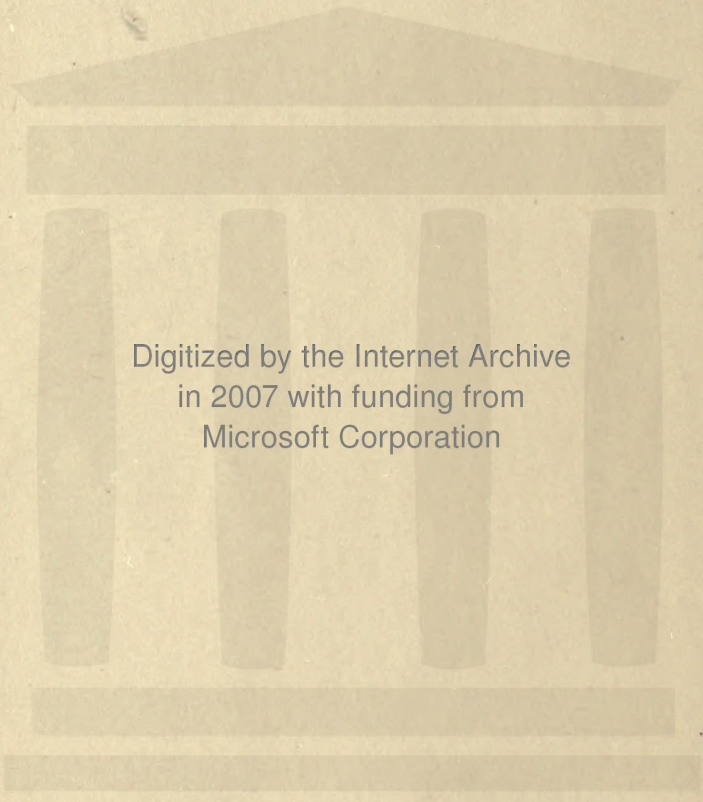


# STUDIES IN

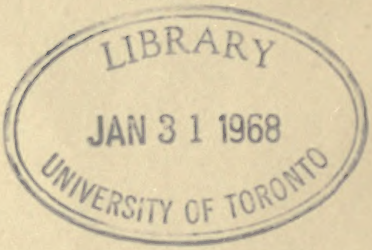
# CONSTITUTIONAL HISTORY

BY

JAMES O. PIERCE

*Ex-Judge of the District Court of Tennessee and Lecturer on Constitutional Law in the University of Minnesota*

MINNEAPOLIS
THE H. W. WILSON COMPANY
1906



TO

CYRUS NORTHROP, LL. D.,

THE HONORED PRESIDENT OF THE UNIVERSITY OF MINNESOTA

THESE

STUDIES IN CONSTITUTIONAL HISTORY

ARE RESPECTFULLY INSCRIBED

# PREFACE

The Essays here gathered are "Studies" which have been pursued while preparing the lectures on "Constitutional Jurisprudence and History" which have been given during the past eighteen years before the College of Law in the University of Minnesota. Search for the principles which lay at the foundation of this Constitutional History seemed imperatively necessary to a proper understanding of the history. Inquiry into the sources of these principles has led to the opinion, which further inquiry has deepened into a conviction, that the fundamental incidents, the great events recognized as turning points in history were providentially controlled, and that "one consistent purpose runs" through all modern history. That purpose has been abundantly manifested in American History, and not less than elsewhere in its constitutional aspects, always guiding, often controlling, and sometimes overruling the well meant plans of men. The prudent Pilgrims, inspired to undertake a new experiment in statehood, were diverted from their first carefully selected destination, and were forced to make their landing "on a stern and rockbound coast." The "Revolutionary Fathers" endeavored earnestly to hold on to their old and familiar relation to the English crown, and reluc-

tantly declared their independence of that crown, only to see opening before them, after that declaration, unanticipated avenues of national development. The defenders of the Union during the Civil War retained persistently the defensive loyalty at first assumed, until even Lincoln, convinced against his will, admitted that the freedom of the black population had become a national necessity, and proclaimed that freedom. After the Revolution, the people unitedly and consistently adhered to the Washingtonian policy of international isolation, until the crisis of the Spanish war brought the new view that such isolation had had its temporary uses, and that broader duties had now become imperative. More recently, under what seemed to be the demand of a new necessity, the opportune exercise of some of these broader duties advanced the American Republic to the high position of Pacificator of the World in an acute crisis. Examined in the light of these circumstances, our history becomes didactic, and teaches as its first lesson the fact of the continuous existence and the frequent interposition in our National affairs of an Overruling Providence, and as its second, the fact that peoples, like men, may rise

> "On stepping stones of their dead selves
> To higher things."

Thanks are hereby returned to the Publishers of the AMERICAN LAW REVIEW, The MINNESOTA HISTORICAL SOCIETY COLLECTIONS, and the DIAL, for their kind permission to republish certain papers which have heretofore appeared in print.

# CONTENTS

# I.

## THE SPIRIT OF '76.*

Although in common use, as if possessing a distinctive meaning, the phrase "The Spirit of '76" has by different persons been variously interpreted and put to divers uses. With some it is made to stand sponsor for the boisterous vociferations and deafening detonations which customarily usher in the Fourth day of July; and John Adams has been quoted as having first suggested this interpretation of the phrase. But whatever John Adams may have prophesied as to the effervescent joy that might be expected to distinguish that holiday, he plainly advocated a more dignified form of celebrating it, and interpreted the spirit of the day as decorous and reverential.

To others, a more elevated conception of this expression has suggested Patriotism and Heroism. But these traits were not born of the American revolution, nor did that era illustrate them exceptionally. They are age-long and world-wide virtues; they have distinguished the achievements of all vigorous peoples, and have commanded the world's admiration in every period of history. Widespread and perennial as they are, they are seldom exclusive. Two stalwart armies are now strenuously

*Address before the Minnesota Society, Sons of the American Revolution, Feb. 22, 1901.

confronting each other in South Africa, each of which has demonstrated its possession of these virtues; but all we learn of the patriotism and heroism of either proves nothing as to the merits of their controversy and thus throws no light upon its intrinsic spirit.

This phrase has also been used as synonymous with a Spirit of Independence. But the American passion for independence does not alone account for or fill the measure of the Spirit of the Age of 1776. The Fathers of the Republic did not at first go afield for independence. When they assumed that state, it was seized upon and utilized as a means to an end. To quote again from the words imputed to John Adams; "It is true, Sir, in the beginning we aimed not at Independence." Nine months after the war had opened, the Fathers began seriously to consider independence; six months later, they definitely declared it as an existing fact, and their main campaign, already in progress, proceeded, with their declaration as one of its incidents.

The war itself was but an incident, not the controlling feature, of the epoch. The revolution was not identical with the war; it was greater than, and it comprehended, the war. Long subsequently to his active participation in it, the considerate afterthought of John Adams centered upon the real American Revolution; but it was not the war. It was the great and solemn change in the hearts, the minds and the purposes of the people, as to their government and their institutions. In his letter to Mr. Niles, of February 13, 1818, Adams said:

> The revolution was effected before the war commenced. The revolution was in the minds and hearts of the people. * * * The people of America had been educated into an habitual affection for England as their mother-country; and while they thought her a kind and tender mother (erroneously

enough, however, for she never was such a mother), no affection could be more sincere. But when they found her a cruel Beldam, willing, like Lady Macbeth, to dash their brains out, it is no wonder if their filial affections were changed into indignation and horror. This radical change in the principles, opinions, sentiments and affections of the people, was the real American revolution."

