredung einige Königl. Württembergische Officiere je auf 1–2 Jahre in die Königl. Preussische Armee, und Königl. Preussische Officiere in das Königl. Württembergische Armee-Korps kommandirt. Hinsichtlich etwa wünschenswerther Versetzung einzelner Officiere aus Königl. Württembergischen Diensten in die Königl. Preussische Armee oder umgekehrt haben in jedem Specialfalle besondere Verabredungen stattzufinden.

Art. 9. Der Bundes-Feldherr, welchem nach Art. 63 das Recht zusteht, sich jederzeit durch Inspektionen von der Verfassung der einzelnen Kontingente zu überzeugen, wird die Königl. Württembergischen Truppen alljährlich mindestens einmal entweder selbst inspiciren, oder durch zu ernennende Inspekteure, deren Personen vorher Sr. Maj. dem Könige von Württemberg bezeichnet werden sollen, in den Garnisonen oder bei den Uebungen inspiciren lassen. Die in Folge solcher Inspicirungen bemerkten sachlichen und persönlichen Missstände wird der Bundes-Feldherr dem Könige von Württenberg mittheilen, welcher seinerseits diesel-

ben abstellen und von dem Geschehenen alsdann dem Bundes-Feldherrn Anzeige machen lässt.

Art. 10. Für die Organisation des Königl. Württembergischen Armee-Korps sind — so lange und insoweit nicht auf dem Wege der Bundes-Gesetzgebung anders bestimmt wird — die derzeitigen Preussischen Normen massgebend. Es kommen demgemäss in dem Königreiche Württemberg, ausser dem G. über die Verpflichtung zum Kriegsdienste v. 9. Nov. 1867 nebst der dazu gehörigen Militair-Ersatz- Instr. v 26. März 1868, insbesondere alle Preuss. Exercier- und sonstigen Reglements, Instruktionen und Reskripte zur Ausführung, namentlich die V. über die Ehrengerichte v. 20 Juli 1843, die für Krieg und Frieden gegebenen Bestimmungen über Aushebung, Dienstzeit, Servis-, Verpflegungs- und Invalidenwesen, Mobilmachung u. s. w., über den Ersatz des Officier-Korps und über das Militair-Erziehungs-Bildungswesen. Ausgenommen sind von der Gemeinsamkeit in den Einrichtungen des Königl. Württembergischen Armee-Korps mit denjenigen der Preuss. Armee: die Militair-Kirchenordnug, das Militairstrafgesetzbuch und die Militair-Strafgerichtsordnung, sowie die Bestimmungen über Einquartierung und Ersatz von Flurbeschädigungen, worüber in dem Königreiche Württemberg die derzeit bestehenden Gesetze und Einrichtungen vorerst und bis zur Regelung im Wege der Bundes-Gesetzgebung in Geltung verbleiben. Die Gradabzeichen, sowie die Benennungen und der Modus der Verwaltung sind in dem Königl. Württembergischen Armee-Korps dieselben wie in der Königl. Preuss. Armee. Die Bestimmungen über die Bekleidung für das Königl. Württembergische Armee-Korps werden von Sr. Maj. dem Könige von Württemberg gegeben und es soll dabei den Verhältnissen der Bundes-Armee die möglichste Rechnung getragen werden.

Art. 11. Im Falle eines Krieges steht von dessen Ausbruch bis zu dessen Beendigung die obere Leitung des Telegraphenwesens, soweit solches für die Kriegswecke eingerichtet ist, dem Bundes-Feldherrn zu. Die Königl. Württembergische Regierung wird bereits während des Friedens die bezüglichen Einrichtungen in Uebereinstimmung mit denjenigen des Nordd. Bundes treffen, und insbesondere bei dem Ausbau des Telegraphennetzes darauf Bedacht nehmen, auch eine der Kriegsstärke ihres Armee-Korps entsprechende Feldtelegraphie zu organisiren.

Art. 12. Aus der von Württemberg nach Art. 62 der Bundes-Verf. zur Verfügung zu stellenden Summe bestreitet die Königl. Württembergische Regierung, nach Massgabe des Bundes-Haushalts-Etats, den Aufwand für die Unterhaltung des Königl. Württembergischen Armee-Korps, einschliesslich Neuanschaffungen, Bauten, Einrichtungen u. s. w. in selbstständiger Verwaltung, sowie den Antheil Württembergs an den Kosten für die gemeinschaftlichen Einrichtungen des Gesammtheeres — Central-Administration, Festungen, Unterhaltung der Militair-Bildungs-Anstalten, einschliesslich der Kriegsschulen und militairärztlichen Bildungs-Anstalten, der Examinations-Kommissionen, der militairwissenschaftlichen und technischen Institute, des Lehrbataillons, der Militair- und Artillerie-Schiessschule, der Militair-Reitschule, der Central-Turnanstalt und des grossen Generalstabs. Ersparnisse, welche unter voller Erfüllung der Bundespflichten als Ergebnisse der obwaltenden besonderen Verhältnisse möglich werden, verbleiben zu Verfügung Württembergs. Das Königl. Württembergische Armee-Korps par-

ticipirt an den gemeinschaftlichen Einrichtungen und wird im grossen Generalstabe verhältnissmässig vertreten sein.

Art. 13. Die Zahlung der von Württemberg nach Art. 62 der Bundes-Verf. aufzubringenden Summe beginnt mit dem ersten Tage des Monats, welcher auf die Anordnung zur Rückkehr der Königl. Württembergischen Truppen von dem Kriegszustande auf den Friedensfuss folgt. In den Etat und die Abrechnung des Bundes-Heeres tritt das Königl. Württembergische Armee-Korps jedoch erst mit dem 1. Jan. 1872 ein. Während der im Art. 2 verabredeten dreijährigen Uebergangszeit wird für den Etat des Königl. Württemburgischen Armee-Korps die Rücksicht auf die, in dieser Periode zu vollziehende neue Organisation massgebend sein, und zwar sowohl in Beziehung auf die in Ansatz zu bringenden Beträge, als auch in Beziehung auf die Zulässigkeit der gegenseitigen Uebertragung einzelner Titel und der Uebertragung gleichnamiger Titel aus einem Jahre ins andere.

Art. 14. Verstärkungen der Königl. Württembergischen Truppen durch Einziehung der Beurlaubten, sowie die Kriegsformationen derselben und endlich deren Mobilmachung hängen von den Anordnungen des Bundes-Feldherrn ab. Solchen Anordnungen ist allezeit und im ganzen Umfange Folge zu leisten. Die hierdurch erwachsenden Kosten trägt die Bundeskasse, jedoch sind die Württembergischen Kassen verpflichtet, insoweit ihre vorhandenen Fonds ausreichen, die nothwendigen Gelder vorzuschiessen.

Art. 15. Zur Vermittelung der dienstlichen Beziehungen des Königl. Württembergischen Armee-Korps zu dem Deutschen Bundesheer findet ein direkter Schriftwechsel zwischen dem Königl. Preuss. und dem Königl. Württembergischen Kriegsministerium statt und erhält letzteres auf diese Weise alle betreffenden zur Zeit gültigen oder später zu erlassenden Reglements, Bestimmungen u. s. w. zur entsprechenden Ausführung. Nebendem wird die Königl. Württembergische Regierung jederzeit in dem Bundesausschuss für das Landheer und die Festungen vertreten sein.

