N.Y. Constitutional Changes, Li[illegible], [illegible].

REFLECTIONS

ON THE

CHANGES WHICH MAY SEEM NECESSARY

IN THE

PRESENT CONSTITUTION

OF THE

STATE OF NEW YORK,

ELICITED AND PUBLISHED BY THE NEW YORK UNION LEAGUE CLUB.

By FRANCIS LIEBER LL.D.,

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NEW YORK, MAY, 1867.

LETTER OF JOHN JAY, ESQ., PRESIDENT OF THE UNION LEAGUE CLUB, TO DR. FRANCIS LIEBER.

UNION SQUARE, NEW YORK,
May 16th, 1867.

DEAR SIR: I have the honor to advise you that the Club, at its monthly meeting on May 9th, after a deliberate discussion, unanimously adopted the following preamble and resolution:

"In view of the early meeting of the Convention for the formation of a new Constitution of the State, it is deemed advisable to obtain all the light which study and experience afford upon this important subject; and believing that the distinguished ability of Dr. Francis Lieber, and his erudition in all matters connected with public law, qualify him especially to speak on the subject: Therefore, be it

Resolved, That Dr. Francis Lieber be requested to write his views on the subject as to the principal points to be looked to in the formation of the new Constitution, and that the Publication Committee of the Club be instructed to print the same and send a copy to each member of the Convention, the governor and judges of the State, and the members of the Legislature; also, to circulate it generally."

"An extract from the minutes.

"Attest:

"CHARLES S. WEYMAN,
"*Resident Secretary.*"

In communicating this action of the Club, embodying so high a tribute to your eminence as a publicist, and which, I trust, will secure to the approaching Convention the benefit of your valuable suggestions, I beg to add that the Publication Committee will be requested immediately to advise with you upon the subject with which they are charged by the resolution.

I am, dear sir,
With great respect,
Faithfully yours,
JOHN JAY,
President, &c.

TO FRANCIS LIEBER, LL.D.,
New York.

NEW YORK, 19*th May*, 1867.

DEAR SIR: The resolution of our association which you have communicated to me in terms of great kindness, lays on me the performance of a work as highly honorable as it is grave, and which it would be bold in me to undertake, were it not that the call of so distinguished a society, and for so solemn a purpose, assumes almost the character of a behest. It would be more than ungracious were I to decline.

The formation or revision of a constitution is as noble a task as the erection of those great cathedrals, toward the rearing of which it was the habit of calling on every one to contribute his share of work or means, however humble it might be; and in obedience to your call I shall cheerfully offer my contribution to the building up of our constitution; or at least I shall "write my views as to the principal points to be looked to in the formation of a new constitution," to use the words of the resolution which you have communicated to me, distinctly understanding that the Club, in publishing my views, makes itself in no way answerable for them, but gives them as the opinions of a fellow-citizen on subjects of great public interest. Demosthenes, in one of his great speeches, mentions the daily and hourly repeated Athenian question, "And what's the news?" Let me consider the call of our Club like the frequent American question, "What do you think about this matter?"—put more solemnly, more singling out, indeed, but still addressed by friends to a friend.

I beg you, dear sir, to convey my sincere thanks to the Club, and to assure our fellow-members that, however unsuccessful I may be, or however my convictions may occasionally differ from the views of some of them, I shall write down what they have asked for, conscious of the weighty importance attached to the topic, and that not a line will be written either from the love of some theory, or in the temper of a partisan, or in the pliable spirit of a courtier to his sovereign, although the sovereign with us be called the people.

Accept for yourself the assurance of my highest esteem, and believe me, Dear sir,

Very truly yours,

FRANCIS LIEBER.

To JOHN JAY, Esq,
President of Union League Club,
New York.

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CONSTITUTION OF NEW YORK.

THE New York State Constitution, of the year 1846, is one of the longest constitutions in existence, and in more than one case passes over from the character of a Constitution and Form of Government, as the universally adopted style used to be, into that of a code of laws. It is difficult even for wise men to avoid, in a constitution, principles and outlines so general, that they lose their practical efficiency, on the one hand, and to escape, on the other hand, details and individual directions with which men, in love with some novel theory, or a theory to them novel, constrain future generations and impede the essential progress of their community. A study of all American State constitutions shows in a striking manner the last-mentioned evil; and a careful perusal of the successive constitutions, as they have followed one another in the different States, exhibits the increasing evil of individual sapiency forcing favorite details of special legislation into the fundamental laws of the States. A written or enacted constitution ought to be like a chart of dykes, protecting the land against the inroads of the element ever ready for mischief and destruction; but it ought not to attempt prescribing the culture of the protected land within. The Constitution of the United States has avoided the difficulty of keeping the mean between useless generalities and embarrassing details, probably, better than any existing enacted constitution, certainly better than any other American fundamental law known to me.

The best military authorities tell us that the orders issued by Napoleon before great battles, in the period of his bril-

liant successes, were characterized by this feature, that the general plan was marked with precision and genius, while, within these lines, sufficient freedom of action was left to his carefully selected commanders, so as to give free play to them for the many emergencies of the battle. Something similar ought to be observed regarding enacted constitutions. The community gains nothing when the framers of a fundamental law go beyond the limits of a constitution and plan of government, and substitute the character of a code of laws for it. The more the latter is done, the more frequent revising conventions become, until they actually change into what might be called periodical super-parliaments.

The approaching Convention, it is to be hoped, will direct its attention to this point of simplification, and to those portions of the existing State constitution which contain embarrassing details; but it seems that the Union League Club, when it honored me with a call for my views on the revision of the constitution, did not ask for a detailed review of the State instrument, but simply for my opinion on some of the main points connected with this great topic. These I am now going to give, repeating, however, that they are simply given as the writer's own, without any responsibility on the part of the association, and that, indeed, I would not have felt induced to give these views on any other condition. They go forth and will be taken for what they are worth.

Laws ought to be certain, both as to meaning and application; trials ought to be speedy; judges ought to be independent; punitary laws ought to be mild, but undoubted in their execution. These are elementary truths now universally admitted by the publicists and political philosophers of our race, and of special importance to a people who acknowledge no other master than their Self-Made Law. Yet every one of these truths is more or less seriously disregarded and counteracted in our present polity.

PARDON.

The present Constitution of New York gives to the Governor the unrestricted privilege of pardoning persons* who have been convicted, in the due and laborious course of law, of an offence against the laws. The Governor can wholly or partially remit the punishment which, by regular sentence, has been decreed to be inflicted on a convict, without being responsible to any person or body of men for so doing. The pardoning power is thus an arbitrary power, and, indeed, the only real vetoing power in our modern law-polities, in the sense of the ancient Roman veto of the tribune, although the term vetoing has been universally but wrongly applied to another act of the Executive. Veto, in the Roman sense, meant the entire or partial voiding and nullifying of a *law*, or a special execution of a law, for reasons judged sufficient by the tribune, and this is precisely what the pardon granted by the chief magistrate effects with us. It is an element of arbitrariness and absolutism in the midst of a system which pretends to eschew all arbitrariness, and proclaims to be founded, as far as it is possible for men to do, on law and justice alone, because it aims, above all, at Liberty, and liberty must rest on law and justice.

There is no inherent reason why the pardoning power should belong to the Executive. It has come to us traditionally from the monarchies in which very naturally the crown acquired by usage the privilege of pardoning, for the monarch is acknowledged as the "source of honor and of mercy," even in those kingdoms in which he is not supposed to unite within himself the judge, the legislator, the commander of the forces, and the executor of all laws. Without

* The subject of pardon, and most of the main topics touched upon in these pages, have been treated at much greater length, though not always from the same point of view, in several of my works, especially in my Civil Liberty and Self-Government, but it will be understood that I could not continually refer, in the course of such a writing as the present, to that or, indeed, to any other book. Thus, there is in the Appendix to the Civil Liberty a somewhat elaborate paper on Pardon; but I ask permission now to refer to the work, once for all, and shall not recur to it.

this tradition, no political philosopher would have assigned the pardoning power to the Executive, and there are many and urgent reasons why it should either be taken from the Executive, or at least should be greatly modified.

Although the prince has the sole right of pardoning (in all but very exceptional cases), yet this power is practically modified in modern times. Applications for pardon go through a minister of the crown, frequently called Minister of Justice and Grace; but, with us, the chief magistrates of the States are so accessible to every applicant that it becomes difficult, and for some individuals impossible, to resist the pressure of influence and importune applications, wholly unconnected though they generally are with any comparative innocence in the convict for whom a pardon is sought. That which is revolting to all administration of justice naturally happens—the convict connected with influential people stands a much better chance of getting pardoned, without any resort to bribery, than an obscure and friendless prisoner. There are now from five to six applications for pardon daily presented to our chief magistrate; indeed, nearly every convict, now-a-days, tries to obtain a pardon, which is not surprising considering the frivolous ease with which our people sign petitions of any sort, frequently for no better reason than to get rid of the importune agent of the petitioner.