Adams's final conception of "The Spirit of '76" evidently was, the disposition and purpose with which the people were animated, when undertaking and accomplishing that radical change.

What, then, was their ultimate purpose in that era,—the underlying motive of their revolutionary movement? At what did the men of 1776 aim, as an end which they ardently desired, even before they determined upon independence,—to reach which they resorted to independence,—and which they were, by assuming independence, the better able to secure? When that end was finally attained, what fundamental principles were thereby advanced, what fatal errors overthrown, what measure of actual progress achieved? What methods were employed and what temper displayed in the process, and in what forms or moulds were the results preserved? Answers to these questions may suggest to us the elements of activity which were operative in that movement, and which, combined in one, will exhibit the concrete spirit of the age.

This great change which the American people thus experienced was, in the main, a governmental change. The era opened with thirteen separate English colonies in America; it witnessed the gradual transformation of these colonies into one federal state; it closed with that state built into a federated republic, a nation of commonwealths, with a dual system of government, upon a representative basis, working with practical success. The peo-

ple of the United States had built this new governmental fabric, and had thereby attained their object, the securing for themselves and their posterity the blessings of civil and religious liberty. To preserve, maintain and perpetuate local self-government was, in the last analysis, the object of the revolutionary movement.

The real Spirit of '76 was the spirit in which this great campaign was waged; a composite of the tendencies and propensities which, throughout the campaign, animated the people. The drift or bias which drew them toward their great end of local self-government, the mood or temper in which they selected their methods of procedure, and the inclination or propensity which suggested the forms of institutions in which they should embody the governmental principles of their choice,—these are among the elements that entered into and composed that intangible essence which we postulate as the Spirit of the Age.

## A Conservative Spirit.

Attracted first to the subject of the methods of procedure employed, we are struck with the frequent evidences of the conservative disposition with which the Fathers entered upon their work. Those who forwarded the revolutionary movement were assiduous in endeavoring to preserve both Institutions and Principles; Institutions of Government to which the people were accustomed, and Principles of Government which they had adopted and made part of their political life. The dominant temper was conservative. In this spirit, they retained their colonial assemblies and easily transformed them into state legislatures. In this spirit, they adhered to the system of representative government long practiced by them as colonies, extended it, and made it general. In the same spir-

it, they continued their devotion to certain established principles of their governmental system, which protected and safe-guarded certain rights of persons and property. These principles they embodied in their Bills of Rights; some of these principles as old as Magna Carta, others of modern origin, like the rule of the subordination of the military to the civil power, which they had themselves applied in practice and found salutary; and these were embedded permanently in their state constitutions. To hold firmly to these valuable institutions which were already their own, was a prime object in all their contention with Great Britain. The public deliverances of the colonists, not only during but prior to the year 1776, uniformly voice and illustrate this conservative feeling. In their address to the king, in 1774, declaring their rights, they avow that "so far from promoting innovations, we have only opposed them." The address read to the Army in 1775 complained that "Parliament had assumed *a new* power over them." The Declaration of 1776 industriously groups together and summarizes their numerous complaints of attempted innovations by both King and Parliament. In the words of one of our historians,* "Instead of throwing off the yoke of King George, they refused to put it on." They honored the England of the past, and they were pleased to style themselves "Englishmen away from home." With ardor they searched English history for precedents, illustrating the rights they claimed for themselves. Another historian* aptly says that "they conducted a revolution with the caution of a law-suit, and justified every step as they advanced by the authority of a precedent." Looking backward through the ages,

*J. S. Landon.

†W. H. Trescot.

the Fathers of the Republic saw the vista of English history expanding into a lengthening arcade of monuments, each testifying of some triumph of the people, some oppression or tyranny throttled, some arbitrary power overthrown; and to that honorable and honored past they bowed in reverence, their conservatism flowering in an ardent attachment to ancient institutions, akin to homage.

## A Progressive Spirit.

But this was not a trait which savored of fear or cowardice. Conservative as was the spirit of that day, it was at the same time unequivocally progressive, and the action of the men of 1776 moved in many respects along lines of progress. When found to be necessary, or highly desirable, the steps they took were bold, and even heroic, as in the instance of their Declaration of Independence. Renouncing by this proceeding their allegiance to King George, and deposing him forever from the headship of the executive department of their government, they erected in his stead an entirely new executive. Progressiveness was manifested in the recommendation of the Congress, made prior to the Declaration, that the several colonies should proceed to adopt, each for itself, a frame or constitution of government adapted to its own local needs; and again in the action taken in the several colonies, by which each transformed itself into a commonwealth. A distinct advance was made with the judiciary by raising this department of the government into a position co-ordinate with the other departments, and giving it an assured independence. Conspicuous was the progressive spirit shown in their movement toward the adoption of that novel plan of federation, the dual system of government, in which both the states and the nation are

afforded all needed opportunities for individual action, with a minimum of friction, and which became the crowning glory of the revolutionary era. The crisis of 1776, bringing the colonists face to face with the problem of independence, prompted their first consideration of the possibilities of such a system. Contemporaneously with the declaration that they had erected a separate state, they took steps toward framing a system of government exhibiting two aspects: first, a central government which could adequately represent that state abroad, and second, local organizations of commonwealths which were sufficient to the maintenance of individual self-government. Progressively they prosecuted this work until the fruition of their hopes appeared in the constitution of 1787.

In these and in other respects, the action of the Fathers was bold and fearless. The spirit of the age was at once conservative and progressive, and this without anomaly. While in some of the steps taken, and the measures of state adopted, conservatism secured the desired result, in others, and for other special purposes, progressiveness dominated. Each element was operative in its own field; and that they were not necessarily antagonistic, but might both well distinguish the spirit of the same age, was evidenced by the outcome of the movement.

## A Democratic Spirit.

By this happy adjustment between the forces of conservatism and progressiveness, the age was enabled more fully to give play to the controlling element of its spirit, the passion for popular government. All the interest of the promoters of the great struggle, and all their hopes and fears, centered in the success of their particular form of democracy, local government by the people on a rep-

resentative basis. As colonists of England, they had long lived under, and had administered with success, their own local systems. Experience had educated them into a belief in the merits of this form of government. They had defended it repeatedly against English aggressions. The attempts to destroy or emasculate their charters and local constitutions, the Parliamentary claims of supremacy over the colonies, the imposition of stamp and tea taxes, the intended subordination of the civil to the military arm of the government, the quarterings of soldiers on the people, the proposed transfer of accused persons to England for trial, all had been resisted, because each in its turn was an encroachment upon and threatened the integrity of their chosen system of local self-government. The colonists were devoted, not in mere pretense, but in sincere loyalty, to their king, and down to 1776, they continuously avowed unqualified allegiance to the crown, while they ceased not to resist the Parliamentary schemes for acquiring supremacy over them. Their relations to the crown, as an integral part of the British Empire and subject to its constitution, did not cause them uneasiness, so long as they could, under that constitution, successfully maintain their chartered rights, and continue to be each a local democracy. Their idea of that constitution was the same outlined in the Mayflower Compact, under which "loyal subjects of our dread sovereign, . . . for the glory of God, and advancement of the Christian faith, and honor of our King and country," established a "civil body politic," on a democratic basis. The King's participation in the schemes for Parliamentary aggressions was among the misfeasances for which, when further condonation had ceased to be a virtue, they impeached him. "The preservation of our liberties" was the alarm-cry which as-

sembled them, shoulder to shoulder, in resistance. "Our attachment to no nation upon earth," they declared, "should supplant our attachment to liberty."