XII. Reichsfinanzen.

Art. 69. Alle Einnahmen und Ausgaben des Reichs müssen für jedes Jahr veranschlagt und auf den Reichshaushalts-Etat gebracht werden. Letzterer wird vor Beginn des Etatsjahres nach folgenden Grundsätzen durch ein Gesetz festgestellt.

Art. 70. Zur Bestreitung aller gemeinschaftlichen Ausgaben dienen zunächst die etwaigen Ueberschüsse der Vorjahre, sowie die aus den Zöllen, den gemeinschaftlichen Verbrauchssteuern und aus dem Post- und Telegraphenwesen fliessenden gemeinschaftlichen Einnahmen. Insoweit dieselben durch diese Einnahmen nicht gedeckt werden, sind sie, so lange Reichssteuern nicht eingeführt sind, durch Beiträge der einzelnen Bundesstaaten nach Massgabe ihrer Bevölkerung aufzubringen, welche bis zur Höhe des budgetmässigen Betrages durch den Reichskanzler ausgeschrieben werden.

Art. 71. Die gemeinschaftlichen Ausgaben werden in der Regel für ein Jahr bewilligt, können jedoch in besonderen Fällen auch für eine längere Dauer bewilligt werden.

Während der im Art. 60 normirten Uebergangszeit ist der nach Titel geordnete Etat über die Ausgaben für das Heer dem Bundesrathe und dem Reichstage nur zur Kenntnissnahme und zur Erinnerung vorzulegen.

Art. 72. Ueber die Verwendung aller Einnahmen des Reichs ist durch den Reichskanzler dem Bundesrathe und dem Reichstage zur Entlastung jährlich Rechnung zu legen.

Art. 73. In Fällen eines ausserordentlichen Bedürfnisses kann im Wege der Reichsgesetzgebung die Aufnahme einer Anleihe, sowie die Uebernahme einer Garantie zu Lasten des Reichs erfolgen.

Schlussbestimmung zum XII. Abschnitt.

Auf die Ausgaben für das Bayerische Heer finden die Art. 69 und 71 nur nach Massgabe der in der Schlussbestimmung zum XI. Abschnitt erwähnten Bestimmungen des Vertr. v. 23. Nov. 1870 und der Art. 72 nur insoweit Anwendung, als dem Bundesrathe und dem Reichstage die Ueberweisung der für das Bayerische Heer erforderlichen Summe an Bayern nachzuweisen ist.

XIII. Schlichtung von Streitigkeiten und Strafbestimmungen.

Art. 74. Jedes Unternehmen gegen die Existenz, die Integrität, die Sicherheit oder die Verfassung des Deutschen Reichs, endlich die Beleidigung des Bundesrathes, des Reichstages, eines Mitgliedes des Bundesrathes oder des Reichstages, einer Behörde oder eines öffentlichen Beamten des Reichs, während dieselben in der Ausübung ihres Berufes begriffen sind oder in Beziehung auf ihren Beruf, durch Wort, Schrift, Druck, Zeichen, bildliche oder andere Darstellung, werden in den einzelnen Bundesstaaten beurtheilt und bestrasft nach Massgabe der in den letzteren bestehenden oder künftig in Wirksamkeit tretenden Gesetze, nach welchen eine gleiche gegen den einzelnen Bundesstaat, seine Verfassung, seine Kammern oder Stände, seine Kammer- oder Ständemitglieder, seine Behörden und Beamten begangene Handlung zu richten wäre.

Art. 75. Für diejenigen in Art. 74 bezeichneten Unternehmungen gegen das Deutsche Reich, welche, wenn gegen einen der einzelnen Bundesstaaten gerichtet, als Hochverrath oder Landesverrath zu

qualificiren wären, ist das gemeinschaftliche Ober-Appellationsgericht der drei freien und Hansestädte in Lübeck die zuständige Spruchbehörde in erster und letzter Instanz.

Die näheren Bestimmungen über die Zuständigkeit und das Verfahren des Ober-Appellationsgerichts erfolgen im Wege der Reichsgesetzgebung. Bis zum Erlasse eines Reichsgesetzes bewendet es bei der seitherigen Zuständigkeit der Gerichte in den einselnen Bundesstaaten und den auf das Verfahren dieser Gerichte sich beziehenden Bestimmungen.

Art. 76. Streitigkeiten zwischen verschiedenen Bundesstaaten, sofern dieselben nicht privatrechtlicher Natur und daher von den kompetenten Gerichtsbehörden zu entscheiden sind, werden auf Anrufen des einen Theils von dem Bundesrathe erledigt.

Verfassungsstreitigkeiten in solchen Bundesttaaten, in deren Verfassung nicht eine Behörde zur Entscheidung solcher Streitigkeiten bestimmt ist, hat auf Anrufen eines Theiles der Bundesrath gütlich auszugleichen oder, wenn das nicht gelingt, im Wege der Reichsgesetzgebung zur Erledigung zu bringen.

Art. 77. Wenn in einem Bundesstaate der Fall einer Justizverweigerung eintritt, und auf gesetzlichen Wegen ausreichende Hülfe nicht erlangt werden kann, so liegt dem Bundesrathe ob, erwiesene nach der Verfassung und den bestehenden Gesetzen des betreffenden Bundesstaates zu beurtheilende Beschwerden über verweigerte oder gehemmte Rechstpflege anzunehmen, und darauf die gerichtliche Hülfe bei der Bundesregierung, die zur Beschwerde Anlass gegeben hat, zu bewirken.

XIV. Allgemeine Bestimmungen.

Art. 78. Veränderungen der Verfassung erfolgen im Wege der Gesetzgebung. Sie gelten als abgelehnt, wenn sie im Bundesrathe 14 Stimmen gegen sich haben.

Diejenigen Vorschriften der Reichsverfassung, durch welche bestimmte Rechte einzelner Bundesstaaten in deren Verhältniss zur Gesammtheit festgestellt sind, können nur mit Zustimmung des berechtigten Bundesstaates abgeändert werden.

APPENDIX III.

VERFASSUNGS-URKUNDE FÜR DEN PREUSSISCHEN STAAT.

APPENDIX III.

VERFASSUNGS-URKUNDE

FÜR DEN

PREUSSISCHEN STAAT

VOM 31. JANUAR 1850.

Wir Friedrich Wilhelm, von Gottes Gnaden, König von Preussen &c. &c. thun kund und fügen zu wissen, dass Wir, nachdem die von Uns unterm 5. Dezember 1848 vorbehaltlich der Revision im ordentlichen Wege der Gesezgebung verkündigte und von beiden Kammern Unseres Königreichs anerkannte Verfassung des Preussischen Staats der darin angeordneten Revision unterworfen ist, die Verfassung in Uebereinstimmung mit beiden Kammern endgültig festgestellt haben.

Wir verkünden demnach dieselbe als Staats-Grundgesetz, wie folgt:

TITEL I. — VOM STAATSGEBIETE.

Art. 1. Alle Landestheile der Monarchie in ihrem gegenwärtigen Umfange bilden das Preussische Staatsgebiet.

Art. 2. Die Gränzen dieses Staatsgebiets können nur durch ein Gesetz verändert werden.

TITEL II. — VON DEN RECHTEN DER PREUSSEN.

Art. 3. Die Verfassung und das Gesetz bestimmen, unter welchen Bedingungen die Eigenschaft eines Preussen und die staatsbürgerlichen Rechte erworben, ausgeübt und verloren werden.