It has long been shown by repeated statistics, that a convict sentenced to ten years' imprisonment or more, or for life, stands a better chance than a criminal who has been sentenced to three years' imprisonment; because the former is very likely to be pardoned after about four years, while the latter is allowed to serve out his term, as convicts express it.

All persons who have made the science of punishment an especial subject of their study—all wardens and superintendents of penitentiaries, as far as my inquiry has gone, agree in this, that in those penitentiary systems in which Reform is made an object together with Punishment, no reform can be looked for so long as the convict occupies his mind with hopes of a pardon or with schemes how to obtain it. Reform requires first of all a resolute resignation to the

assigned punishment; it may be followed by an acknowledgment of its justice, after which real and a penetrative reform may take place. Pardon rarely elicits a feeling of gratefulness in the pardoned person which might temper the feeling of hostility toward the non-penal world of which the criminal population is universally possessed.

The reckless pardoning, as it must be called, has wrought another most serious injury in many portions of our country; it has degraded the woman, by being extended to her almost as a matter of course, even in cases of the most heinous crimes, simply on the ground that she is a woman, thus proceeding for a sexual reason in a case of moral character. The woman is in this manner treated as too weak to expect strict moral responsibility from her, and we are consequently justified in saying that she is degraded. Her moral character is so far effaced.

From whatever point of view we may look at the unrestricted privilege of pardoning and its operation, it is inconsistent with our polity; it unsettles the law, and even administration of justice; it encourages crime by increasing impunity, and helps to efface that moral character of the community, without which no Freedom, which we so highly prize, can endure. It is illogical and mischievous.

About a year ago, the New York Prison Association addressed a number of questions, in a Circular Letter to Former Chief Magistrates of the Different States, on the subject of Pardoning. It was not considered delicate to address governors in power, on a privilege which, at the time, they were exercising. The following are the questions then propounded, with the exception of the last one, as irrelevant here:

I.—"When you were Governor of the State of
and possessed the privilege of pardon, did you consider it a desirable attribute of the Executive Power, or, on the contrary, a burden, and generally a painful moral responsibility? Do you think this *unlimited* authority of pardoning necessary in our political system; or is it, on the contrary, in your opinion, repugnant to our theory of government, which discountenances irresponsible and arbitrary power? Has the

privilege of pardon, as it now exists, grown out of the polity, peculiarly our own, or does it exist because we found it when our own governments were established?

II.—"Is it, in your opinion, possible that, easily accessible as our Chief Magistrates necessarily are, the privilege of pardoning can be guarded against frequent abuse and serious mistakes? Does, or does not, the privilege of pardoning, as it now exists, lead, in many cases, to results wholly unconnected with the degree of guilt or the comparative innocence of the convicts, and does not the obtaining of a pardon very frequently depend upon the influence which can be brought to bear on the petition for the pardon, rather than on the merits of the case itself?

III.—"Is it your conviction that the power of pardoning, as it now exists, leads more frequently to a defeat of the ends of justice, than to the furtherance of a wise and even-handed administration of the same?

IV.—"Do you, or do you not, think that a recommendation for pardon by the Jury, who pronounce the culprit guilty, ought to be excluded as incompatible with that verdict, and that the recommendation to a merciful consideration should be restricted to the Judge or Judges who tried the case?

V.—"Is it your opinion that the ends of justice and the real interest of the convicts themselves would be better promoted, if the power of pardoning in the Executive were modified and circumscribed by a wisely organized Council or Board of Pardon, as is the case in some States in this country and in some European governments; or do you regard the power of pardoning as an inherent, absolute, and essential attribute of the Executive, so that it ought to continue in the same form in which it now exists in nearly all the States?

VI.—"If you think that there should be a Council, or Board of Pardon, is it your opinion that, whenever State Constitutions are changed, authority ought to be conferred upon the Legislature to establish such Council or Board?

VII.—"Is there, in your opinion, any other mode, besides

that indicated in Questions V. and VI., whereby the power of pardon can be properly limited or regulated?"

All the answers received from the different ex-governors, with one partial exception, if I remember aright, were in that spirit in which the reader will readily perceive that the questions were drawn up.

But is the privilege of pardon necessary at all? A most distinguished philosopher has actually maintained that laws should be very mild and the pardoning power abolished; but no matter how light soever laws may be, those cases cannot be avoided by any human code, in which a plain and strict *application* of the law—and the law ought to be applied strictly and plainly—militates with essential and intrinsic justice.

The pardoning power ought to exist somewhere, and it ought to be wisely circumscribed and organized. No better way of moderating the pardoning power in republics has been discovered, in America as well as in Europe (for instance in the republic of Geneva), than the establishment of a Board of Pardon, which acts in conjunction with the executive power. In our State it would probably be found the best to establish, by law, a Board of say five members, one or two of them to be judges, without the written report of which Board to the governor, no pardon should be permitted, or whose consent, after full investigation of the case, should be necessary for the validity of the governor's pardon. The members of the Board of Pardon should be appointed for a distinct number of years, by the governor with the consent of the Senate, and not be elected for a short time, as, for instance, the prison inspector now is—a mode of appointment which has proved injurious to the penitentiary system in our State, and to the essential interests of the community.

If the convention should fear going into details, it may be possible that the end we have in view may be obtained by adding in the new Constitution, granting the pardoning privilege to the Executive, these words: *modified and circumscribed as the Legislature may direct by law.* 1.

This may possibly suffice, but thus much, at least, is urgently called for, if we mean to be a commonwealth of law

and principle, and not to surrender it to arbitrary views and subjective whim.

RECUPERATION OF THE FULL CIVIL AND POLITICAL STATUS.

Another subject of great injustice connected with the irregular and unrighteous use of the pardoning power, is the fact that as the law now stands, a convict sentenced for the most nefarious crimes, but pardoned, re-enters into the possession of all his political rights, voting and all, while his fellow-convict, sentenced for a less crime to a shorter imprisonment, and, because sentenced to a shorter time, remaining unpardoned to the end of his sentence, loses certain political rights in consequence of having been punished for an infamous crime. The theory undoubtedly is, that the Executive pardons because he has found that there was good reason for arresting the full course of the law, but whatever the theory may be, the fact is as it is daily shown, a crying injustice, and

2. *the Constitution ought to establish that no pardon induces perfect recuperation of political or civil rights, unless the pardon mentions this fact according to the law which the Legislature may establish;* that is to say, the reinstating in the full political or civil status must be subject to the same restriction or modification to which the pardon in general shall be subject.

REHABILITATION.

At all times, our present ones not excepted, it has happened that persons have been condemned for crimes, of which it was proved at a later time that they were wholly innocent. If the victim is still alive, there is no other means of restoring him to the status of which he ought never to have been deprived, than *pardoning* him. The English and American law does not know the idea of Rehabilitation. But in a case such as has been mentioned, it is the community, or its administration of justice, which ought to crave the pardon of the innocent convict—not, indeed, the convict the pardon of the Executive, or of any person or body of persons. Public acknowledgment of the grievous error, and compensation, as

far as it is possible (which is never very far), ought then to take place, either to the living victim, or to the memory and surviving family if he is no longer living, or has actually died by execution. It is nothing short of barbarous helplessness when a political community does not know how to escape a difficulty but by a process in which there is no reason—not even verbal logic. We have done grievous wrong to a fellow-citizen, therefore we issue a writ of pardon for the offences which we nevertheless confess he has never committed! *It is necessary, therefore, that the idea of Rehabilitation be introduced into our law; and it seems that this can be done effectually* 3 *and beyond cavil, only by a proper provision in the Constitution, while the Board of Pardon would be, probably, the most convenient body to act—not as a court of appeal, but as a Board of Revision, with the power to authorize the Governor to issue—not a pardon, but a proclamation of rehabilitation and compensation, together with one of regret on the part of the community.*

Every reader to whose mind is present the case of the English lawyer who, in 1844, was sentenced to transportation for life, for forgery, and who, some two or three years ago, was *pardoned* because it was made patent that a most grievous wrong had been perpetrated against him—every such reader will agree that this subject of honorable Rehabilitation is neither subtle nor practically useless, but that it is, on the contrary, a subject of plain and palpable political truth, practical candor, and indispensable justice.

SUSPENSION OF SENTENCE.

A subject not wholly unconnected with that of Pardon, and directly opposite to the one just reflected upon, is that of Suspending Sentence.

In England, as well as here, the usage has crept into the courts of justice of suspending the sentence; that is to say, when in a penal trial, after a laborious and costly process, the indicted person has at length been found guilty, and the judge acknowledges the verdict—not setting it aside—he nevertheless undertakes to suspend sentence, sometimes for one reason, sometimes for another. At times the judge couples a certain condition with this suspension, thus creat-

ing, in fact, a new sentence. In a noted case, a highly reputed judge, in a neighboring State, suspended sentence provided the person found guilty would leave the State! Once the sentence suspended, it is hardly ever, if indeed, in this country, ever executed. There are persons in our community against whom successively several verdicts of guilty were found, and over whom a corresponding number of suspended sentences hover, none of which will ever be executed. How is it morally possible that a person should be brought back into court and receive sentence, after having been roaming about for a year with the placard of "guilty" pinned to him?