It was this inestimable right,—the right of each of thirteen peoples to govern themselves in all their local concerns, as they pleased,—whose maintenance was their principal and ultimate aim; and that aim was realized, precisely as they had hoped and desired, when they organized, as a part of the dual system of government, thirteen self-governing commonwealths, each independent for local purposes. "Government of the people, by the people, and for the people," was thus finally assured, and the inmost wish of the democratic "Spirit of '76" was now satisfied.

## A Constitutional Spirit.

Continuously throughout the colonial era in America, the colonists manifested a disposition toward the arrangement of their governmental affairs upon a basis of fixed principles; a basis now known as constitutional, and which has become a cardinal feature of our political system. The growth of this disposition was largely aided by the written charters under which many of the colonies were founded. But the proclivity was not born of these charters. It was a trait of the English people; one antedating the settlement of the colonies, and of which the forms employed in the charters were simply an outgrowth. It appears as a tendency in the request of the Virginia colonists in 1619 for a House of Burgesses, in the Mayflower Compact of 1620, and in the refusal of the citizens of Watertown in 1631, to pay taxes which had been ordered by a body not chosen by the people. It begins to assume definite form in the Connecticut written constitu-

tion of 1639, and the Rhode Island town compacts of about the same date. It increases in prominence, and becomes more insistent, with the growth of the colonies. At the inception of the attempted interferences by the Parliament and the Crown with the political privileges which the people prize, this propensity has developed into a passion, and asserts itself boldly; and now the constitutional rights of the colonists are put forward in justification of their resistance. Long before the term "constitutional" comes into general use, the contentions of the colonists are seen to be based upon the idea that government ought to, and in their case, must, conform to a system of established rules; and this is constitutional government in its essence. The fourteen years' debate between the statesmen of the colonies and those of the mother country, which preceded the outbreak of the war, teemed with assertions by the former of the fundamental rights of the colonies as a component part of the Empire. The terms "constitution" and "constitutional" came into common use, and they characterized all the great deliverances of the provincial and continental congresses of the time, and were embodied in the resolutions of town meetings and other local assemblies. The individual colonists were to a large extent trained and educated into this spirit, and the "embattled farmers" at Lexington reserved their fire until first attacked, lest by too precipitate action they might weaken their position as defenders of infringed rights. Constitutionalism thus became a factor in the controversy with Great Britain. Democracy, seeking to protect its ancient privileges, summoned constitutionalism to its aid, and both became elements in the composition of the Spirit of the Age.

The influence of this spirit has never waned. Ani-

mated by it, the state founded in 1776 has achieved a success never anticipated. Constitutionalism has become, not only a cult, but a recognized power. It has developed new and undreamed of capacities for usefulness. It has built up Federation into first importance, has transformed Jurisprudence, and has opened to Freedom new opportunities for beneficence. Our conception of the Spirit of the Age of 1776 can be a just and adequate one, only as it shall include the principle of Constitutionalism, which that age raised to such importance.

## A National Spirit.

Another distinctive element in the Spirit of the Age was developed in the hearts of the people during their great struggle, and has since been gaining in strength and persistence until it is now irrepressible. What should be the final form of the new state they were creating was apparently unsettled in the minds of many of the Fathers, in the beginning. But there is clearly traceable, from an early day, a disposition toward giving their political venture a National aspect, which grew into a strong National spirit. As planted, the colonies were separate and independent communities; but they soon began to realize that "in Union there is strength," and coalescence of neighboring settlements was frequent, for the purpose of common defense. The colonies of Connecticut, Rhode Island and New Haven were built by the union of towns. The union between Connecticut and New Haven, and that between Massachusetts and Plymouth, though compulsory at first, became by acquiescence mutually satisfactory. The New England Confederacy of 1643 had continued in existence for forty years. Union of all the colonies had been

tentatively suggested in 1696, 1701, 1722 and 1754. United action commenced with the stamp-act congress in 1765, which was composed of representatives from nine of the colonies, but spoke the sentiments of all. From this time forth, union of action was the rule; and this was the controlling spirit in resisting the stamp and tea taxes, in instituting and maintaining the work of the Committees of Correspondence, in convening the Continental Congress, and in adopting the non-importation agreement. If the Declaration of July, 1775, to the Inhabitants of Great Britain, was unduly boastful in saying, "Our union is perfect," this clearly expressed a growing feeling toward nationality. Many influential colonists were even then outspoken in favor of close and permanent union, and the number of such increased. Paine's "Common Sense," appearing early in 1776, and devoted to exploiting the idea of immediate nationality, was generally acknowledged to be a powerful advocate for independence, and a moulder of public opinion. Several colonies had previously declined to empower their delegates to join in declaring independence; while two of them had declined to consider seriously the thought of separating singly from the mother country. But after the appearance of "Common Sense," the spirit of nationality spread rapidly, and the colonies grew nearer together. Colony after colony fell into line, pronouncing in favor of a joint declaration of independence; and it was in obedience to explicit instructions from their people at home, in the case of most of the colonies, and with the known assent of the people in the other colonies, that the delegates from the thirteen put forth their one Declaration of Independence, in behalf of "one people," thereby "to assume among the Powers of the earth the separate and equal station to

which the Laws of Nature and of Nature's God entitle them."

During the period of this progressive development of a National spirit, there is no exhibition of the growth of any contrary tendency. Those who expressed or reserved opinions against national action were in the minority, and remained so. The framing and adoption of the Articles of Confederation, (1777-1781), by which each state "retains its sovereignty, freedom and independence," and under which the central government had so little means of enforcing its legislation, has been argumentatively urged as refuting the theory of nationality. But this argument has been pressed too far. Defective as they were, the Articles of Confederation did not vest any of the powers or privileges of nationality in any other than the central government. They show no spirit or tendency toward subverting that government or reducing it to a grade lower than nationality. They show only a temporary jealousy of that government and a spirit of doubt as to the proper form in which it should exercise its conceded authority. Happily, this phase of doubt soon passed away, without any break in the continuity of the Nation, and with no attempt to erect a rival, or to extirpate the spirit in which the Nation had been established.

## Conclusions.

If these are proper deductions to be made from the well-known facts of our history, they show "the Spirit of '76" to have been a composite one. Viewed with respect to its most conspicuous elements, it was at once conservative, progressive, democratic, constitutional and national. The American spirit of today is distinguished

by the same characteristics, and is a survival of the revolutionary spirit, grown with the lapse of years to become more earnest, insistent and intense. It was but natural that so novel an experiment as our present dual system of government should be originated, nurtured, developed, and perfected by a stirring and active spirit, representative of the thoughts, feelings and purposes of a strenuous people.