Art. 4. Alle Preussen sind vor dem Gesetze gleich. Standesvorrechte finden nicht statt. Die öffentlichen Aemter sind, unter Einhaltung der von den Gesetzen festgestellten Bedingungen, für alle dazu Befähigten gleich zugänglich.

Art. 5. Die persönliche Freiheit ist gewährleistet. Die Bedingungen und Formen, unter welchen eine Beschränkung derselben,

insbesondere eine Verhaftung zulässig ist, werden durch das Gesetz bestimmt.

Art. 6. Die Wohnung ist unverletzlich. Das Eindringen in dieselbe und Haussuchungen, sowie die Beschlagnahme von Briefen und Papieren, sind nur in den gesetzlich bestimmten Fällen und Formen gestattet.

Art. 7. Niemand darf seinem gesetzlichen Richter entzogen werden. Ausnahmegerichte und ausserordentliche Kommissionen sind unstatthaft.

Art. 8. Strafen können nur in Gemässheit des Gesetzes angedroht oder verhängt werden.

Art. 9. Das Eigenthum ist unverletzlich. Es kann nur aus Gründen des öffentlichen Wohles gegen vorgängige, in dringenden Fällen wenigstens vorläufig festzustellende Entschädigung nach Massgabe des Gesetzes entzogen oder beschränkt werden.

Art. 10. Der bürgerliche Tod und die Strafe der Vermögenseinziehung finden nicht statt.

Art. 11. Die Freiheit der Auswanderung kann von Staatswegen nur in Bezug auf die Wehrpflicht beschränkt werden.

Abzugsgelder dürfen nicht erhoben werden.

Art. 12. Die Freiheit des religiösen Bekenntnisses, der Vereinigung zu Religionsgesellschaften (Art. 30 und 31) und der gemeinsamen häuslichen und öffentlichen Religionsübung wird gewährleistet. Der Genuss der bürgerlichen und staatsbürgerlichen Rechte ist unabhängig von dem religiösen Bekenntnisse. Den bürgerlichen und staatsbürgerlichen Pflichten darf durch die Ausübung der Religionsfreiheit kein Abbruch geschehen.

Art. 13. Die Religionsgesellschaften, so wie die geistlichen Gesellschaften, welche keine Korporationsrechte haben, können diese Rechte nur durch besondere Gesetze erlangen.

Art. 14. Die christliche Religion wird bei denjenigen Einrichtungen des Staats, welche mit der Religionsübung im Zusammenhange stehen, unbeschadet der im Art. 12 gewährleisteten Religionsfreiheit, zum Grunde gelegt.

Art. 15. Vacat.

Art. 16. Vacat.

Art. 17. Ueber das Kirchenpatronat und die Bedingungen, unter welchen dasselbe aufgehoben werden kann, wird ein besonderes Gesetz ergehen.

Art. 18. Vacat.

Art. 19. Die Einführung der Civilehe erfolgt nach Massgabe eines besonderen Gesetzes, was auch die Führung der Civilstandsregister regelt.

Art. 20. Die Wissenschaft und ihre Lehre ist frei.

Art. 21. Für die Bildung der Jugend soll durch öffentliche Schulen genügend gesorgt werden.

Aeltern und deren Stellvertreter dürfen ihre Kinder oder Pflegebefohlenen nicht ohne den Unterricht lassen, welcher für die öffentlichen Volksschulen vorgeschrieben ist.

Art. 22. Unterricht zu ertheilen und Unterrichtsanstalten zu gründen und zu leiten, steht Jedem frei, wenn er seine sittliche, wissenschaftliche und technische Befähigung den betreffenden Staatsbehörden nachgewiesen hat (s. Erlass des Minist. der geistlichen &c. Angelegenheiten, betr. die Ertheilung von Privat-Unterricht gegen Bezahlung durch öffentliche Lehrer, insbesondere an Schüler der eigenen Klasse. Oeffentliche Lehrer bedürfen zur Ertheilung von Privat-Unterricht eines für Privatlehrer erforderlichen Erlaubnissscheines der Ortsschulbehörde nicht, v. 6. Octob. 1882 [Centralblatt für die Unterrichts-Verwalt. S. 716]).

Art. 23. Alle öffentlichen und Privat-Unterrichts- und Erziehungsanstalten stehen unter der Aufsicht vom Staate ernannter Behörden.

Die öffentlichen Lehrer haben die Rechte und Pflichten der Staatsdiener.

Art. 24. Bei der Einrichtung der öffentlichen Volksschulen sind die konfessionellen Verhältnisse möglichst zu berücksichtigen.

Den religiösen Unterricht in der Volksschule leiten die betreffenden Religionsgesellschaften.

Die Leitung der äusseren Angelegenheiten der Volksschule steht der Gemeinde zu. Der Staat stellt, unter gesetzlich geordneter Betheiligung der Gemeinden, aus der Zahl der Befähigten die Lehrer der öffentlichen Volksschulen an.

Art 25. Die Mittel zur Errichtung, Unterhaltung und Erweiterung der öffentlichen Volksschule werden von den Gemeinden und, im Falle des nachgewiesenen Unvermögens, ergänzungsweise vom Staate aufgebracht. Die auf besonderen Rechtstiteln beruhenden Verpflichtungen Dritter bleiben bestehen.

Der Staat gewährleistet demnach den Volksschullehrern ein festes, den Lokalverhältnissen angemessenes Einkommen.

In der öffentlichen Volksschule wird der Unterricht unentgeltlich ertheilt.

Art. 26. Ein besonderes Gesetz regelt das ganze Unterrichtswesen.

Art. 27. Jeder Preusse hat das Recht, durch Wort, Schrift, Druck und bildliche Darstellung seine Meinung frei zu äussern.

Die Censur darf nicht eingeführt werden; jede andere Beschränkung der Pressfreiheit nur im Wege der Gesetzgebung.

Art. 28. Vergehen, welche durch Wort, Schrift, Druck oder bildliche Darstellung begangen werden, sind nach den allgemeinen Strafgesetzen zu bestrafen.

Art. 29. Alle Preussen sind berechtigt, sich ohne vorgängige obrigkeitliche Erlaubniss friedlich und ohne Waffen in geschlossenen Räumen zu versammeln.

Diese Bestimmung bezieht sich nicht auf Versammlungen unter freiem Himmel, welche auch in Bezug auf vorgängige obrigkeitliche Erlaubniss der Verfügung des Gesetzes unterworfen sind.

Art. 30. Alle Preussen haben das Recht, sich zu solchen Zwecken, welche den Strafgesetzen nicht zuwiderlaufen, in Gesellschaften zu vereinigen.

Das Gesetz regelt, insbesondere zur Aufrechthaltung der öffentlichen Sicherheit, die Ausübung des in diesem und in dem vorstehenden Artikel (29) gewährleisteten Rechts.

Politische Vereine können Beschränkungen und vorübergehenden Verboten im Wege der Geseztgebung unterworfen werden.

Art. 31. Die Bedingungen, unter welchen Korporationsrechte ertheilt oder verweigert werden, bestimmt das Gesetz.

Art. 32. Das Petitionsrecht steht allen Preussen zu. Petitionen unter einem Gesammtnamen sind nur Behörden und Korporationen gestattet.

Art. 33. Das Briefgeheimniss ist unverletzlich. Die bei strafgerichtlichen Untersuchungen und in Kriegsfällen nothwendigen Beschränkungen sind durch die Gesetzgebung festzustellen.