The very first paragraph of the declaration of rights, contained in the English Bill of Rights, is to the effect "that the pretended power of suspending laws or the execution of laws by regal authority, without consent of Parliament, is illegal," and we allow a judge "the suspending of laws, or the execution of laws;" for, to this the suspension of sentence, and defeat of the result of a legal trial, obviously amounts.

In the city of New York, this abuse of judicial power, against all correct idea of a true administration of justice, has become quite common, and, it is believed, far more common than anywhere in America or England; while in no other countries judges have been allowed to arrogate this power. It is not known to me, despite of some research, how early this assumption of discretionary power in the judge took place in England, nor have I been able to ascertain when it became habitual in certain localities in the United States; but the evil does exist, and a most serious evil it is. It increases the already alarming impunity with which crime may be committed; it helps to unsettle the administration of justice and the public sense of justice; it is an uncalled-for and unwarranted power in the judge; it is unnecessary, for we have the pardoning power; it introduces an additional element of arbitrariness, where no arbitrary power ought to have a place. The judge, instead of assuming this power, might declare that he means to ask the Board of Pardon, or the Executive, for a favorable consideration of the case. The

jury, on the contrary, ought never to make any recommendation against its own verdict, as is now very frequently done.

The abuse exists, and it is very doubtful whether a mere law abolishing it would be proof against all subterfuges of our cavilling generation. It is suggested, *therefore, to extinguish this serious inconsistency by a provision in the new Constitution, and to oblige every court to pronounce sentence within the term in which the respective case has been tried.* 4

THE INDEPENDENCE OF THE JUDICIARY.

The principle embodied in the Habeas Corpus Act of 1679, and transplanted into the Constitution of the United States as the Privilege of the Writ of Habeas Corpus, on the one hand, and the Independence of the Judiciary on the other, are two of the greatest acquisitions, we might almost say, of the greatest conquests in the progress of civilization, and two of the greatest guarantees of personal security and civil liberty ever devised by man.

By Independence of the Judiciary is meant the well sustained impartial position of the judge between the two parties (which our trial in courts of law assigns to him), and the freedom of the judge from any influence, direct or indirect, of the Executive, the power-holder, the Sovereign, be he one person, or may he consist of many or of all. It requires a variety of means to obtain this important end.

After the English had severely suffered from the dependence of the judges upon the crown when it was worn by the Stuarts—those "Stuart judges" whom Lord Campbell, himself Chief-Justice of England, calls ruffians in ermine—and when the great Bill of Rights of 1688 had settled many constitutional points of elementary importance, it was added, by the Act of Settlement of 1700, completing the Bill of Rights: "That after the said limitation shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries, ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them." At a later period, by the first act under George III, it was estab-

lished that the death of the monarch should not void a judge's commission, as had been the case theretofore, and thus the independence of the English judge and the independent tenure of the office were firmly established and completed.

The principle that judges shall hold their office during good behavior was incorporated in the constitutions which were adopted by New York, Massachusetts and some other States, after the Declaration of Independence and before the adoption of the Constitution of the United States. The Constitution of New York (adopted in 1777) ordains "that the chancellor, the judges of the Supreme Court, and the first judge of the county court in every county, hold their offices during good behavior, or until they shall have respectively obtained the age of sixty years."

The first Constitution of Massachusetts, of 1780, and chiefly indicted by John Adams, contains as "Part I.," "a declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts," consisting of thirty articles, of which the twenty-ninth reads thus :

"It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent, as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries, ascertained and established by standing laws." *

Sounder and more direct language cannot be used by man, and that sterling patriot and hero of independence,

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* All these early constitutions, together with the Declaration of Independence, the Articles of Confederation between the said States, the treaties between France and the United States of America, were published by a resolution of December 29, 1780, of the Continental Congress, in "two hundred correct copies," "to be bound in boards."

to whose warm love of liberty we owe in a great measure our Revolution, as much as great events can be owed to individuals—that bold man in the vigorous age of forty and some years—placed the immovability of the judge and his tenure of office during good behavior in the very Bill of Rights of his commonwealth. Let us remember this fact. Civil liberty is never promoted by merely increasing the power of the power-holder, and it is always undermined by increasing absolutism, most especially so by democratic absolutism.

The general mode of appointment of judges used to be by the governor, with the consent of the senate, and during good behavior. In many States the Legislature elected the judges by joint ballot. This was the mode adopted in South Carolina, and at one period in our own State. The Governor had nothing to do with the election. To this election by the legislature, the State of Georgia added the tenure of office for a short period of years. The judges, it was observed, at once lost in character. At length our State adopted, in the present Constitution, the short term of office of Georgia, and substituted popular election for election by the legislature as in Georgia. Thenceforward the change swept over the country until the convention of Massachutts, in 1853, refused to approve the proposed amendment of judges appointed by popular election for a limited time. She was the first State whose convention made a stand against this innovation.

In no case, I believe, did this change proceed from dissatisfaction with the merits of the old system. Complaints were uttered nowhere, except, indeed, the dissatisfaction that judges who belonged to an opposite party, before they were appointed, should occupy their places on the bench forever, thus withholding a chance of appointing a fellow-partisan in their stead. But one of the very objects to be obtained by appointment during good behavior, is the divesting of the judge of party or executive influence, and it used to be invariably observed, when the old system obtained, that in placing a citizen on the bench as judge for life, the grave responsibility was so distinctly felt by the incumbent, that no dependence on party or any other power could be looked for.

The greatest judges of America have graced the bench

under the former order of things; but it is inherent in frail human nature, that he who has power wants more. The greed of power is in every one of us, no matter whether that one be called a king, or the many be called the people. The change of name does not change the character of the individuals. We, as people, are as greedy for power, as he who wields it alone, and judges independent of the influence of the sovereign have appeared as disagreeble to the American sovereign, as they were offensive to a Louis the Fourteenth. Self-limitation is wonderfully rare.

There prevailed likewise the error that people sought for the essence of liberty in universal electiveness, and unchecked absolute electors, so that universal suffrage exist. Liberty, however, consists in no absolutism or despotism, be it democratic or monarchical, and election should by no means extend to every office or occupation. Our legislators ought to be elected; our governor ought to be elected; but who would trust himself to a pilot or a physician elected for him by the community in which he lives? or to an elective watchmaker, or who would wish his cook to be elected for him?

If liberty required judges dependent on the sovereign people, then consistent reasoning would lead us to the conclusion that the highest liberty exists where there are no officers at all set apart as judges, but where the people themselves, or a crowd of them assembled in the market, are the judges. A more deplorable administration of justice, however, than that of the people of Athens, assembled in the agora, cannot well be imagined, for a community which aims at liberty. An eminent Frenchman—now banished from France, because too "liberal"—proclaimed in a sort of manifesto issued from his exile, that Liberty consists in Equality, and Equality demands the abolition of Two Houses and of immovable judges. *We* consider the representative system necessary for Liberty in national polities, and the one-house system a grievous error; while we believe an independent judiciary an indispensable element of enduring freedom.

The independent position of the judge is more important in republics—and especially in republics founded on universal suffrage—than in monarchies; for, to resist a monarch im-

parts dignity to a man; there is something heroic in opposition, but opposing the influence of the people, however mistaken they may be, requires far greater courage, for he who does it is easily stamped with contempt, as an enemy to the people, while those who are opposed present no responsibility. Who can bring the people to an account?

It is not because judges are, forsooth, worse than other people, but it is simply because they are human beings like every one of us, that they must necessarily become subject to the sovereign, who stands high above the executive, when they desire re-election or wish to remain on good terms with the Prince, as Machiavelli calls the sovereign of a State, whether the sovereign power be in one or in the community. That Prince has always his courtiers. It has ever been considered highly despotic when kings have taken the administration of justice into their own hands, and not allowed their own courts of law to decide between them and the subjects; and in a somewhat similar manner is it incumbent upon the popular sovereign to erect an independent judiciary between themselves and single citizens, as well as between citizen and citizen.

Candor will oblige every reflecting citizen to confess that, speaking now of our whole country, the elective appointment and short duration of office has not improved our judicial system in any way, nor is it, probably, the people at large who care much for it—certainly not where they fully understand it. It is rather Impatience which leads to the support of the present system—impatience of a portion of the profession at the little chance there would be to obtain a seat on the bench under the old system, and occasional impatience at judges who may stand in the way of certain favorite ideas. We recollect very clearly how the Washington journal, which was considered the "official paper" under President Jackson, vehemently advocated the abolition of the "good behavior" principle in the Supreme Court, because this tribunal would not render opinions agreeing in spirit with the party then dominant. We are sometimes told that in a certain place the elective principle has worked well, and then a good judge is pointed out to us who has been elected three times in succession,

because his party is in an overwhelming majority in his district; so that, as an evidence of the fair working of the principle the approach to an appointment for life or for a long tenure of the office, is pointed out. But all things in a free country must be calculated for the test of parties nearly balanced and increasing in ardor as they approach to an equality in number and in power. Where this state of things obtains in our country the elective judiciary has decidedly not recommended itself.