A fair example of the embodiment of this spirit in one of the actors in the great drama is found in the career of George Washington. In more than one sense, he was the foremost American of his time. Innately of a conservative disposition, he clung long to the old forms of the institutions of his native state, and he was among the last to reach the conclusion that separation from Great Britain was inevitable. But he was so progressive as to be able, in due time, to read in the signs of the times the necessity for introducing new institutions. He was at the head of the non-importation agreement in his state. Attending the Continental Congress as a delegate, he wore his military uniform, thereby quietly attesting his belief that a general war was imminent and was the great issue of the day. As commander-in-chief of the army, he early recommended to Congress the establishment of a continental navy. Later, he led in Virginia the movement which, through the Annapolis gathering, resulted in the Philadelphia convention. Though allied by birth and family friendships to many of the Virginia royalists, he proved to be a typical democrat; for he was the one man among the colonists whom the malcontents chose for a king, and who had the opportunity to sway his fellow citizens toward monarchy, and he, from principle, resolutely resisted the temptation. In supporting the administration

of government according to fixed principles, he was among the leaders. His rule over the army as its General, his views of the relations between the military and the civil departments, and his recommendations to the Congress during the war, all manifested attachment to constitutional government. His well-known attitude in this respect pointed to him as the member of the Philadelphia Convention best fitted to preside over its deliberations. He was no less distinctly national in his preferences respecting the form of government to be adopted. Communicating the Declaration of Independence to the army, he congratulated them on being in the service of a great State. As commander-in-chief, he prescribed an oath of allegiance to the United States, to be taken by persons who had received British protection. He deprecated the prominence given to state sympathies during the war, and encouraged the use of the term "American." His letter, as President of the constitutional convention, commending its work to the people, announces as one of its merits, the intended "consolidation of our government." These same traits of character distinguished his public acts as President of the United States, and he remained through life an excellent exponent of "the Spirit of '76."

## II.

## THE UNITED STATES A NATION FROM THE DECLARATION OF INDEPENDENCE.*

If it be desirable, either for the settlement of the truth of history, or merely for the satisfaction of patriotic curiosity, to fix the time when the United States became a Nation, there is ground for the contention that this status was assumed with the Declaration of the Independence. The adoption of the Constitution framed in 1787 marked the time, say some theorists. Others, like the late General Francis A. Walker in his "Making of the Nation," are able to discover and postulate nationality only as a result of the first thirty years' exercise of the functions of the United States government under the Constitution. Nationality did not become a fact until the close of the civil war in 1865, say still others. Neither of these views is acceptable to those who find some plausibility in the arguments which were advanced in 1860, and have been recently renewed, in favor of the state secession which was attempted in 1861.

These arguments in favor of the secession theory have

*From the Minnesota Historical Society Collections, Vol. X. Read September 8, 1902.

been urged so earnestly, and with such assumptions of their infallibility, that it becomes every filial son of the Republic to examine with scrutiny the foundations of our institutions, in order to see whether there was ever any historical or constitutional excuse for secession.

The prime argument in its favor was based on the assumption that the United States Constitution was a compact between sovereign states; one resting on mutual concessions, and voidable in case of an attempted revocation of any of those concessions. From these premises, there was a logical deduction of the right of nullification in 1832, and from the same premises a logical deduction of the right of secession in 1860. If the premises were correct, the logic was unimpeachable. The trouble with each syllogism was, that the premises were without foundation.

A correct conclusion as to the *status* of the states at the time the Constitution was adopted must depend upon a correct understanding of their prior *status*. Such an understanding every student of our history ought to undertake to reach. It is to be regretted that diverse and confusing views have been entertained and expressed on this subject. So great a man as John Marshall appears to have thought, at times, that prior to the adoption of that instrument, the thirteen states were each sovereign, and were connected only by a league. If this had been true, then it would follow that the theory suggested by Marshall, as to the process employed in forming our present Constitution, would have been the only mode of proving the nationality of our government. If the people of each of the thirteen states had severally assumed full sovereignty, both internal and external, in July, 1776, then an agreement in 1787 by which each of those peoples should first surrender its own local sovereignty and there-

after join with all the others in establishing a new composite sovereignty, would have been the only feasible method of compassing a single nationality. Then the assumption that this process had actually been followed would have been the only efficient answer to the secession arguments. Doubtless this would have been a sufficient answer, sufficient to the extent of furnishing a demonstration. So astute in statesmanship were our forefathers, that they selected a mode of establishing the Constitution of 1787, by which the people of the whole nation, disregarding their then existing State organizations, resumed the exercise of their own sovereignty, and took action through their own state conventions, in which they were represented by delegates elected for the especial purpose, and thus, as one people, launched their new frame of government. Whatever powers had formerly been committed to the thirteen several state governments, were thus revoked by those who originally conferred them; and whatever the character of the league which might have existed, if any, it would thereby have been terminated. Herein is to be found one everlasting confutation of the secession theory.

But is this the only ground on which to deny the right of secession? Were the states in fact sovereign under the Articles of Confederation, and were they made such by the Declaration of Independence? If, on the contrary, there existed from the beginning one sovereignty of the whole people, and if it be true, as Lincoln declared, that the Union came first, and was always supreme, that the States were from the beginning subordinate, and have derived all their powers and privileges of Statehood from their membership in the Union, then there is disclosed another, a more radical, more fundamental and more thor-

oughly demonstrative fact, to confute the theory of secession, and to rob its advocates of all basis for even a difference of opinion on the subject.

## Were the States Ever Sovereign?

It is possible to conceive of a Philadelphia convention, in 1787, meeting as a body of ambassadors from sovereign states, to form a league for their mutual convenience, just as the secessionists insisted was the case. But if the thirteen states were not then so many sovereigns, and *never had been*, the premises most vital to the secession theory are seen to be, and to have always been, wholly wanting. The most important question in the whole inquiry then is, what sort of a government resulted from the Declaration of Independence? Was there or not, one central government, supreme over the thirteen states, and deriving its powers from the entire people of the United States?

Let the limits of this inquiry be carefully observed. It is not material that we should see a complete and fully rounded nationality assumed or acting at the outset. It may be granted that many steps taken were tentative, and that the era was a changeful one. Beyond doubt there was some sort of a union between the thirteen states, from the beginning. The immediate inquiry is as to the general character of that Union. Did it, in its essentials, display more the characteristics of a Nation, or more those of a league? Or if it be urged, and granted, that the general character did not then clearly appear, still, was there not manifested a distinct tendency toward a certain definite ideal? Which thought was dominant, Nation or League? Were not certain steps taken in one direction, namely, toward nationality, which were quite inconsis-

tent with the idea of a mere league, which were never retraced, and which ever pointed toward the final goal? If, *to this extent*, the impress of nationality was made by the Declaration of Independence, then is our inquiry answered. If the United States was at first but an embryo Nation, then it was not a League.