Art. 34. Alle Preussen sind wehrpflichtig. Den Umfang und die Art dieser Pflicht bestimmt das Gesetz.

Art. 35. Das Heer begreift alle Abtheilungen des stehenden Heeres und der Landwehr.

Im Falle des Krieges kann der König nach Massgabe des Gesetzes den Landsturm aufbieten.

Art. 36. Die bewaffnete Macht kann zur Unterdrückung innerer Unruhen und zur Ausführung der Gesetze nur in den vom Gesetze bestimmten Fällen und Formen und auf Requisition der Civilbehörde

verwendet werden. In lezterer Beziehung hat das Gesetz die Ausnahmen zu bestimmen.

Art. 37. Der Militairgerichtsstand des Heeres beschränkt sich auf Strafsachen und wird durch das Gesetz geregelt. Die Bestimmungen über die Militairdisziplin im Heere bleiben Gegenstand besonderer Verordnungen.

Art. 38. Die bewaffnete Macht darf weder in, noch ausser dem Dienste berathschlagen oder sich anders, als auf Befehl, versammeln. Versammlungen und Vereine der Landwehr zur Berathung militairischer Einrichtungen, Befehle und Anordnungen sind auch dann, wenn dieselbe nicht zusammenberufen ist, untersagt.

Art. 39. Auf das Heer finden die in den Artikeln 5.–6.–29.–30. und 32. enthaltenen Bestimmungen nur insoweit Anwendung, als die militairischen Gesetze und Dissiplinarvorschriften nicht entgegenstehen.

Art. 40. Die Errichtung von Lehen ist untersagt.

Der in Bezug auf die vorhandenen Lehen noch bestehende Lehnsverband soll durch gesetzliche Anordnung aufgelöst werden.

Art. 41. Die Bestimmungen des Art. 40 finden auf Thronlehen und auf die ausserhalb des Staats liegenden Lehen keine Anwendung.

Art. 42. Ohne Entschädigung bleiben aufgehoben, nach Massgabe der ergangenen besonderen Gesetze: 1) das mit dem Besitze gewisser Grundstücke verbundene Recht der Ausübung oder Uebertragung der richterlichen Gewalt (Tit. VI.) und die aus diesem Rechte fliessenden Exemtionen und Abgaben; 2) die aus dem gerichts- und schutzherrlichen Verbande, der früheren Erbunterthänigkeit, der früheren Steuer- und Gewerbe-Verfassung herstammenden Verpflichtungen.

Mit den aufgehobenen Rechten fallen auch die Gegenleistungen und Lasten weg, welche den bisher Berechtigten dafür oblagen.

Titel III. — Vom Könige.

Art. 43. Die Person des Königs ist unverletzlich.

Art. 44. Die Minister des Königs sind verantwortlich. Alle Regierungsakte des Königs bedürfen zu ihrer Gültigkeit der Gegenzeichnung eines Ministers, welcher dadurch die Verantwortlichkeit übernimmt.

Art. 45. Dem Könige allein steht die vollziehende Gewalt zu. Er ernennt und entlässt die Minister. Er befiehlt die Verkündigung der Gesetze und erlässt die zu deren Ausführung nöthigen Verordnungen.

Art. 46. Der König führt den Oberbefehl über das Heer.

Art. 47. Der König besetzt alle Stellen im Heere, so wie in den übrigen Zweigen des Staatsdienstes, in sofern nicht das Gesetz ein Anderes verordnet.

Art. 48. Der König hat das Recht, Krieg zu erklären und Frieden zu schliessen, auch andere Verträge mit fremden Regierungen zu errichten. Letztere bedürfen zu ihrer Gültigkeit der Zustimmung der Kammern, sofern es Handelsverträge sind, oder wenn dadurch dem Staate Lasten oder einzelnen Staatsbürgern Verpflichtungen auferlegt werden.

Art. 49. Der König hat das Recht der Begnadigung und Strafmilderung.

Zu Gunsten eines wegen seiner Amtshandlungen verurtheilten Ministers kann dieses Recht nur auf Antrag derjenigen Kammer ausgeübt werden, von welcher die Anklage ausgegangen ist.

Der König kann bereits eingeleitete Untersuchungen nur auf Grund eines besonderen Gesetzes niederschlagen.

Art. 50. Dem Könige steht die Verleihung von Orden und anderen mit Vorrechten nicht verbundenen Auszeichnungen zu.

Er übt das Münzrecht nach Massgabe des Gesetzes.

Art. 51. Der König beruft die Kammern und schliesst ihre Sitzungen. Er kann sie entweder beide zugleich oder nur eine auflösen. Es müssen aber in einem solchen Falle innerhalb eines Zeitraums von sechszig Tagen nach der Auflösung die Wähler, und innerhalb eines Zeitraums von neunzig Tagen nach der Auflösung die Kammern versammelt werden.

Art. 52. Der König kann die Kammern vertagen. Ohne deren Zustimmung darf diese Vertagung die Frist von 30 Tagen nicht übersteigen und während derselben Session nicht wiederholt werden.

Art. 53. Die Krone ist, den Königlichen Hausgesetzen gemäss, erblich in dem Mannsstamme des Königlichen Hauses nach dem Rechte der Erstgeburt und der agnatischen Linealfolge.

Art. 54. Der König wird mit Vollendung des achtzehnten Lebensjahres volljährig.

Er leistet in Gegenwart der vereinigten Kammern das eidliche Gelöbniss, die Verfassung des Königreichs fest und unverbrüchlich zu halten, und in Uebereinstimmung mit derselben und den Gesetzen zu regieren.

Art. 55. Ohne Einwilligung beider Kammern kann der König nicht zugleich Herrscher fremder Reiche sein.

Art. 56. Wenn der König minderjährig oder sonst dauernd ver-

hindert ist, selbst zu regieren, so übernimmt derjenige volljährige Agnat (Art. 53.), welcher der Krone am nächsten steht, die Regentschaft. Er hat sofort die Kammern zu berufen, die in vereinigter Sitzung über die Nothwendigkeit der Regentschaft beschliessen.

Art. 57. Ist kein volljähriger Agnat vorhanden und nicht bereits vorher gesetzliche Fürsorge für diesen Fall getroffen, so hat das Staatsministerium die Kammern zu berufen, welche in vereinigter Sitzung einen Regenten erwählen. Bis zum Antritt der Regentschaft von Seiten desselben führt das Staatsministerium die Regierung.

Art. 58. Der Regent übt die dem Könige zustehende Gewalt in dessen Namen aus. Derselbe schwört nach Einrichtung der Regentschaft vor den vereinigten Kammern einen Eid, die Verfassung des Königreichs fest und unverbrüchlich zu halten, und in Uebereinstimmung mit derselben und den Gesetzen zu regieren.

Bis zu dieser Eidesleistung bleibt in jedem Falle das bestehende gesammte Staatsministerium für alle Regierungshandlungen verantwortlich.

Art. 59. Dem Kron-Fideikommisz-Fonds verbleibt die durch das Gesetz vom 17. Januar 1820, auf die Einkünfte der Domainen und Forsten angewiesene Rente.

Titel IV. — Von den Ministern.

Art. 60. Die Minister, so wie die zu ihrer Vertretung abgeordneten Staatsbeamten haben Zutritt zu jeder Kammer und müssen auf ihr Verlangen zu jeder Zeit gehört werden.