Every consideration, therefore—many having not been touched upon—seems *to bid us return to the well-tried*

5. *bulwark of constitutional life and existence—to the non-electiveness of the judiciary, and the appointment during good behavior, to which it would be wise to add the removal of judges by the concurrent vote of both houses of the Legislature, two-thirds of the members present concurring, and the cause of removal being entered in the journal of each house; or by a separate two-thirds vote of each house.*

In England it has been seen a judge *may* be removed upon the address of both houses of parliament, that is to say, it shall be lawful for the crown to remove a judge if the two houses have addressed the king to that effect. It is not obligatory for the crown to do so. In our far more popular governments a two-thirds vote of the legislature ought to be necessary on the one hand, and a two-thirds vote, once given, ought to be tantamount to removal, and not make it merely lawful for the executive to remove the judge, thus having drawn down upon himself the adverse opinion of so large a majority of both houses.

COURTS OF PEACE AND ARBITRATION.

There are, indeed, elective judges, if they can be fairly called judges, who, according to the testimony of statistics, as well as of great lawyers, such as Lord Brougham in the House of Lords, highly recommend themselves, and it will not be inappropriate for the Convention to consider whether the revised constitution ought not to leave it permissive for the legislature to introduce them at a future period.

In Prussia, Denmark and other countries, permanent courts of arbitration, or rather courts of peace, as they are called in the native languages, have been introduced. Their characteristic features are the following:

The whole country is divided into districts of courts of peace;

Each district elects periodically several judges of peace, so that parties may have a choice;

Each party must plead his own case, no professional lawyer being allowed;

Submission to these courts is wholly voluntary; but the contending parties must agree upon the judge whom they select, and sign a declaration that they will submit to the decision;

Civil suits, of whatever amount, and suits for small personal offences only, are admitted;

The administration of these courts in public.

The introduction of the principle of conciliation and peace, for the litigation in law courts, was attempted in France, in the first Revolution, but their justices of peace never acquired much importance, until, as we understand, within the last decennium or two. Nor will it be necessary to say that these judges and courts of peace and arbitration have anything similar with the justices of the peace in the English system of law, except in name.

The amount of property disposed of by the courts of peace, according to the officially published statistics, is stupendous; and the litigation thus prevented is, of course, proportionate. It occurs even that in great cases before the regular courts—for instance, in will cases of comprehensive magnitude and legal difficulty, portions of the case, concerning which the parties may agree, are taken out of the court, and decided by a freely selected court of peace, whose decision is taken back to the original court, thenceforth to form an element of the case, and of the ultimate decision, not wholly dissimilar to the sending of a portion of a case in chancery, before a a jury, to have facts decided, and of receiving the decision into the general case.

It appears that these courts of peace really mark a distinct progress in our civilization. They are a partial return to the origin of all administration of justice, as real progress is so often a return, not to primitive barbarity, but to an original principle; and it is well to be weighed whether the introduction of the voluntary submission to a permanent court of arbitration, with elective judges, would not be wise and expedient when every consideration of substantial liberty and thorough protection calls for the abolition of an elective judiciary of the regular law-courts. Perhaps we may go farther, and say that these courts and messengers of peace, by the side of, and along with, the law-courts, may be found peculiarly assimilative with a modern republican system, and commendable in our polity, in which a sterling and uncompromising administration of the law is made necessary by, and justly expected to exist parallel with, the highest possible individual liberty.

Be it then repeated, that a place ought to be left open in the new constitution for the possible introduction of the system of courts of peace.

NUMBER OF COURTS.

Speedy administration of justice is so universally acknowledged as a very element of justice itself, that it would be superfluous to dwell on the subject, were it not that in our State the accumulation of judicial baseness causes a very serious delay of justice. This is not owing to the courts, to the lawyers, or to the character of our trials, but to the fact that the Constitution of '46, establishes a number of judges and courts, inadequate to the increasing population and wealth, and to the consequently multiplied transactions of men. Care, therefore, ought to be taken in the revised Constitution that sufficient adaptiveness to circumstances be left, and that those fettering details be omitted which are peculiarly inexpedient for communities so rapidly changing and growing as our own. The Legislature ought to have the right to adapt the number of courts and of judges to the exi-

gencies of the times; and the conditions ought to be pointed out under which the Legislature shall be obliged to increase the number of courts or to make re-distributions of them.

APPOINTMENT OF STATE OFFICERS AND THEIR TENURE OF OFFICE.

So much for the judges; as to the appointment of the State officers, such as the canal commission, inspector of prisons, it is well to remember that the first of all requisites for an appointment to office, in a stable, regulated polity of freemen is Fitness, and this Fitness can be obtained only when Responsibility visibly and pointedly centres in the appointing power, and when sufficient time is given for the incumbent to make the experience of one year bear fruit in the next. The idea of possessing an office like an estate is abhorrent to essential Civil Liberty, but equally abhorrent is the idea of Rotation, merely for the sake of rotation. It leads to disregard of fitness and even of character; to a taking the whole government for a prey to be seized upon by him who can—a state of things worse than the treating of offices like convenient farms; to the sway of a few who without responsibility make out the ticket, all appearances of a general election to the contrary notwithstanding, and finally it leads to the withdrawal of the fittest men and those of a sterling character, from an honorable competition for honorable offices, which is one of the greatest evils that can befall a republic. The idea of rotation; the idea that no one and nothing is entitled to office, not even talent and virtue; that the more arbitrarily offices are bestowed, the clearer is shown the unrestricted power of the people, and the more absolute the power of the people the greater is their liberty—these ideas were most strictly and logically carried out in the Greek democracies; for there they appointed by the lot. Aristotle says in his Politics, that the true criterion of the Democracy (the absolute and unmitigated democracy of his time) is the Lot, and we all know what those democracies ended in, after a very short-lived existence. The testimony which

we find in history is corroborated by the unanimous condemnation of those contemporaries whose reflections have come down to us—of the philosophers, the poets, the statesmen, and the historians. A short life and a rapid downward career, when once the downward course had begun, without any recuperative power—this was the fate of all of them. Modern civilization requires longevity of political societies or nations, and recuperative powers, such as modern nations have shown them, and such as not one ancient State has exhibited.

The former almost universal mode of appointing by the Executive with the consent of the Senate, seems to be far the best; certainly no better one has yet been discovered. The last but one constitution of South Carolina, effected all appointments by election and by joint ballot of the Legislature, without any co-operation of the governor. It produced a stringent centralism without a sharply felt responsibility—a state of things by no means inviting imitation; indeed, one of the chief advantages of a Uni-Executive, now universally adopted in America, is this, that the Executive is lifted sufficiently above, or singled out from the rest of the citizens, both to feel somewhat, at least, disentangled from party meshes, and to individualize responsibility.

It would seem, then, advisable that the revised constitution *contain a provision which gives all State appointments, and those more local offices which the Legislature may point out by law, to the governor with the consent of the Senate, and which lays down the period of years for which such appointments shall hold—say, for instance, six years—unless the Legislature assigns a shorter or longer term to any specific office by a two-thirds vote.*

SUFFRAGE.

Whether for the benefit of the people or the contrary, universal suffrage has become the generally adopted principle on which our political systems are based; that is to say, the right of voting for the members of the legislatures, is freely

granted to every male citizen of age, with some exceptions however, and among these the exception based upon color is the most prominent. The constitution of 1846 gives the right of voting to every male citizen of age, excepting the man of color; but this exception again has its exceptions.

The train of reasoning in article II. of the present State constitution is this:

Every male citizen of age has a right to vote, without reference to property, education, birth, or knowledge of the language of the land. It is a right which belongs to the inherent humanity of a man of age.

Nevertheless, this humanity is defeated or invalidated by color. By whatever process this may be effected, the color incapacitates.

Yet, again, if a person of color is "seized and possessed of a freehold estate of the value of two hundred and fifty dollars over and above all debts and encumbrances charged thereon, and shall have been actually rated and paid a tax thereon," in that case he "shall be entitled to vote at such election;" so that the possession of an estate of the value of two hundred and fifty dollars, invalidates, in turn, the effect of color, which had incapacitated the person of African descent from voting. Two hundred and fifty dollars restore his full humanity, or make him white, so to say.

So glaring an inconsistency ought not to continue in our fundamental law. The psychologic principle of humanity is first adopted; it is modified by a physiologic reason; and this modification is modified again by an economic reason. Arguments taken from wholly different spheres are here strung together for sound logic, and it would appear advisable that *no property qualification being adopted in general, it ought also to be omitted with reference to persons of color*, who are here, who cannot be extinguished by law, whatever may be done in the course of time by the process of absorption; whose race was forcibly brought hither by our race, and who do not in our State constitute the least respectable portion of the population. 8.