It is often insisted that there was separate and individual state action in the beginning, because of the fact that each state provided for its own local government. A favorite assertion is, that all the colonies united in declaring each to be free and independent, "each free to do all that any nation might or could do." If such were the intent, why was not language used appropriate to express that intent? In that *single* Declaration, the colonists spoke as one people, about to assume one station in the family of nations; and "in the name and by the authority of the good people of these colonies," they declared that "these United Colonies" are now "free and independent States," and that as such "they" possess national powers, and may do all "acts and things which independent states may of right do." These national attributes were predicated of the *"United Colonies,"* the word "United" having been here carefully added to Jefferson's original draft. In the light of the fact that no one of the colonies ever undertook to do alone the acts and things that "independent states may of right do," the intent seems plain to declare a joint and united independence of Great Britain, and to step as one Nation into the world's arena.

Such names as Marshall and Motley are cited as supporters of a contrary opinion on this question. But the glory which surrounds great names should not be allowed to blind us to the facts of history. While Marshall and Motley were not only men of conceded ability, but men

whose patriotism we may well emulate, yet they were not infallible. Great Homer might sometimes nod; and if we find our Homer nodding, let us jog his elbow and bid him awaken to the truth of history. In recent years, such writers for the public as General Francis A. Walker, Professor Albion W. Small and Senator Henry Cabot Lodge have seen, or fancied they saw, some intrinsic merit in the secession arguments. But on the other hand, Story, Cooley, Pomeroy, Hare and Jameson among our jurists; Lincoln, C. C. Pinckney and John Q. Adams among our statesmen; Bancroft, Landon, Frothingham and Brownson among our historians, and Lecky and Trevelyan across the water, have placed the origin of our nation at the Declaration of Independence.

Mr. George Ticknor Curtis is cited as saying in his Constitutional History, when speaking of the Articles of Confederation;

> "The parties to this instrument were free, sovereign, and independent political communities, each possessing within itself all the powers of legislation and government over its own citizens, which any political society can possess." (vol. 1, p. 98.)

But surely Mr. Curtis is not to be understood to impute to each state the national characteristics which belonged to the central government; for he elsewhere says,—

> "The powers exercised by the Congress before the Declaration of Independence, show that its functions were those of a revolutionary government." (v. 1, p. 26.)

And he suggests as among the consequences flowing from the adoption of the Declaration, the following:

> "That the people of the country became thenceforth the rightful sovereign of the country; that they became united

in a national capacity, as one people; that they could thereafter enter into treaties and contract alliances with foreign nations, could levy war and conclude peace, and do all other acts pertaining to the exercise of a national sovereignty; and finally, that, in their national capacity, they became known and designated as the United States of America." (p. 36.)

In his oration delivered on July 4th, 1862, at Boston, Mr. Curtis became more specific. He said:

"We thus see that from the first dawn of our national existence, through every form which it has yet assumed, a dual character has constantly attended our political condition. A nation has existed, because there has all along existed a central authority, having the right to prescribe the rule of action for the whole people on certain subjects, occasions and relations." (v. 2, 551.)

"We have seen that our National Union has had three distinct stages. The first was the Union formed by sending delegates to the Revolutionary Congress, and by a general submission to the measures adopted by that body for the common defense. The second was the closer league of the Confederation, the powers of which were defined by a written charter. The third was the institution of a government proper, with sovereign but enumerated powers, under the Constitution." (v. 2, p. 553.)

Judge Cooley, in his treatise on "Constitutional Limitations," thus summarizes the governmental conditions existing under the leadership of the Continental Congress:

"When the difficulties with Great Britain culminated in actual war, the Congress of 1775 assumed to itself those powers of external control which before had been conceded to the crown or to the Parliament, together with such other powers of sovereignty, as it seemed essential a general government should exercise, and became the national government of the United Colonies. By this body, war was conducted, independence declared, treaties formed, and admiralty jurisdiction exercised. It is evident, therefore, that the States, though declared to be "sovereign and independent," were never strictly so in their individual character, but that they were always, in respect to the higher powers of sovereignty, subject to the control of a central party, and were never separately known as members of the family of nations."

(Cooley's Const. Lims. p. 5-6.)

THE INTENT OF THE FRAMERS.

But the question has been seriously propounded, was the Declaration "a *conscious* step toward the establishment of an American State, in the purposes of its framers?"

Doubtless it would be impossible to predicate one general purpose to that end, in the minds of all the signers of the instrument. Doubtless there was difference of individual opinion, as is usual in such cases. But our history abounds in evidences that the specific purpose named did exist among the framers.

In their address to the inhabitants of Great Britain, on July 6th, 1775, the Congress assumed the name of "The United Colonies of North America," a title which they retained until they exchanged it for that of "The United States of America." In the month previous, Rhode Island had recommended to the Congress the establishment of a Continental Navy. The Continental Army had already been established and a Code of Regulations, or Articles of War, provided for its government. On January 1st, 1776, one flag bearing thirteen stripes had been unfurled at the head of the Army. Thus was being realized the wish uttered by Gadsden of South Carolina, in the Stamp Act Congress in 1765, for joint action on a continental basis, "as Americans."

In 1776, before the Declaration was signed, there were before the Congress for consideration, two plans of united government; Galloway's Plan of 1774, and Franklin's Plan of 1775. Each of these embraced some details differing from those of the one finally adopted, and Franklin's plan contemplated some elements of nationality. Paine's pamphlet, "Common sense," written at the special instance of Dr. Benjamin Rush, (who was

later a signer of the Declaration,) was circulated early in 1776, and was admittedly the most active agent in inciting the colonists to make the Declaration; and it pointed out National Union as the means by which to accomplish Independence, suggested that Independence and "a continental form of government" were synonymous, and urged the assembling of a general conference to frame a "Continental Charter." So there were some influential minds then advocating the forming of a national government.

The Great Seal of the United States dates from the year 1782. Its device grew out of a design presented to the Congress on August 10th, 1776, by a committee of three appointed to prepare one on July 4th, 1776, immediately after the reading of the Declaration of Independence. The members of that committee were Franklin, Adams, and Jefferson. Their design for a seal included the motto "*E Pluribus Unum.*" When the design as amended was adopted by Congress in 1782, this motto was retained, and the report of Secretary Charles Thomson explained the symbolism of the escutcheon and the motto as follows:

"The escutcheon is composed of the chief (upper part of shield) and pale (perpendicular stripes), the two most honorable ordinaries. The pieces paly (stripes) represent the several states all joined in one solid compact entire, supporting a chief, which unites the whole and represents congress. The motto alludes to this union. The pales in the arms are kept closely united by the chief, and the chief depends on that union and the strength resulting from it for its support, to denote the confederacy of the United States of America and the preservation of their union through congress.

"The colors of the pales are those used in the flag of the United States of America: White signifies purity and innocence, red, hardness and valor, and blue, the color of the chief, signifies vigilance, perseverence and justice. The olive branch and arrows denote the power of peace and war, which is exclusively vested in congress. The con-

stellation denotes a new state taking its place and rank among other sovereign powers. The escutcheon is borne on the breast of an American eagle without any other supporters, to denote that the United States ought to rely on their own virtue.