Jede Kammer kann die Gegenwart der Minister verlangen.

Die Minister haben in einer oder der anderen Kammer nur dann Stimmrecht, wenn sie Mitglieder derselben sind.

Art. 61. Die Minister können durch Beschluss einer Kammer wegen des Verbrechens der Verfassungsverletzung, der Bestechung und des Verrathes angeklagt werden. Ueber solche Anklage entscheidet der oberste Gerichtshof der Monarchie in vereinigten Senaten. So lange noch zwei oberste Gerichtshöfe bestehen, treten dieselben zu obigem Zwecke zusammen.

Die näheren Bestimmungen über die Fälle der Verantwortlichkeit, über das Verfahren und über die Strafen werden einem besonderen Gesetze vorbehalten.

Titel V. — Von den Kammern.

Art. 62. Die gesetzgebende Gewalt wird gemeinschaftlich durch den König und durch zwei Kammern ausgeübt.

Die Uebereinstimmung des Königs und beider Kammern ist zu jedem Gesetze erforderlich.

Finanzgesetz-Entwürfe und Staatshaushalts-Etats werden zuerst der Zweiten Kammer vorgelegt; leztere werden von der Ersten Kammer im Ganzen angenommen oder abgelehnt.

Art. 63. Nur in dem Falle, wenn die Aufrechthaltung der öffentlichen Sicherheit, oder die Beseitigung eines ungewöhnlichen Nothstandes es dringend erfordert, können, insofern die Kammern nicht versammelt sind, unter Verantwortlichkeit des gesammten Staatsministeriums, Verordnungen, die der Verfassung nicht zuwiderlaufen mit Gesetzeskraft erlassen werden. Dieselben sind aber den Kammern bei ihrem nächsten Zusammentritt zur Genehmigung sofort vorzulegen.

Art. 64. Dem Könige, so wie jeder Kammer steht das Recht zu, Gesetze vorzuschlagen.

Gesetzesvorschläge, welche durch eine der Kammern oder den König verworfen worden sind, können in derselben Sitzungsperiode nicht wieder vorgebracht werden.

Art. 65–68. Die Erste Kammer wird durch Königliche Anordnung gebildet, welche nur durch ein mit Zustimmung der Kammern zu erlassendes Gesetz abgeändert werden kann.

Die Erste Kammer wird zusammengesetzt aus Mitgliedern, welche der König mit erblicher Berechtigung oder auf Lebenszeit beruft.

Art. 69. Die Zweite Kammer besteht aus dreihundert zwei und fünfzig Mitgliedern. Die Wahlbezirke werden durch das Gesetz festgestellt. Sie können aus einem oder mehreren Kreisen oder aus einer oder mehreren der grösseren Städte bestehen.

Art. 70. Jeder Preusse, welcher das fünf und zwanzigste Lebensjahr vollendet hat und in der Gemeinde, in welcher er seinen Wohnsitz hat, die Befähigung zu den Gemeindewahlen besitzt, ist stimm berechtigter Urwähler.

Wer in mehreren Gemeinden an den Gemeindewahlen Theil zu nehmen berechtigt ist, darf das Recht als Urwähler nur in einer Gemeinde ausüben.

Art. 71. Auf jede Vollzahl von zwei hundert und fünfzig Seelen der Bevölkerung ist ein Wahlmann zu Wählen. Die Urwähler wer-

den nach Massgabe der von ihnen zu entrichtenden direkten Staatssteuern in drei Abtheilungen getheilt, und zwar in der Art, dass auf jede Abtheilung ein Dritttheil der Gesammtsumme der Steuerbeträge aller Urwähler fällt.

Die Gesammtsumme wird berechnet: *a*) gemeindeweise, falls die Gemeinde einen Urwahlbezirk für sich bildet; *b*) bezirksweise, falls der Urwahlbezirk aus mehreren Gemeinden zusammengesezt ist.

Die erste Abtheilung besteht aus denjenigen Urwählern, auf welche die höchsten Steuerbeträge bis zum Belaufe eines Dritttheils der Gesammtsteuer fallen.

Die zweite Abtheilung besteht aus denjenigen Urwählern, auf welche die nächst niedrigeren Steuerbeträge bis zur Gränze des zweiten Dritttheils fallen.

Die dritte Abtheilung besteht aus den am niedrigsten besteuerten Urwählern, auf welche das dritte Dritttheil fällt.

Jede Abtheilung wählt besonders, und zwar ein Dritttheil der zu wählenden Wahlmänner.

Die Abtheilungen können in mehrere Wahlverbände eingetheilt werden, deren keiner mehr als fünfhundert Urwähler in sich schliessen darf.

Die Wahlmänner werden in jeder Abtheilung aus der Zahl der stimmberechtigten Urwähler des Urwahlbezirks ohne Rücksicht auf die Abtheilungen gewählt.

Art. 72. Die Abgeordneten werden durch die Wahlmänner gewählt.

Das Nähere über die Ausführung der Wahlen bestimmt das Wahlgesetz, welches auch die Anordnung für diejenigen Städte zu treffen hat, in denen an Stelle eines Theils der direkten Steuern die Mahl- und Schlachtsteuer erhoben wird.

Art. 73. Die Legislatur-Periode der Zweiten Kammer wird auf fünf Jahre festgesetzt.

Art. 74. Zum Abgeordneten der Zweiten Kammer ist jeder Preusse wählbar, der das dreissigste Lebensjahr vollendet, den Vollbesitz der bürgerlichen Rechte in Folge rechtskräftigen richterlichen Erkenntnisses nicht verloren und bereits drei Jahre dem Preussischen Staatsverbande angehört hat. Der Präsident und die Mitglieder der Ober-Rechnungskammer können nicht Mitglieder eines der beiden Häuser des Landtages sein.

Art. 75. Die Kammern werden nach Ablauf ihrer Legislatur-Periode neu gewählt. Ein Gleiches geschieht im Falle der Auflösung. In beiden Fällen sind die bisherigen Mitglieder wählbar.

Art. 76. Die beiden Häuser des Landtages der Monarchie (die Kammern) werden durch den König regelmässig in dem Zeitraum von dem Anfange des Monats November jeden Jahres bis zur Mitte des folgenden Januar und ausserdem, so oft es die Umstände erheischen, einberufen.

Art. 77. Die Eröffnung und die Schliessung der Kammern geschieht durch den König in Person oder durch einen dazu von Ihm beauftragten Minister in einer Sitzung der vereinigten Kammern.

Beide Kammern werden gleichzeitig berufen, eröffnet, vertagt und geschlossen.

Wird eine Kammer aufgelöst, so wird die andere gleichzeitig vertagt.

Art. 78. Jede Kammer prüft die Legitimation ihrer Mitglieder und entscheidet darüber. Sie regelt ihren Geschäftsgang und ihre Disziplin durch eine Geschäftsordnung und erwählt ihren Präsidenten, ihre Vicepräsidenten und Schriftführer.

Beamte bedürfen keines Urlaubs zum Eintritt in die Kammer.

Wenn ein Kammer-Mitglied ein besoldetes Staatsamt annimmt oder im Staatsdienste in ein Amt eintritt, mit welchem ein höherer Rang oder ein höheres Gehalt verbunden ist, so verliert es Sitz und Stimme in der Kammer und kann seine Stelle in derselben nur durch neue Wahl wieder erlangen.

Niemand kann Mitglied beider Kammern sein.