In connection with the subject of State suffrage, it is believed that the Convention ought to consider very thoroughly whether it would not be wise and expedient to adopt the principle that no person shall have the right to vote in State elections, or shall be considered a citizen of the State, as it is generally expressed, who is not a citizen of the United States. It is a subject of the highest importance, a discussion of which would require an extent which cannot be allotted to it in a paper like the present one. It must be dismissed, therefore, with this allusion. Citizenship in America, however frequently it has been the ground of dispute, has not yet received that breadth of discussion which it deserves and demands, especially in point of State citizenship and American or United States citizenship, and with reference to the question whether there really are two citizenships in America, as many persons seem to suppose. Is it wise—is it even just to allow foreigners to vote in State elections immediately after their arrival, as is actually the case in some States? And is it right or necessary to allow them a share in the important affairs of State governments before the United States confer upon them the complete legal status? Are, then, our State affairs trifles? Strange indeed! According to the State sovereignty doctrine, the States are the only sovereigns, and the United States a mere temporary partnership, yet the citizenship of the sovereign States was thrown to almost every man, whilst the citizenship of that loose partnership was surrounded with dignity.

EXTENSION OF SUFFRAGE TO WOMEN.

The adoption of universal suffrage has led many persons to the belief and broad assertion that the right of voting is a Natural Right, and if it is a natural right, it ought, as a matter of course, to be extended to Woman; while, on the other hand, many persons seem to profess that no qualification whatever —neither residence, nor acquaintance with our polity or language, nor untarnished character, nor interest in the commonwealth—should be demanded as a requisite for the right of voting. All these are erroneous conceptions.

A natural right cannot mean anything but a right (that is, a well-founded claim) directly proceeding from the very attributes of humanity, the nature of men. The right of life, of property, or exclusive possession of what we have produced or first appropriated when it belonged to no one—as the fish in the sea; the right of communion, of locomotion, of education and self-improvement, or progress and civilization; of the Family, as the social institution prior to all states; the right of government, that is, of forming political societies to govern and be governed; the right of having laws and of association; the right of exchanging of what is our own; the right of roads for intercommunication and locomotion; the right of worshipping—all these are natural rights, because they are acknowledgments of the constituents of humanity, and claims of each on each, and ought to remain unmolested in the pursuit and development of humanity.

The natural rights are always observed, at least in their incipiency; they become always more developed and intenser as civilization advances; they are always recuperated when brutal force or ramified despotism has obscured them or beaten them down for a time; and the denial of them is always met with direct resentment, even in the lowest savage, corresponding to the developed consciousness of these primordial or natural rights.

But how can so special a right as that of voting for a representative be a natural right, when the representative government itself is something that does not spring directly from the nature of man, however natural it may be in another sense of the word—that is to say, consistent with the progress of civilization? It is the latest and the highest of all civilized governments; but where was the natural right of suffrage under the patriarchal government—in the Mosaic commonwealth, founded on a hereditary and priestly nobility; where in the Asiatic depotism—types of government necessary in their season—when nothing and nobody was voted for?

The National Polity is the normal type of modern government or of the political dispensation of our age; the great aim of our civilization is the greater and greater development,

and firmer establishment and wider extension of substantial civil liberty; and the only means of obtaining this great end, under the first-mentioned condition, is the representative system. The representative system is the only means of protecting individual liberty, and preventing democratic despotism. The right of suffrage, therefore, is a noble right, or ought to be so; but it is not a natural right. It is a political right, to which Providence has led man in the progressive course of history.

Take from a savage the fruit he has just plucked from the tree, or his child, or prevent him from talking with his friend, or incarcerate him, and you will excite his resentment on the spot; but prevent him from voting where the right to do so may have been extended to him by some wholesale theory, and no resentment will be observable. On the contrary, it is unfortunately a fact that the more you extend suffrage, on a really large scale, the less people care for it, until we discover the humiliating fact that at large elections with universal suffrage, it is no uncommon occurrence that only 45 out of a hundred qualified voters actually go to the poll; 50 and 55 per centum are common; 60 and 65 per centum shows a deep interest in the question, and 75 a passionate interest. Eighty voters out of a hundred hardly ever go to the poll, outside of large cities. Moreover, a question of law, of principle, of a constitution, of Secession itself,* never brings out as many voters as a question of personal interest. Shall A or C be inspector of the county jail? will bring more ballots to the poll than the question, Shall we adopt a proposed constitution?

If, then, the right of voting is a political, and not a natural right, it cannot be claimed for the female sex as a natural right; but it is claimed at present on several other grounds, which, I believe, may be summed up in the following way:

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* So startling a fact requires authority for its statement; I feel obliged, therefore, to deviate from the rule I laid down for myself at the beginning of my paper, and refer the reader to a paper on election statistics in the Appendix to Civil Liberty.

Withholding suffrage from the women is a degradation of the female sex.

If she cannot vote she is not represented.

Giving the right of voting to the latter would highly improve and even refine our elections, and not un-woman the woman.

Lastly: Why not? Why should they not vote like ourselves? Are they worse than we are?

Every student of civilization knows that the position which woman occupies in society is one of the gages by which we try to ascertain the civilization of that society in general. We all know that every step onward has assigned to woman some important element of civilization which, until then, was withheld from her as unfit or unnecessary for her —even education itself; nay, reading and writing not excluded. Every one knows that women are freely admitted to occupations now, which but a short time ago would have been withheld from them. It characterizes the bible very highly that the woman, in the Old Testament, occupies a far higher place than, at the time, she did in Asia generally, and that women appear as prominent personages in the origin and first spread of christianity, both at the age of Christ and during the first centuries, when the Roman matron, a noble type even in the pagan times, gave essential aid to the diffusion of that religion for which many women as well as men died the martyr's death. We all recollect what American mothers and sisters and daughters have heroically done in our last struggle for our country, and no nobler type of humanity can be conceived than a patriotic mother or wife who, with the hot tears of affection in the last embrace, still says: Go; or who goes to the hospital and gives herself up to the work of comforting and assuaging, and healing, while her husband or her father may be fighting either near or far away. We have had many, many illustrations of this patriotic type; but, happily, patriotism is not necessarily politics, and we say boldly, that those women who truly know their calling, which lies far beyond politics, do not desire the vote.

Not accepting the votes from women is as little degradation to Woman, as women are degraded in those monarchies in which no princess can ascend the throne, or, we may say indeed, as she is degraded in England, because she can there ascend the throne only when no brothers of her, even younger than herself, are left to assume the crown. It is a political law which regulates the succession, and no degradation ensues. The Roman church, which canonizes women as well as men, does not degrade the female sex by excluding it from the priesthood.

Division of Labor, as the political economists call the very foundation of our whole economy, begins with the division of the sexes, and expands forth as a physiological and psychologic division and distribution of employment, pursuit, and social relations. According to this distribution the political occupation ought not be assumed by woman.

Man and woman are made to complete one another; to become "one flesh and bone," to establish the family, whence the state arises not only in primeval times, but every day anew; the destiny of the woman is to rely, to be protected, to harmonize in society with her attractions, both physical and psychological, the jarring elements brought by men from the sterner and not unfrequently coarser pursuits of practical life; the influence of woman, in her appropriate province, and which, owing to her living far more in the world of feeling than in that of reasoning and calculation, is so direct and great, that a transfer to other spheres is dangerous and of evil effect; she exercises and ought to exercise much of her beneficial influence by her delicacy and modesty, and her legitimate influence in the proper sphere would be lost, were she to enter the arena of politics. The inter-completing character of the two sexes, so necessary to us in the plans of Providence, would be lost; she would cease to be a true companion; politics would undoubtedly un-woman her, and her essential character and desirable, nay necessary, influence would be lost. Is she to vote by mere impulse and feeling, or is she to visit public meetings? Who wishes this of his own mother, his wife, his sister, his daughter? So foreign is political strife or management to her nature, that wherever

women have seized upon it, it seems they have seized upon the worst elements in politics, from the French fish-women in the Revolution to a Pompadour. Female monarchs sometimes form exceptions, owing to their peculiar position; but how would we like to have a female President, and what would it lead to? Wherever the distinction of the sexes is erased, in whatever condition of life this may be, it excites that regret which all confusion of primary laws produces. There are exceptions indeed. He who writes these pages fought by the side of a woman-sergeant, so brave that she received successively several orders of distinction, which graced her breast when, at a later period, she stood before the altar to be wedded to another sergeant. Ought I, on the ground of this exceptional case, to propose the extension of the militia law to all the women of the state?

Where a high property qualification exists, or where, for any other reason, there are but few votes to be collected, we may imagine single women to vote without producing a serious disturbance in society, whatever the effect on themselves may be; but so far from allowing that the suffrage of women is nothing but a consistent extension of the universal-suffrage principle, I hold it to be a well founded truth, that, of all countries, those in which universal suffrage exists, are the very ones in which woman herself and society at large would suffer most from such a change. Woman would not carry into politics grace, amenity, and the element of the Beautiful, so important in all civilization; but she would be infallibly contaminated by the coarser elements of politics, suffer far more than men, who can, occasionally, swallow a dose of coarseness without producing a permeating ill effect in their whole system. Not that coarseness is indifferent. Far from it, indeed! But the fact will not be denied, that indelicacy has not the general ruinous effect on man which it infallibly produces in woman. What effects are those produced in women who enjoy the turf, or speculate at the bourse in Paris? The answer, that these places have no good effect on men either, would be no proper reply; for these places denaturalize the woman; the inconsistency in the case produces a hideous character.