"Reverse. The pyramid signifies strength and duration. The eye over it and the motto allude to the many signal interpositions of Providence in favor of the American cause. The date underneath is that of the Declaration of Independence, and the words under it signify the beginning of the new American era, which commences from that date."

We are still using the same Great Seal. If it testifies now of Nationality, it surely gave the same testimony when first adopted; for the statute book of the Republic still bears the law first passed in September, 1789, announcing that—

"The seal heretofore used by the United States in Congress assembled is declared to be the seal of the United States."

It seems clear that some, at least, of the Fathers of the Republic entertained the opinion that Nationality resulted from the adoption of the Declaration of Independence, and that among them were three members of the committee who drafted that instrument.

There is, however, better historical evidence available than the mere expressions of individual views. The contemporaneous acts of responsible bodies speak more loudly than do the personal opinions of any of the members of such bodies. What the people of the thirteen colonies, speaking authoritatively, declared that they wished their delegates in the Continental Congress to do, and what the Congress had previously done with the approval of the people, may be taken as evidencing clearly what the Congress thought it was doing when declaring Independence. The official action on both sides discloses a certain set purpose.

## The Dual System Intended.

When the situation between the rebellious colonies and the mother country became critical, early in 1776, and a severance of the old relations began to seem inevitable, there were three several though cognate propositions advanced for consideration by the people, on which action was finally taken by the Congress, and the discussions concerning which were practically simultaneous, namely; first, to declare the Independence of the Colonies; second, to adopt a form of central confederated government; and third, to have each state provide for itself a separate local government. In each of these governmental transactions, the supremacy in some form of the central government seemed to be considered essential.

On May 10th, 1776, the Congress passed a resolution recommending to the colonial assemblies that they severally "adopt such government" as shall "best conduce to the happiness and safety of (1) their constituents in particular, and (2) America in general."

When on June 11th, 1776, the resolution in favor of Independence was adopted by the Congress, it was by a bare majority of the Colonies, the representatives from several colonies having received no specific instructions, while those from New Jersey, Pennsylvania and Maryland had been explicitly instructed not to vote for Independence. Later, these three colonies changed front and espoused the project which was then becoming popular.

The instructions given, under which certain of the delegates acted in pronouncing the Declaration, are unambiguous. They unite, in almost identical terms, in stating the common purpose of the people of the colonies, in two important respects. These instructions are col-

lated as follows, in Frothingham's "Rise of the Republic."

In *South Carolina*, Independence had been opposed by a large portion of the people.

The new government on March 23d, 1776, gave full authority to their delegates to agree to any measure judged necessary for the welfare of the colony or of America.

On April 1st, the legislature resolved that their new constitution looked forward to an accommodation with Great Britain.

On April 6th, they resolved that the colony "would not enter into any treaty or correspondence with that power, or with any person under that authority, *but through the medium of the Continental Congress.*" (p. 528.)

In *Georgia*, there had been strong opposition to independence. On April 5th, the Provincial Congress authorized its delegates to join in all measures they might think calculated for the common good, and charged them to remember that "the great and righteous cause in which they were engaged was not provincial, but continental." (p. 528.)

In *North Carolina*, the Provincial Congress voted April 12th, 1776, "to concur with the delegates in the other colonies in declaring independency and forming foreign alliances,—reserving to the colony the sole and exclusive right of forming a constitution and laws for it,"—also "of appointing delegates in a general representation of the colonies for such purposes as might be agreed upon." (p. 503-4.)

In *Rhode Island*, the delegates in Congress requested instructions concerning independence. On May 4th, 1776, the Assembly empowered the delegates to consult on "promoting the strictest union and confederation" between the

United Colonies, and to secure their rights, by treaties or otherwise,

"taking the greatest care to secure to this colony, in the strongest and most perfect manner, its present established form and all the powers of government so far as it relates to its internal police and conduct of its own affairs, civil and religious." (p. 504.)

And the Assembly in this state closed its records with the formula, "God save the United Colonies," instead of "God save the King," as formerly.

In *Massachusetts*, the House sent to the Council a resolution on Independence, which the Council negatived on the ground that Congress should first act on the subject. And on May 10th the House voted, referring it to the towns to say whether they would sustain the Congress in declaring independence; and about two-thirds of the towns in May and June promised their support. (p. 507-8.)

On July 3d, the House advised their delegates in Congress that independence "was almost the universal voice of this colony." (p. 508.)

In *Virginia*, the convention which met on May 6th voted on May 14th, instructing the delegates in Congress

"to propose to that respectable body to declare the United Colonies free and independent states," and to give the assent of the Colony "to whatever measures may be thought proper and necessary by the Congress for forming foreign alliances and a confederation of the colonies, * * * Provided, that the power of forming government for, and the regulation of the internal concerns of each colony, be left to the respective colonial legislatures." (p. 511.)

Madison said of this that it was "a link in the history of our national birth." (Writings, III, 337.)

The Assembly of *Delaware*, on June 14th, authorized

the delegates to join with other delegates in adopting measures to promote the liberty of America,

"reserving to the people of this colony the sole and exclusive right of regulating the internal government and police of the same." (p. 523.)

The Provincial Congress of *New Jersey* voted, on June 21st, empowering the delegates to join with the others "in declaring the United Colonies independent of Great Britain," and forming a confederacy,

"always observing that whatever plan of confederacy they entered into, the regulating the internal police of this province was to be reserved to the colony legislature." (p. 525.)

The *New Hampshire* legislature, on June 15th, instructed the delegates

"to join in declaring the thirteen colonies a free and independent state, * * * provided the regulation of their internal police be under the direction of their own assembly." (p. 530.)

In *Connecticut*, the legislature, on June 14th, instructed the delegates to propose in Congress "to declare the United American Colonies free and independent states," and to promote a permanent plan of union and confederation,

"saving that the power for the regulation of the internal concerns and police of each colony" be left to the colonial legislature. (p. 530.)

In *Pennsylvania*, a conference of committees which issued a call for a convention to form a government, voted on June 24th, to concur in a vote of Congress declaring the United Colonies free and independent States, provided that the power of forming the government and the regu-

lation of the internal concerns of each colony be always reserved to the people. (p. 522.)

The convention of *Maryland*, on June 28th, recalled the former instructions against independence, and instructed the delegates

> "to concur with the delegates of the other colonies in declaring the United Colonies free and independent States," and in forming a compact or confederation, "provided, the sole and exclusive right of regulating the internal government and police of this colony be reserved to the people thereof." (p. 527.)

The form of government which the people expected and anticipated would result from their Declaration of Independence is thus made manifest. These instructions from nine of the colonies, the first having been given by North Carolina on April 12th, taking more definite form in those from Rhode Island on May 4th and Virginia on May 6th, and followed substantially and almost literally in six other colonies in June, disclose a common purpose. They unquestionably contemplated the assumption by the central government of the functions and powers of external sovereignty, and the reservation to each state of the functions and powers of local internal government only. The action of the other four colonies was not inconsistent with this programme. Georgia had charged her delegates to remember that their cause was continental, not provincial. South Carolina had officially announced on April 6th that she would not undertake Independence singly, or otherwise than "through the medium of the Continental Congress." This was practically the same conclusion previously reached by the Provincial Congress of New York, who in declining on June 4th, 1775, to pronounce in favor of Independence, said they would leave a "so general and

momentous concern to the Continental Congress."* These colonies had plainly disavowed individual independence. When the delegates from New York and Massachusetts, who had received no specific instructions on the subject, joined with the instructed ones in the Declaration of Independence, it is manifest that they all looked forward to some form of government, in which there should be a central power exercising external sovereignty, which should guarantee to each state the right of managing its local government in its own way.