Art. 79. Die Sitzungen beider Kammern sind öffentlich. Jede Kammer tritt auf den Antrag ihres Präsidenten oder von zehn Mitgliedern zu einer geheimen Sitzung zusammen, in welcher dann zunächst über diesen Antrag zu beschliessen ist.

Art. 80. Keine der beiden Kammern kann einen Beschluss fassen, wenn nicht die Mehrheit der gesetzlichen Anzahl ihrer Mitglieder anwesend ist. Jede Kammer fasst ihre Beschlüsse nach obsoluter Stimmenmehrheit, vorbehaltlich der durch die Geschäftsordnung für Wahlen etwa zu bestimmenden Ausnahmen.

Art. 81. Jede Kammer hat für sich das Recht, Adressen an den König zu richten.

Niemand darf den Kammern oder einer derselben in Person eine Bittschrift oder Adresse überreichen.

Jede Kammer kann die an sie gerichteten Schriften an die Minister überweisen und von denselben Auskunft über eingehende Beschwerden verlangen.

Art. 82. Eine jede Kammer hat die Befugniss, Behufs ihrer Information Kommissionen zur Untersuchung von Thatsachen zu ernennen.

Art. 83. Die Mitglieder beider Kammern sind Vertreter des ganzen Volkes. Sie stimmen nach ihrer freien Ueberzeugung und sind an Aufträge und Instruktionen nicht gebunden.

Art. 84. Sie können für ihre Abstimmungen in der Kammer niemals, für ihre darin ausgesprochenen Meinungen nur innerhalb der Kammer auf den Grund der Geschäftsordnung (Art. 78.) zur Rechenschaft gezogen werden.

Kein Mitglied einer Kammer kann ohne deren Genehmigung während der Sizungsperiode wegen einer mit Strafe bedrohten Handlung zur Untersuchung gezogen oder verhaftet werden, ausser wenn es bei Ausübung der That oder im Laufe des nächstfolgenden Tages nach derselben ergriffen wird.

Gleiche Genehmigung ist bei einer Verhaftung wegen Schulden nothwendig.

Jedes Strafverfahren gegen ein Mitglied der Kammer und eine jede Untersuchungs- oder Civilhaft wird für die Dauer der Sitzungsperiode aufgehoben, wenn die betreffende Kammer es verlangt.

Art. 85. Die Mitglieder der Zweiten Kammer erhalten aus der Staatskasse Reisekosten und Diäten nach Massgabe des Gesetzes. Ein Verzicht hierauf ist unstatthaft.

Titel VI. — Von der richterlichen Gewalt.

Art. 86. Die richterliche Gewalt wird im Namen des Königs durch unabhängige, keiner anderen Autorität als der des Gesetzes unterworfene Gerichte ausgeübt.

Die Urtheile werden im Namen des Königs ausgefertigt und vollstreckt.

Art. 87. Die Richter werden vom Könige oder in dessen Namen auf ihre Lebenszeit ernannt.

Sie Können nur durch Richterspruch aus Gründen, welche die Gesetze vorgesehen haben, ihres Amtes entsetzt oder zeitweise enthoben werden. Die vorläufige Amtssuspension, welche nicht kraft des Gesetzes eintritt, und die unfreiwillige Versetzung an eine andere Stelle oder in den Ruhestand können nur aus den Ursachen und unter den Formen, welche im Gesetze angegeben sind, und nur auf Grund eines richterlichen Beschlusses erfolgen.

Auf die Versetzungen, welche durch Veränderungen in der Organ-

isation der Gerichte oder ihrer Bezirke nöthig werden, finden diese Bestimmungen keine Anwendung.

Art. 87*a*. Bei der Bildung gemeinschaftlicher Gerichte für preussische Gebietstheile und Gebiete anderer Bundesstaaten sind Abweichungen von den Bestimmungen des Artikels 86 und des ersten Absatzes im Artikel 87 zulässig. Ges. vom 19. Februar 1879 (Ges.-S. S. 18).

Art. 88. Aufgehoben.

Art. 89. Die Organisation der Gerichte wird durch das Gesetz bestimmt.

Art. 90. Zu einem Richteramte darf nur der berufen werden, welcher sich zu demselben nach Vorschrift der Gesetze befähigt hat.

Art. 91. Gerichte für besondere Klassen von Angelegenheiten, insbesondere Handels- und Gewerbegerichte, sollen im Wege der Gesetzgebung an den Orten errichtet werden, wo das Bedürfniss solche erfordert.

Die Organisation und Zuständigkeit solcher Gerichte, das Verfahren bei denselben, die Ernennung ihrer Mitglieder, die besonderen Verhältnisse der lezteren und die Dauer ihres Amtes werden durch das Gesetz festgestellt.

Art. 92. Es soll in Preussen nur Ein oberster Gerichtshof bestehen.

Art. 93. Die Verhandlungen vor dem erkennenden Gerichte in Civil- und Strafsachen sollen öffentlich sein. Die Oeffentlichkeit kann jedoch durch einen öffentlich zu verkündenden Beschluss des Gerichts ausgeschlossen werden, wenn sie der Ordnung oder den guten Sitten Gefahr droht.

In anderen Fällen kann die Oeffentlichkeit nur durch Gesetze beschränkt werden.

Art. 94. Bei Verbrechen erfolgt die Entscheidung über die Schuld des Angeklagten durch Geschworene, insoweit ein mit vorheriger Zustimmung der Kammern erlassenes Gesetz nicht Ausnahmen bestimmt. Die Bildung des Geschworenengerichts regelt das Gesetz.

Art. 95. Es kann durch ein mit vorheriger Zustimmung der Kammern zu erlassendes Gesetz ein besonderer Gerichtshof errichtet werden, dessen Zuständigkeit die Verbrechen des Hochverraths und diejenigen Verbrechen gegen die innere und äussere Sicherheit des Staats, welche ihm durch das Gesetz überwiesen werden, begreift.

Art. 96. Die Kompetenz der Gerichte und Verwaltungsbehörden wird durch das Gesetz bestimmt. Ueber Kompetenz-Konflikte zwi-

schen den Verwaltungs- und Gerichtsbehörden entscheidet ein durch das Gesetz bezeichneter Gerichtshof.

Art. 97. Die Bedingungen, unter welchen öffentliche Civil- und Militairbeamte wegen durch Ueberschreitung ihrer Amtsbefugnisse verübter Rechtsverletzungen gerichtlich in Anspruch genommen werden können, bestimmt das Gesetz. Eine vorgängige Genehmigung der vorgesetzten Dienstbehörde darf jedoch nicht verlangt werden.

Titel VII. — Von den nicht zum Richterstande gehörigen Staatsbeamten.

Art. 98. Die besonderen Rechtsverhältnisse der nicht zum Richterstande gehörigen Staatsbeamten, einschliesslich der Staats-Anwälte, sollen durch ein Gesetz geregelt werden, welches, ohne die Regierung in der Wahl der ausführenden Organe zweckwidrig zu beschränken, den Staatsbeamten gegen willkürliche Entziehung von Amt und Einkommen angemessenen Schutz gewährt.

Titel VIII. — Von den Finanzen.

Art. 99. Alle Einnahmen und Ausgaben des Staats müssen für jedes Jahr im Voraus veranschlagt und auf den Staatshaushalts-Etat gebracht werden.

Lezterer wird jährlich durch ein Gesetz festgestellt.