Nor can it be said that she is not represented if she does not vote. A representative is not a thing made up of thousands of bits coming from the voters, as the confectioner makes up his figures of many ingredients. The representative is a living individuality, elected because the majority think he will make a fair law-maker for them, and will sufficiently take care of their interest, and is in this respect the interest of the wife, the daughter, the woman in general, whose destiny and calling are closely intertwined with those of the other sex, not represented by the vote of the men. If the positive voting alone procures representation, how, then, am I represented, when I vote in the minority? A class, indeed, separated for whatever reason it may be from the rest of the community, is not represented if it cannot make its interests felt by the vote; the peasant was plainly not represented when the three estates of the clergy, nobility, and citizens constituted the government; but to say that a husband does not represent his wife or whole family, is abandoning essential truths and attempting to reduce state affairs to fallacious arithmetical calculations.

Enough has probably been said on a subject which, however, has by no means been exhausted, and it may be sufficient simply to add, *that the Convention, it is to be hoped, will not yield to the entreaties which will doubtlessly be made in a spirit which happens to be fashionable just now* in *our restless period. Female suffrage ought not to be established.*

9

NUMBER OF REPRESENTATIVES.

Corruption, even the corruption of representatives, that is, in plain words, the taking of money for the sacred trust of the vote, has become an alarming evil with us, because our government is republican, and republics can weather corruption probably less easily than monarchies; because this corruption has broken out immediately after the high-toned and heroic period of our recent struggle, when willing sacrifice was the prevailing order of the day; because no direct means of cure offers itself for such a malady, and because,

not only does in republics Responsibility appear to the evil-disposed to be divided, although moral responsibility, in its very nature, is indivisible, but also Injury itself seems to the willing offender to be divided and lose its malignant definiteness. To cheat the public, to defraud the Treasury, to be dishonest to a commonwealth, appears vague, and is taken as a somewhat abstract offence. We mortals are so coarse that it requires a certain elevation of character not to feel less repugnance to defraud the people than to cheat the same people through a living individual—by name a king.*

Corruption in public men has recently been called the "canker-worm of the Anglo-Saxon," with reference to the peculation which is perpetrated both in England and here. There is, however, nothing either English or American, Saxon or not Saxon, in public corruption, although it may show itself, for ought we know, at this moment more glaringly in England and here than anywhere else, because the pursuit of wealth is carried on here more energetically, the opportunity of obtaining it is greater, and the struggle for the obtaining of certain political institutions, and public liberty, is more finished in the two great English-speaking nations than elsewhere. What a canker-worm of the Gallic race has not corruption been within our own remembrance!

Be this, however, as it may, so much is certain that the evil cannot be cured by a simple political prescription, and especially not by an extension of the number of representatives, as has been irrationally proposed. A thousand representatives, it has been said, will not be so easily corrupted, as three hundred; but moral evils are neither cured

* The imagined divisibility of crime (as if of three men killing another, each committed a third of a murder only); or the imaginary divisibility of responsibility in a body of men (according to which men have so often voted for wrong or shame, when, single they would not have had the daring to do so); and the callousness which is felt in injuring an impersonal victim (as if it were not criminal to rob when to a certainty the victim will never know the injury done him)—these subjects have never received the attention and treatment which would be adequate to their psychologic and historical importance. "Single is each man born; single he dies, and single he must answer for what he has done in this life."

by mechanical contrivances nor by arithmetical means. On the contrary, when Responsibility is spread over a wide surface it becomes proportionally thin and pervious. Bribery would become cheap; men of high character would wholly decline to be nominated for the legislature, and the public standard would sink low indeed, nor ought the election districts be suffered to remain as small as now.

The smaller an election district is made, the smaller will be the man who is sent to the legislature. Many persons believe liberty to consist in close representation, and close representation to consist in the fact of a representative being taken out of the very midst of the smallest possible cluster of men, as if a representative were a sample, sent to the legislature as one bale of cotton is sent to the custom house representing a hundred fellow-bales on board a ship which has entered the port. Nor is the modern representative an attorney sent with instructions, such as the members of the Third Estate were in the middle ages, who asked for new instructions when those they had received proved insufficient. A modern representative is neither a sample, nor a chemical compound of particles taken from the different constituents, nor an attorney or instructed agent with powers limited by the elected. A representative is a living individuality and un-mysterious human being, elected for his character, knowledge, and interest he feels in the community, to be one of the legislators for the whole nation or state, as the case may be, and one of those who act as trustees of the whole, so as to help breaking the absolutism which necessarily makes itself felt wherever the public power acts directly and unmitigated by intervening trustees or representatives. The election of the representative ought to be left perfectly free, so as to make it honorable to be elected, and to leave to the people a free choice. It seems to have been thought in America agreeable to a high sense of liberty if the choice of representatives was restricted by law, and a residence among the electors was required to be qualified for election. Doubtless this was done on the supposition that

the representative is sent to the legislature like a sample; in reality, however, no one ought to limit the choice. If electors prefer a man of their neighborhood, they may choose him; but let freemen enjoy the liberty of electing whom they think proper.

Regarding this subject, then, the Convention ought to remember that three hundred—rather less than more—is the number of representatives which experience has suggested to us as 10. *the most practical;* that election districts ought to have a sufficient extent for liberal action, and that full freedom ought to be left to the constituents to elect any citizen of the State, wherever he may reside.*

STATE SOVEREIGNTY, DOUBLE ALLEGIANCE.

The constitution of New York applies the word "sovereign" to the State. Ought it to be left there after we have just emerged from a terrible conflict caused by this very term being applied to the single States? Is it necessary in any way to retain it?

No word has been used in more different significations than that of sovereign, from the first meaning in its derivation from the mediæval *superanus* (signifying optimate, or one of the upper and ruling class in the city-republics) to the meaning of chief, as when we say sovereign remedy; or as courts from which there lay no appeal, were called sovereign courts; to the proud assumption by Louis XIV. and his puny imitators, the Stuarts; and finally, to the mysterious meaning ascribed to it by the secessionists, according to whom a State was "absolutely sovereign," and yet was subject to a superior constitution and was deprived of most attributes generally recognized as those of sovereignty.

Cardinal Mazarin sent word to the French ambassador at Munster, to insist above all things on the different German

* The English exception to this rule is more apparent than real. The English firmly established parliamentary usage rests on conditions totally different from ours.

princes being declared sovereign although the form of the empire was allowed to continue. This was avowedly done to make Germany weak and break up the power of Austria. Only now the Germans have commenced to throw off this virus of petty sovereignty, and now again they are opposed by France.

I have collected some interesting facts and given my thoughts on this subject on a previous occasion, on a few pages which I ask leave to reproduce here:

The mischief and ruin produced by the vague adoption of potent and comprehensive terms in spheres of high and vast action or thought, have never been illustrated outside of the ecclesiastical dominion and persecution, so sadly and on so large a scale as the gradual and unauthorized introduction of the term sovereignty has done in the history of our country. Never before has an erroneous theory borne more bitter fruits. The Constitution of the United States does not contain once the word sovereignty, studiously omitting it after it had been used in the Articles of Confederation; and only a few days ago* a notable member of Congress spoke, in a solemn attack on the nationality of our Government, repeatedly of the "local sovereignty" in the United States, reminding the student of history of the oath of fidelity which the Stadtholder, in assuming his office, was obliged to take separately to each "sovereign city" of Holland and Friesland, and in other portions of that country, whose glorious career was early cut short by the morbid development of the disjunctive and centrifugal principle, not only of State Rights, but of City Rights, to the extinction of the national and centripetal principle. The Netherlands have passed through all the phases of State Rights doctrine long before us, but it led them to a change of government, not to a large and protracted civil war, although it plunged them into manifold disorders and civil heart-burnings.

The estates of Holland and West Friesland were displeased with the public prayers for the Prince of Orange, which some High Calvinistic ministers were gradually introducing, in the

* February, 1864.

latter half of the seventeenth century, and in 1663, a decree was issued ordaining to pray first of all "for their noble high mightinesses, the estates of Holland and West Friesland, as the true sovereign, and only sovereign power after God, in this province; next, for the estates of the other provinces, their allies, and for all the deputies in the Assembly of the States General, and of the Council of State." Here is our State Rights doctrine in full bloom long before our theorists were born, many of whom, indeed, boast of our State Rights doctrine as of something peculiarly American, new and beautiful.