Here, in essence, was our present dual system of government, now appearing, as Mr. Curtis has suggested, to have been in contemplation from the beginning. The full details of such a system were of course not then seen nor understood by even the most observing of those astute statesmen. The problem was a serious one. Indeed, it was the problem of the ages, to harmonize powerful external sovereignty with free and untrammeled local self-government. This was the problem with which the Philadelphia convention was to struggle in 1787. But when they set themselves to solve that problem, and when they put forth the present Constitution as its solution, the men of 1787 were simply performing the task assigned to them by the people who authorized the Declaration of Independence in 1776.

### National Powers Assumed and Exercised.

It seems but natural that the Congress should have taken, as it did, a liberal view of the powers which it might properly exercise, after the people had approved this Declaration, and before and after the adoption of the Articles of Confederation. That body assumed all the powers of

*(1 Thorpe 106.)

external sovereignty which it was necessary or desirable should be exercised. It continued to maintain, and to enlist men into and commission officers in "the American Continental Army." It created and maintained a Navy; established a National Court of Admiralty; issued paper money; sent ambassadors abroad; and entered into treaties with foreign powers. In the latter part of 1776, apprehensive for the safety of the people, Congress transferred to Washington, as Commander in Chief, for a period of six months, complete dictatorial power over the liberties and property of the citizens of the United States, in much the same manner as that in which the Roman Senate was wont to have recourse to a dictator. The last governmental action of the Congress was the organization of the Northwestern Territory, a truly national act, and the exercise of internal sovereign power. After having had the subject under consideration for several years, Congress was actually engaged in the sovereign act of admitting Kentucky into the Union as a State, when its functions were suspended by the final ratification of the Constitution.

Others took similar views of the situation created by the Declaration. Washington, on July 9th, 1776, in presenting this Declaration to the Army, said to them:

> "The General hopes this important event will serve as an incentive to every officer and soldier to act with fidelity and courage, as knowing that now the peace and safety of his country depend (under God) solely on the success of our arms, and that he is now in the service of a State possessed of sufficient power to reward his merit and advance him to the highest honors of a free country."

Some of the states, notably South Carolina and Delaware, in December, 1776, sent delegates to the Congress empowered "to represent the State in particular and

America in general." Washington, in January, 1777, prescribed an oath of allegiance to the United States, to be taken by persons who had claimed British protection. In the treaty of amity and commerce between the United States and France, in 1778, the contracting parties were called "the two nations." During the Confederation period, it was customary for writers and speakers to apply the term "nation" to the people of the United States.

Mr. Bancroft's epitome of the results of the Declaration of Independence may well be preserved in letters of gold:

> "The Declaration was not only the announcement of the birth of a people, but the establishment of national government; an imperfect one, it is true, but still a government, in conformity with the limited constituent powers which each colony had conferred upon its delegates in congress. The war was no longer a civil war; Britain was become to the United States a foreign country. Every former subject of the British king in the thirteen colonies now owed primary allegiance to the dynasty of the people, and became a citizen of the new republic; except in this, everything remained as before; every man retained his rights; the colonies did not dissolve into a state of nature, nor did the new people undertake a social revolution. The management of the internal police and government was carefully reserved to the separate states, which could each for itself, enter upon the career of domestic reforms. But the states which were henceforth independent of Britain were not independent of one another; the United States of America, presenting themselves to mankind as one people, assumed powers over war, peace, foreign alliances, and commerce."

It is to the facts of our national history such as these above referred to, rather than to the opinions of men, that appeal should be taken, in order to determine whether national characteristics and the attributes of high sovereignty pertained to the central government or to the several states, during the revolutionary period.

It would be strange if no questions had ever been presented to the Courts, calling for a judicial investigation of these phases of our early history. But this line of inquiry has been judicially pursued; and the facts of our history have been so well stated and summarized, in certain of the decisions of the Supreme Court of the United States, as not only to emphasize these salient facts but to illustrate the judicial deductions to be properly made therefrom.

Before the accession of Marshall to the bench of the Supreme Court, that Court had more than once declared itself upon the question of the relative positions of the States and the United States prior to the adoption of the Constitution.

In Chisholm v. Georgia, in 1793 (2 Dall. 419), Chief Justice *Jay* said:

"The Declaration of Independence found the people already united for general purposes, and at the same time providing for their more domestic concerns by state conventions and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was not then an uncommon opinion that the unappropriated lands which belonged to that crown, passed not to the people of the colony or state within whose limits they were situated, but to the whole people. * * * The people continued to consider themselves, in a national point of view, as one people, and they continued, without interruption, to manage their national concerns accordingly. Afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the states the basis of a general government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present constitution." (p. 470.)

Judge *Wilson*, in his concurring opinion in the same case, said, speaking of the constitution:

"One of its declared objects is, to form a Union more perfect than, before that time, had been formed. Before that time the Union possessed legislative, but unenforced legislative power, over the States. Nothing could be more natural than to intend that this legislative power should be enforced by powers executive and judicial." (p. 465.)

It was upon these views that the Supreme Court decided that the State of Georgia was subject to be sued in the Federal Courts. This was the first great case in that Court, which turned upon constitutional questions.

The second great constitutional case in that court was Penhallow v. Doane, in 1795 (3 Dall. 54), in which the court sustained the jurisdiction of the "Court of Appeals in cases of Capture," established by the Congress in the Confederation era, over the prize courts established by the States. The decision was based upon the national character of the government of the Continental Congress prior to the Constitution.

Judge *Paterson* in his opinion said:

"The powers of Congress were revolutionary in their nature, arising out of events adequate to every national emergency, and co-extensive with the object to be attained. Congress was the general, supreme and controlling council of the nation; the centre of union, the centre of force, and the sun of political system. To determine what their powers were, we must inquire what powers they exercised. Congress raised armies, fitted out a navy, and prescribed rules for their government; congress conducted all military operations both by land and sea; congress emitted bills of credit, received and sent ambassadors, and made treaties; congress commissioned privateers to cruise against the enemy, directed what vessels should be liable to capture, and prescribed rules for the distribution of prizes. These high acts of sovereignty were submitted to, acquiesced in, and approved of by the people of America. In congress were vested, because by congress were exercised, with the approbation of the people, the rights and powers of war and peace.

"In every government, whether it consists of many states or of a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of

war and peace are component parts of this supremacy, and incidental thereto is the question of prize. The question of prize grows out of the nature of the thing.

"If it be asked in whom, during our revolutionary war, was lodged, and by whom was exercised, this supreme authority, no one will hesitate for an answer. It was lodged in and exercised by Congress. It was there or nowhere; the States individually did not, and with safety could not, exercise it.