Art. 100. Steuern und Abgaben für die Staatskasse dürfen nur, so weit sie in den Staatshaushalts-Etat aufgenommen oder durch besondere Gesetze angeordnet sind, erhoben werden.

Art. 101. In Betreff der Steuern können Bevorzugungen nicht eingeführt werden.

Die bestehende Steuergesetzgebung wird einer Revision unterworfen und dabei jede Bevorzugung abgeschafft.

Art. 102. Gebühren können Staats- oder Kommunalbeamte nur auf Grund des Gesetzes erheben.

Art. 103. Die Aufnahme von Anleihen für die Staatskasse findet nur auf Grund eines Gesetzes statt. Dasselbe gilt von der Uebernahme von Garantien zu Lasten des Staats.

Art. 104. Zu Etats-Ueberschreitungen ist die nachträgliche Genehmigung der Kammern erforderlich.

Die Rechnungen über den Staatshaushalts-Etat werden von der Ober-Rechnungskammer geprüft und festgestellt. Die allgemeine

Rechnung über den Staatshaushalt jeden Jahres, einschliesslich einer Uebersicht der Staatsschulden, wird mit den Bemerkungen der Ober-Rechnungskammer zur Entlastung der Staatsregierung den Kammern vorgelegt.

Ein besonderes Gesetz wird die Einrichtung und die Befugnisse der Ober-Rechnungskammer bestimmen.

Titel IX. — Von den Gemeinden, Kreis-, Bezirks- und Provinzial-Verbanden.

Art. 105. Die Vertretung und Verwaltung der Gemeinden, Kreise und Provinzen des Preusisschen Staats wird durch besondere Gesezte näher bestimmt.

Allgemeine Bestimmungen.

Art. 106. Gesetze und Verordnungen sind verbindlich, wenn sie in der vom Gesetze vorgeschriebenen Form bekannt gemacht worden sind.

Die Prüfung der Rechtsgültigkeit gehörig verkündeter Königlicher Verordnungen steht nicht den Behörden, sondern nur den Kammern zu.

Art. 107. Die Verfassung kann auf dem ordentlichen Wege der Gesetzgebung abgeändert werden, wobei in jeder Kammer die gewöhnliche absolute Stimmenmehrheit, bei zwei Abstimmungen, zwischen welchen ein Zeitraum von wenigstens ein und zwanzig Tagen liegen muss, genügt.

Art. 108. Die Mitglieder der beiden Kammern und alle Staatsbeamten leisten dem Könige den Eid der Treue und des Gehorsams, und beschwören die gewissenhafte Beobachtung der Verfassung.

Eine Vereidigung des Heeres auf die Verfassung findet nicht statt.

Art. 109. Die bestehenden Steuern und Abgaben werden forterhoben und alle Bestimmungen der bestehenden Gesetzbücher, einzelnen Gesetze und Verordnungen, welche der gegenwärtigen Verfassung nicht zuwiderlaufen, bleiben in Kraft, bis sie durch ein Gesetz abgeändert werden.

Art. 110. Alle durch die bestehenden Gesetze angeordneten Behör — den bleiben bis zur Ausführung der sie betreffenden organischen Gesetze in Thätigkeit.

Art. 111. Für ben Fall eines Krieges oder Aufruhrs können bei

dringender Gefahr für die öffentliche Sicherheit die Artikel 5. 6. 7. 27. 28. 29. 30. und 34. der Verfassungs-Urkunde zeit- und distriktsweise ausser Kraft gesetzt werden. Das Nähere bestimmt das Gesetz.

Uebergangsbestimmungen.

Art. 112. Bis zum Erlass des im Artikel 26. vorgesehenen Gesetzes bewendet es hinsichtlich des Schul-und Unterrichtswesens bei den jetzt geltenden gesetzlichen Bestimmungen.

Art. 113. Vor der erfolgten Revision des Strafrechts wird über Vergehen, welche durch Wort, Schrift, Druck oder bildliche Darstellung begangen werden, ein besonderes Gesetz ergehen.

Art. 114. Vacat.

Art. 115. Bis zum Erlasse des im Artikel 72. vorgesehenen Wahlgesetzes bleibt die Verordnung vom 30., Mai 1849., die Wahl der Abgeordneten zur Zweiten Kammer betreffend, in Kraft.

Art. 116. Die noch bestehenden beiden obersten Gerichtshöfe sollen zu einem Einzigen vereinigt werden. Die Organisation erfolgt durch ein besonderes Gesetz.

Art. 117. Auf die Ansprüche der vor Verkündigung der Verfassungs-Urkunde etatsmässig angestellten Staatsbeamten soll im Staatsdienergesetz besondere Rücksicht genommen werden.

Art. 118. Sollten durch die für den Deutschen Bundesstaat auf Grund des Entwurfs vom 26. Mai 1849. festzustellende Verfassung Abänderungen der gegenwärtigen Verfassung nöthig werden, so wird der König dieselben anordnen und diese Anordnungen den Kammern bei ihrer nächsten Versammlung mittheilen.

Die Kammern werden dann Beschluss darüber fassen, ob die vorläufig angeordneten Abänderungen mit der Verfassung des Deutschen Bundesstaats in Uebereinstimmung stehen.

Art. 119. Das im Artikel 54. erwähnte eidliche Gelöbniss des Königs, so wie die vorgeschriebene Vereidigung der beiden Kammern und aller Staatsbeamten, erfolgen sogleich nach der auf dem Wege der Gesetzgebung vollendeten gegenwärtigen Revision dieser Verfassung. (Art. 62. und 108.).

Urkundlich unter Unserer Höchsteigenhändigen Unterschrift und beigedrucktem Königlichen Insiegel.

Gegeben Charlottenburg, den 31. Januar 1850.

(L. S.) Friedrich Wilhelm.

Graf von Brandenburg. von Ladenberg. von Manteuffel. von Strotha. von der Heydt. von Rabe. Simons. von Schleinitz.

APPENDIX IV.

LOIS CONSTITUTIONNELLES.

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Loi Relative a L'Organisation des Pouvoirs Publics.

25–28 février 1875.

Art. 1. Le pouvoir législatif s'exerce par deux Assemblées: la Chambre des députés et le Sénat.

La Chambre des députés est nommée par le suffrage universel, dans les conditions déterminées par la loi électorale.

La composition, le mode de nomination et les attributions du Sénat seront réglés par une loi spéciale.

Art. 2. Le Président de la République est élu à la majorité absolue des suffrages par le Sénat et par la Chambre des députés réunis en Assemblée nationale.

Il est nommé pour sept ans. Il est rééligible.

Art. 3. Le Président de la République a l'initiative des lois, concurremment avec les membres des deux Chambres. Il promulgue les lois lorsqu'elles ont été votées par les deux Chambres; il en surveille et en assure l'exécution.

Il a le droit de faire grâce; les amnisties ne peuvent être accordées que par une loi.

Il dispose de la force armée.

Il nomme à tous les emplois civils et militaires.

Il préside aux solennités nationales; les envoyés et les ambassadeurs des puissances étrangères sont accrédités auprès de lui.

Chacun des actes du Président de la République doit être contresigné par un ministre.

Art. 4. Au fur et à mesure des vacances qui se produiront à partir de la promulgation de la présente loi, le Président de la République nomme, en conseil des ministres, les conseillers d'Etat en service ordinaire.

Art. 5. Le Président de la République peut, sur l'avis conforme du Sénat, dissoudre la Chambre des députés avant l'expiration légale de son mandat.