No one is sovereign within the polity of the United States, taking the term in a practical and legal meaning, and no one ought to be sovereign. The United States are sovereign in an international sense; that is, they are equal to any foreign power or potentate, and have no superior on earth; while in a domestic sense, the people, that is the totality of the nation, have the sovereign power if they please to exercise it, to establish that government which they deem most appropriate appropriate for their circumstances, and most corresponding to their own convictions of rights and freedom; but within the established polity of the United States no one, we repeat, is sovereign; has the right to claim sovereignty, or the power to exercise sovereignty. We should not be free men if any one had. Sir Edward Coke declared in the House of Commons, when the Petition of Rights was discussing, that "'sovereign power' is no parliamentary word," and well would it have been for our country if it never had slipped into our terminology, or, at least, if it had been properly defined.

The old Articles of the Confederation contain indeed this passage:

"Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States, in Congress assembled."

Sovereignty is either used in this case pleonastically to express the independence which had been proclaimed by the Declaration of Independence, or else the framers of the

Articles fell into the error of attempting to establish a pure confederacy or league, or did not know how to help themselves after having severed their allegiance from the Crown of England, at a time when all confederacies of antiquity and modern times had shown that they are inherently weak governments, inadequate to any one of the large demands of civilization, freedom and independence, and at a time, too, when the national polity, with whatever variety, had become the normal political type of the existing historic period. When small communal polities impede and harass each other, the foundation of a confederacy is a progressive step in political civilization. Such were the Greek confederacies, inadequate as they soon proved themselves notwithstanding. The Confederacy of the Iroquois in our country showed a higher political state in its members than that in which the isolated tibes lived; but it is the principle which *unites* the confederated members, not the principle which keeps them apart as so-called sovereign States, that shows the progress.*

When the Articles of Confederation were adopted, many confederacies had found already their grave; the Netherlands were descending; Switzerland was allowed to exist by her neighbors (she has now adopted in her General Constitution many important points of union from the American Constitution); and Germany was presenting a deplorable spectacle of weakness by her confederacy of sovereign princes into which the Empire had elapsed, and by her doctrine of "Separatism," the term used in Germany in the last century for se-junctive State Rights doctrine.

Madison, therefore, wrote to Edmund Randolph, prior to the convention of 1787, under date of April 8 of that year,† these memorable words:

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* A very interesting account of the Confederacy of the Iroquois (which Mr. Calhoun mentioned not without approbation, on account of the veto power of each single chief, resembling the individual vetoing power in the ancient Polish Diet), was given by Mr. Henry R. Schoolcraft, in Senate Documents No. 24, 1846, separately published as Notes on the Iroquois, &c. New York: Bartlett & Welford, 1846.

† Elliot's Debates, &c., Vol. V., page 107, Philad. edition of 1859.

"I hold it for a fundamental point, that an individual independence of the States is utterly irreconcilable with the idea of an aggregate sovereignty. I think, at the same time, that a consolidation of the States into one simple republic is not less unattainable than it would be inexpedient. Let it be tried, then, whether any middle ground can be taken, which will at once support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful."

There is not a word of that mystic local sovereignty, or sovereignty of States, in this plain and wise passage.

Hamilton, who had expressed himself in the convention very strongly on national sovereignty,* uses on one occasion, in the *Federalist*, the term "residuary sovereignty" of the States, which has been used in favor of the States Rights doctrine by several of its advocates. But Hamilton was a national man, and of too penetrating a mind not to see that if the retaining of a certain amount of power in the States were a proof of their real sovereignty, the vast amount of rights which each free citizen retains in the case of every constitution, and for the protection of which constitutions of free communities are chiefly established, would prove an originally, full, and later residuary sovereignty in the individual. Sovereignty is inherently an attribute of a society, or of the representing agent of society (as in the case of government when it represents at home the nation; abroad, the independent State); sovereignty is not a sum total of many or a few fractional sovereignties, it is the attribute of an organized or organizing people.

Hamilton, moreover, on June 18, 1787, when the question before the convention was: "That the Articles of Confederation ought to be revised and amended so as to render the Government of the United States adequate to the exigencies, the preservation, and the prosperity of the Union," said, in a speech in which he examines the various confederacies and

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* Pages 201 and 212 of the volume cited in the preceding note.

elective governments in antiquity and modern times: "The Swiss Cantons have scarce any union at all, and have been more than once at war with one another. How, then, are all these evils to be avoided? Only by such a complete sovereignty in the general government as will turn all the strong principles and passions above mentioned on its side."

Ere seventy-five years had elapsed from the day when these words were spoken, Switzerland had passed through a far graver civil war than was known in her history at Hamilton's time—a war caused by an attempted Sonderbund or separate league, and the United States were passing through a far graver civil conflict for the integrity of the country than that from which the Swiss had recently emerged.

More than all this—Washington wrote to John Jay, on March 10, 1787, these words, which it were well if they never passed from the memory of the American people: "My opinion is, that the Country has yet to *feel* and *see* (the italicizing is by Washington) a little more before it can be accomplished (viz.: a constitution). A thirst for power, and the bantling—I had like to have said the monster—sovereignty, which have taken such fast hold of the States individually, will, when joined by the many whose personal consequence in the line of State polities will in a manner be annihilated, form a strong phalanx against it.

The colonial charters were, indeed, the only patent and legal fashionings of our early polities, and after the Declaration of Independence they constituted the only lines of demarcation visible to the lawyer's eye, so that a confederacy such as it was attempted to establish under the Articles of Confederation, naturally suggested itself; but there were from the earliest times deeper causes at work which steadily led the portion of the Saxon race and the descendants of other European nations to form one nation, and throughout the history of this people the tendency toward the formation of a nation, until the nationality is legally pronounced in the formulation which we call the Constitution, is discernible. The Constitution did not make the people or nation, but the framers strove or felt impelled by necessity to enounce it,

and to establish something far higher, more serviceable, and more consonant with modern civilization than "a mere treaty, a league between States," as Madison called depreciatingly the Articles of Confederation.

So far the pages of an earlier writing of mine, on State Sovereignty. A few additional words are necessary on State Allegiance. It has been "decided" by our highest Court, when it consisted of the Senate, that there exists a double allegiance in this State—one allegiance due to the government of the United States, and one to the State of New York; but if allegiance implies the highest or supreme obedience to some one or some power—and what does it mean if it does not mean that?—a double allegiance is an impossibility and *nemo ad impossibilia obligatur*. I give one more page of the earlier pamphlet.

Allegiance is that feeling of pride and adhesion, and that faithful devotion to a person's nation which every generous man is conscious of owing to his country—cast into the highest obligation of obedience to the highest agent, politically representing the country or the nation. This definition is given with a perfect recollection of Blackstone's definition to the contrary, and of the fact that acts of Parliament have declared that allegiance is due to the person of the King and not to the crown, which latter theory is "damnable."* English history sufficiently proves that, despite of the law books, allegiance is essentially due to the crown, that is, to the country, and not "due by nature to the person of the king." How else could it be apparently transferred by a convention or revolution from one monarch to another person wearing the same crown, which means, of course, the representation of the country? The relation of a son to a father

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* The Act called Exilium Hugonis de Spencer Patris et Filii, and the repeals and re-repeals of acts concerning allegiance, with much that interests the publicist and jurist, can be found in the Tryal of Dr. Henry Sacheverell, before the House of Peers, &c., &c. London, 1710.

The fact that Allegiance is inherently national, all Acts and definitions to the contrary notwithstanding, and that history proves this to be so, is treated of at some length in Political Ethics, Boston, 1838.

is a *natural* one, but no act of Parliament can unfather a father.

That phase of State Rights doctrine, which acknowledged, at one and the same time, the sovereignty of the States and the sovereignty of the United States, admitted likewise of two allegiances—a contradiction in terms. A double allegiance would be a fearful see-saw for a conscientious citizen, and even worse than the allegiance of the feudal times, which was a graduated allegiance, but not a double or multiplied one. We cannot faithfully serve two masters. We owe, indeed, obedience to the State Government, but so we owe obedience to many persons, laws and institutions, without its amounting to allegiance. The so-called double allegiance savors of the barbarous, and now extinct petty treason which the wife could commit in England against her husband, making him a sub-sovereign, to whom the wife owed sub-allegiance. Is such a barbarous confusion of ideas to be repeated with us?

The inherent inconsistency of a double allegiance has always shown itself as soon as stern and testing cases have presented themselves—practical cases which call for actions and not only for apparent symmetry of verbal positions; while the other phase of the State Rights doctrine, which declared the States *bona fide* and exclusive sovereigns, leaving to the National Government the mere character of an attorney, with certain powers to be taken back at any moment by the party for whom the attorney acts, has led to the direst acts of dishonor and dishonesty.