En ce cas, les colléges électoraux sont reunis pour de nouvelles élections dans le délai de deux mois, et la Chambre dans les dix jours qui suivront la clôture des operations électorales.[1]

Art. 6. Les ministres sont solidairement responsables devant les Chambres de la politique générale du gouvernement, et individuellement de leurs actes personnels.

Le Président de la République n'est responsable que dans le cas de haute trahison.

Art. 7. En cas de vacance par décès ou pour toute autre cause, les deux chambres réunies procèdent immédiatement à l'élection d'un nouveau Président.

Dans l'intervalle, le conseil des ministres est investi du pouvoir exécutif.

Art. 8. Les Chambres auront le droit, par délibérations séparées, prises dans chacune à la majorité absolue des voix, soit spontanément, soit sur la demande du Président de la République, de déclarer qu'il y a lieu de reviser les lois constitutionnelles.

Après que chacune des deux Chambres aura pris cette résolution, elles se réuniront en Assemblée nationale pour procéder à la révision.

Les délibérations portant révision des lois constitutionnelles, en tout en partie, devront êtres prises à la majorité absolue des membres composant l'Assemblée nationale.

La form républicaine du Gouvernement ne peut faire l'objet d'une proposition de revision.[2]

Les membres des familles ayant régné sur la France sont inéligible à la Présidence de la République.[3]

Loi Relative a L'Organization du Sénat.

24–28 février, 1875.

Arts. 1–7 abrogés.

Art. 8. Le Sénat a, concurremment avec la Chambre des députés, l'initiative et la confection des lois. Toutefois, les lois de finances doivent être, en premier lieu, présentées à la Chambre des députés et votées par elle.

Art. 9. Le Sénat peut être constitué en cour de justice pour juger, soit le Président de la République, soit les ministres, et pour connaître des attentats commis contre la sûreté de l'Etat.

[1] Loi constitutionnelle des 13–14 août 1884, art. 1.
[2] *Ibid.* art. 2. [3] *Ibid.* art. 2.

LOI CONSTITUTIONNELLE SUR LES RAPPORTS DES POUVOIRS PUBLICS.

16–18 juillet 1875.

Art. 1. Le Sénat et la Chambre des députés se réunissent chaque année le second mardi de janvier, à moins d'une convocation antérieure faite par le Président de la République.

Les deux Chambres doivent être réunies en session cinq mois au moins chaque année. La session de l'une commence et finit en même temps que celle de l'autre.

Art. 2. Le Président de la République prononce la clôture de la session. Il a le droit de convoquer extraordinairement les Chambres. Il devra les convoquer si la demande en est faite, dans l'intervalle des sessions, par la majorité absolue des membres composant chaque Chambre.

Le Président peut ajourner les Chambres. Toutefois, l'ajournement ne peut excéder le terme d'un mois ni avoir lieu plus de deux fois dans la même session.

Art. 3. Un mois au moins avant le terme légal des pouvoirs du Président de la République, les Chambres devront être réunies en Assemblée nationale pour procéder à l'élection du nouveau Président.

A défaut de convocation, cette réunion aurait lieu de plein droit le quinzième jour avant l'expiration de ces pouvoirs.

En cas de décès ou de démission du Président de la République, les deux Chambres se réunissent immédiatement et de plein droit.

Dans le cas où, par application de l'article 5 de la loi du 25 février, 1875, la Chambre des députés se trouverait dissoute au moment où la Présidence de la République deviendrait vacante, les colléges électoraux seraient aussitôt convoqués, et le Sénat se réunirait de plein droit.

Art. 4. Toute assemblée de l'une des deux Chambres qui serait tenue hors du temps de la session commune est illicite et nulle de plein droit, sauf le cas prévu par l'article précédent et celui où le Sénat est réuni comme Cour de justice ; et, dans ce dernier cas, il ne peut exercer que des fonctions judiciaires.

Art. 5. Les séances du Sénat et celles de la Chambre des députés sont publiques.

Néanmoins, chaque Chambre peut se former en comité secret, sur la demande d'un certain nombre de ses membres, fixé par le règlement.

Elle décide ensuite, à la majorité absolue, si la séance doit être reprise en public sur le même sujet.

Art. 6. Le Président de la République communique avec les Chambres par des messages qui sont lus à la tribune par un ministre.

Les ministres ont leur entrée dans les deux Chambres et doivent être entendus quand ils le demandent. Ils peuvent se faire assister par des commissaires désignés, pour la discussion d'un projet de loi déterminé, par décret du Président de la République.

Art. 7. Le Président de la République promulgue les lois dans le mois qui suit la transmission au gouvernement de la loi définitivement adoptée. Il doit promulguer dans les trois jours les lois dont la promulgation, par un vote exprès dans l'une et l'autre Chambre, aura été déclarée urgente.

Dans le délai fixé pour la promulgation, le Président de la République peut, par un message motivé, demander aux deux Chambres une nouvelle délibération qui ne peut être refusée.

Art. 8. Le Président de la République négocie et ratifie les traités. Il en donne connaissance aux Chambres aussitôt que l'intérêt et la sûreté de l'Etat le permettent.

Les traités de paix, de commerce, les traités qui engagent les finances de l'Etat, ceux qui sont relatifs à l'état des personnes et au droit de propriété des Français à l'étranger, ne sont définitifs qu'après avoir été votés par les deux Chambres. Nulle cession, nul échange, nulle adjonction de territoire, ne peut avoir lieu qu'en vertu d'une loi.

Art. 9. Le Président de la République ne peut déclarer la guerre sans l'assentiment préalable des deux Chambres.

Art. 10. Chacune des Chambres est juge de l'éligibilité de ses membres et de la régularité de leur élection ; elle peut seule recevoir leur démission.

Art. 11. Le bureau de chacune des deux Chambres est élu chaque année pour la durée de la session et pour toute session extraordinaire qui aurait lieu avant la session ordinaire de l'année suivante.

Lorsque les deux Chambres se réunissent en Assemblée nationale, leur bureau se compose des président, vice-présidents et secrétaires du Sénat.

Art. 12. Le Président de la République ne peut être mis en accusation que par la Chambre des députés et ne peut être jugé que par le Sénat.

Les ministres peuvent être mis en accusation par la Chambre des députés pour crimes commis dans l'exercice de leurs fonctions. En ce cas, il sont jugés par le Sénat.

Le Sénat peut être constitué en cour de justice par un décret du Président de la République, rendu en conseil des ministres, pour juger toute personne prévenue d'attentat commis contre la sûreté de l'Etat.

Si l'instruction est commencée par la justice ordinaire, le décret de convocation du Sénat peut être rendu jusqu'à l'arrêt de renvoi.

Une loi déterminera le mode de procéder pour l'accusation, l'instruction et le jugement.

Art. 13. Aucun membre de l'une ou de l'autre Chambre ne peut être poursuivi ou recherché à l'occasion des opinions ou votes émis par lui dans l'exercice de ses fonctions.

Art. 14. Aucun membre de l'une ou de l'autre Chambre ne peut, pendant la durée de la session, être poursuivi ou arrêté en matière criminelle ou correctionnelle qu'avec l'autorisation de la Chambre dont il fait partie, sauf le cas de flagrant délit.

La détention ou la poursuite d'un membre de l'une ou de l'autre Chambre est suspendue pendant la session, et pour toute sa durée si la Chambre le requiert.