Joseph T. Jackson, who died as general of the so-called confederacy, with the soldierly name of honor and affection, Stonewall Jackson, seems to have been a man of singular directness of mind and purpose. He had all along believed in a double allegiance; but when the testing hour arrived, calling for decision, and showing the impossibility of two allegiances, his night-long prayer to be enlightened in his grievous perplexity showed that we cannot have two sovereigns. For one of the two he must decide, and he decided in favor of State allegiance, doubtless convinced for the rest

of his life, that an honest acknowledgment of two allegiances is a matter of impossibility for an earnest man. Jackson was a Virginian, and there, on the same soil where he wrestled in prayer, another and a far greater Virginian has recognized the nationalizing element in the Constitution of the United States, and uttered, long before him, those memorable words: "All America is thrown into one mass—where are your landmarks, your boundaries of colonies? They are all thrown down. The distinctions between Virginians, Pennsylvanians, New Yorkers, and New Englanders, are no more; I am not a Virginian, but an American." Had these words of Patrick Henry never touched a chord in Jackson's heart, or at least showed him that two sovereigns being impossible, the question must be whether the one of the parties, called the country, or the United States, had not rights too, and greater ones than Virginia? and had he never asked himself what original cause made Virginia so great and so exclusive a sovereign, and whether it had ever acted as real sovereign?

On the other hand, men who believed, or pretended to believe in State Sovereignty alone, when Secession broke out, went over with men and ships, abandoning the flag to which they had sworn fidelity; thus showing that all along they had served the United States like Swiss hirelings, and not as citizens, in their military service. They did more; not only did they desert the service of the United States, on the ground that their own individual States, to whom they owed allegiance, had declared themselves out of the Union, but in many cases they took with them, or attempted to take with them, the men who owed no such allegiance, being either foreigners or natives of other American States. In other cases they actually called publicly on their former comrades to be equally faithless, and desert with their ships or troops. The Swiss mercenaries used to act more nobly. Once having sold their services, and having taken the oath of fidelity, they used to remain faithful unto death, as they did on many a battle field, and through long periods of history down to the revolution which dethroned Charles the Tenth of France.

I close the introduction of pages formerly written, only repeating that a "double allegiance" is far worse than the graduated allegiance of the feudal system and allegiance following sovereignty; it would seem advisable that *the word sovereign be omitted in the revised Constitution, as unnecessary, deceptive, indeterminate and mischievous, capable of a variety of interpretations, and flattering to puny vanity.*

CITY GOVERNMENT.

This age has been justly called the Age of Cities, for in no period previous to the present one have so many populous cities existed at one and the same time; and at no former age have the demands for personal and individual liberty been so great as at present. The problem how to harmonize dense and large city populations with the highest demands of political liberty—with universal suffrage, for instance—has nowhere been solved, and the least approach to a solution has probably been made with us, especially so in the city in which these pages are now writing.

City populations, enjoying a high degree of liberty, are far more subject to demagoguism than the rural population, as all city-democracies of antiquity and the middle ages show, and as may be very readily accounted for. It is an evil which is vastly increased in those of our cities into which monthly, almost daily, numbers of foreigners, not trained in our political and school systems, flow, and soon exercise that right of voting which, in ancient cities, even in the most democratic, such as Athens, was jealously withheld from every man not born to the soil and of citizen parents. Our city governments are mismanaged; they are corrupt; maladministration has become the rule; and proportionately little is obtained by the citizen for the high taxes imposed on him. Everywhere are citizens obliged to have recourse to private means for greater safety and greater public cleanliness.

Here, as elsewhere, it has been proposed to find a remedy in frequently repeated elections of all officers, by universal suf-

frage. This would simply multiply the evil in proportion to the repetition of the elections, and to the further extension of suffrage. Imagine what government—if government, indeed, it could be called—would come to in a city like New York, with monthly elections of all officers, and women's suffrage added to the present general suffrage!

A city government is not and ought not to be like a general, legislating government. A city government is chiefly a police government, and has to watch over the safety of the inhabitants, over their health and over public morality. These, with Common Education and Public Charity, are the legitimate ends which ought to be before the eyes of city officers. The distribution of money for these objects is one of the main objects, and the sums which are levied to obtain these ends are, in our cities, immense, and induce peculation of a flagrant character, where plain and pointed responsibility is diminished, by constant change, and by officers backed by electing majorities, and where the public money is voted away chiefly by those who do not pay city taxes. What remedy can be resorted to against an evil growing with appalling rapidity? Would our people, for instance the people of New York, allow a division of the city into a number of municipal corporations containing populations equal to those of other cities of respectable size, say two hundred thousand? And would this not lead, in all probability, to a city confederacy, with its full share of danger and of mischief? At any rate, experienced mariners will not launch at once on such unknown seas—unknown, yet with well-known breakers.

Even if universal suffrage is retained as a general principle for the general State government, as will be most likely the case, there is no reason why a portion of the suffrage for the city government should not be restricted to the tax-payers, that is why the authority of spending the large sums should not, in part, be restricted to those who pay the sum to be spent. It is a most republican principle. We do not want a representative of public opinion in general, but cashiers as it were, and we find suffrage restricted in a hundred cases,

where the election of a representative is not the object. The comptroller, on the other hand, ought, it seems, to be an officer distinctly disconnected with the city government, an officer appointed by the Legislature, or by the governor, with the consent of the Senate, with a proper inspection over him; and lastly, the city government ought to be strictly prohibited from appropriating any money, except plainly for city objects of public necessity—no dinners, no medals, no receptions. This undoubtedly would occasionally appear at first stingy, perhaps even mean; but we have gotten into such straits that we cannot allow ourselves to be drawn from what is necessary and indispensable. Perhaps after the trial of a rigid regime for twenty years, something milder may be introduced by way of Amendment to the Constitution; for the present it seems that a provision of the Constitution should establish for cities containing a population above a certain number:

Two houses, one of which representing the tax-payers exclusively;

A superintendent of the finances and disbursing officer appointed by the Legislature or the governor, with the consent of the Senate, for five years at least;

And a strict inhibition of all expenditure, except such as may be required for direct ends of public necessity.

Such a government would be of a tentative character only; but no wise and experienced statesman will pretend to move in novel cases of great importance, in any other way. It is only the demagogue, or the lover of his own fantastic theories, who can pretend to an infallible sagacity in combinations unknown until now.

EDUCATION AND EDUCATIONAL TEST.

Great efforts are made in the State of New York to promote public education, but it is observed by all who are well acquainted with our school system, that, in many portions of the State, the result is not adequate to the expenditure of money and to the time given up to the important end. One

of the reasons is the irregularity of the attendance in the school, and the question has frequently occupied our different school boards, whether attendance could not be made obligatory in our State, as it is in many other communities, where fine, and even imprisonment, awaits the parent who neglects to send his children, of a certain age, to school. No one doubts the right of a government—especially of a government founded on universal suffrage, that is, on supposed general intelligence—to make school attendance obligatory, when that government liberally establishes a public school system throughout the land. The given conditions, however, may make it difficult, sometimes impossible, to introduce this principle. Those who have paid minute attention to the state of things in the city of New York, agree that it would be difficult to introduce a plainly compulsory law of school attendance in this place. Indirect means and legitimate allurements may be devised, but it is doubtful whether, at present, simple compulsion could be resorted to by the people. Would it, then, not be wise on the one hand to leave it optional with each county to adopt compulsory school education, and on the other hand to establish the educational test for the right of voting throughout the State?

The optional principle regarding certain laws has been, of late, adopted with good effect in several countries; and no valid reason can be given against an educational test of suffrage in a polity founded on universal suffrage by ballot, and not by word of mouth.

The same lack of logic which was pointed out in another section of these pages, pervades our present suffrage. The case stands thus:

We insist on universal suffrage;

Because we think the people at large sufficiently intelligent, or we take the means to make them sufficiently intelligent to vote understandingly;

Our ideas of individual independence demand the voting by ballot and not by open word of mouth;

Yet we allow every one to vote, whether he can read the ballot which he drops into the urn or not; that is to say,

whether he knows for whom or what he is voting or not; so that after all we do not care for the individual independence of the voter or an intelligent vote.

The educational test, which only demands the very minimum of education, is especially requisite where universal suffrage exists; and a man who cannot read his own vote, and cannot read his journal, or reports on public affairs, is so separated from public opinion, public discussion and public progress, in a time when public information is not obtained in the public market as it was in Athens, that there is no wrong whatever in withholding from him the vote.

In the Swiss republics, each voter must write his ballot at the polling place before the election officers.

No injustice would be done if we adopt the reading and writing test, especially if it were settled that such a test should go into operation three years from the day of the ratification of the new constitution. A man who cannot learn to read and write in three years had better stay away from the polls.

It seems incumbent, therefore, on the Convention *to consider the propriety of introducing a clause in the revised*
13 *constitution, which allows each county to introduce compulsory school attendance, and which makes the test of Reading and Writing, to be proved, in cases of challenge at the polling place—the latter by writing the ballot, or a portion of it—a requisite for the exercise of the right of voting, from the beginning of the fourth year after the adoption of the new fundamental law of this State.*

Two subjects will require the attention of the Convention—namely, the impossibility of doing all the legislative business of a community of four millions, within one hundred days, and the impropriety as well as inconvenience of allowing every judge and magistrate, however limited his sphere may be, to pronounce on the constitutionality of a law according to his fancy; but these subjects will undoubtedly induce the framers of our fourth constitution to weigh them well, and to provide remedies where they are found necessary.

THE END.