"Disastrous would have been the issue of the contest, if the States separately had exercised the powers of war; for in such case there would have been as many supreme wills as there were States, and as many wars as there were wills. Happily, however, for America, this was not the case; there was but one war and one sovereign will to conduct it.

"The danger being imminent and common, it became necessary for the people or colonies to coalesce and act in concert, in order to divert or break the violence of the gathering storm. They accordingly grew into union, and formed one great political body, of which Congress was the directing principle and soul. As to war and peace, and their necessary incidents, Congress, by the unanimous voice of the people, exercised exclusive jurisdiction, and stood, like Jove amidst the deities of old, paramount and supreme. The truth is, that the States, individually, were not known nor recognized as sovereign, by foreign nations, nor are they now. The States collectively, under Congress as the connecting point or head, were acknowledged by foreign powers as sovereign, particularly in that acceptation of the term which is applicable to all great national concerns, and in the exercise of which other sovereigns would be more immediately interested, such, for instance, as the rights of war and peace, of making treaties, and sending and receiving ambassadors." (p. 80-81.)

The other Judges spoke to the same effect. Judge *Iredell* said:

"But, that previously thereto (the ratification of the Articles of Confederation), they did exercise with the acquiescence of the States, high powers of what I may, for distinction, call external sovereignty, is unquestionable. Among numerous instances that might be given of this, were the treaties with France, in 1778." (p. 91.)

Again he said: "When the obnoxious acts of Parliament passed, if the people in each province had chosen to resist separately, they undoubtedly had equal rights to do so, as to join in general measures of resistance with the people of

the other provinces, however unwise and destructive such a policy might and undoubtedly would have been.

"If they had pursued this separate system, and afterwards the people of each province had resolved that such province should be a free and independent state, the State from that moment would have become possessed of all the powers of sovereignty, internal and external." (p. 92-3.)

And further: "It seems to have been the sense of all the States that Congress should possess all the incidents to external sovereignty." (p. 95.)

In the following year (1796) the Supreme Court again had occasion, in the case of *Ware v. Hylton* (3 Dall. 199), to consider the status of the general government during the war, with reference to the power of Virginia to confiscate a debt due to a British creditor. Judge *Chase* said:

"I entertain this general idea, that the several states retained all internal sovereignty, and that Congress properly possessed the great rights of external sovereignty." (p. 232.)

Judge *Wilson* in the same case spoke of the Congress of the Revolution as

"that body which clearly possesed the right of confiscation, as an incident of the powers of war and peace." (p. 281.)

Judge *Marshall* was not only familiar with these decisions of the Supreme Court, but they met with his concurrence and approval. In 1809, there arose, in the case of the United States v. Peters, (5 Cranch 115), another controversy over the respective admiralty jurisdictions of the United States and a State, under the Confederation. This time the opinion of the Supreme Court was pronounced by *Marshall*, sustaining the national character of the Court of Appeals created by the Continental Congress. He said:

"By the highest judicial authority of the nation it has been long since decided, that the Court of Appeals erected

by Congress had full authority to revise and correct the sentences of the courts of admiralty of the several States, in prize causes. That question, therefore, is at rest." (p. 140.)

To this extent, then, the states were not sovereign under the Confederation, whatever Judge *Marshall* may have said elsewhere.

More recently, and as a natural corollary to those early opinions, the Supreme Court of the United States has said, in 1868, in the case of *Lane County v. Oregon*, (7 Wall 71, p. 76); "Both the States and the United States existed before the Constitution." And as a more full statement of the character of the United States as thus existing, the court at the same term said, in *Texas v. White*, (7 Wall. 700, p. 725):

"The Union of the States never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of a comon origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction, from the Articles of Confederation. By these the Union was solemnly declared to be perpetual. And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, be not?"

It was by these considerations that the Supreme Court was led up to the declaration in the same opinion, that "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

## Subordination of the States.

Were the judges of the Supreme Court, in making these decisions, unmindful of the declaration in the Ar-

ticles of Confederation, "Each State retains its sovereignty, freedom and independence?" Or did they studiously ignore that declaration? Were not their opinions in direct conflict with that declaration? Or, if not, what did that declaration mean?

If the Supreme Court was right in saying that the external sovereignty was in the United States from the beginning, and that the powers exercised by the states all pertained to internal sovereignty, then the Articles of Confederation are to be taken as declaring that "each state retains" such powers of internal sovereignty as it then possessed. This we now see to be historically and constitutionally true. That such was the opinion of the Supreme Court is apparent from the language of Judge *Blair* in *Penhallow v. Doane,* (1795), in which the distinction between external and internal sovereignty had been so clearly stated:

> "It is true, that instrument is worded in a manner, on which some stress has been laid, that the several States should retain their sovereignties and all powers not thereby expressly delegated to Congress, as if they were, till the ratification of that compact, in possession of all the powers thereby delegated. But it seems to me that it would be going too far, from a single expression, used perhaps, in a loose sense, to draw an inference so contrary to a known fact, to-wit: that Congress was, with the approbation of the States, in possession of some of the powers there mentioned, which yet, if the word "retain" betaken in so strict a sense, it must be supposed they never had." (p. 112.)

Certainly no one of the states could "retain" any of those powers of sovereignty which were then, and always had been, denied to it.

The judicial declaration of South Carolina is to the same effect.

In *McCready v. Hunt,* in 1834, the Court of Appeals

of that state had before it the question of the validity of an act of the Legislature prescribing a new form of oath to be taken by officers of the state militia, so as to relieve them from any obligation to support the laws of Congress and enable them to enforce the nullification law of the State. (2 Hill, Law Rep., 1.) The case turned upon the question, to which power was the allegiance of the citizens of South Carolina due? The Court of Appeals held the act in question to be unconstitutional. The lower Court had declared that by the Declaration of Independence,

> "South Carolina became a free, sovereign and independent state, and from this period all power and sovereign authority became vested in the people of South Carolina, as a free and independent nation." (p. 7).

But the Court of Appeals reversed that ruling, and in reversing it, said that

> "Before the Constitution of 1787, it was not then doubted that allegiance was due to the United States"; (p. 215); and decided that it was still due.

But have we any contemporary evidence that this was the sense in which those who framed the Articles of Confederation actually used these words? Yes; if we are to take according to its plain meaning the full wording of the resolution of the convention of the people of Maryland, adopted June 28th, 1776, the last of the series of instructions to delegates above referred to, on the subject of a Declaration of Independence, and which were laid before the Continental Congress on July 1st, three days before the signing of the Declaration, to-wit:

> "That the deputies of said colony or any three or more of them be authorized and empowered to concur with the other United Colonies, or a majority of them, in declaring the

United Colonies free and independent States; in forming such further compact and confederation between them, in making foreign alliances, and in adopting such other measures, as shall be adjudged necessary for securing the liberties of America; and that said Colony will hold itself bound by the resolutions of the majority of the United Colonies in the premises; Provided the sole and exclusive right of regulating the internal government and police of that Colony be reserved to the people thereof."

The two questions of a Declaration of Independence and Articles of Confederation were at the time before the Congress, and it was to the representatives of Maryland in the Congress that these instructions were addressed. Surely, the Supreme Court of the United States has correctly deduced, from the action taken by that Congress with the assent and approbation of the people, the fact that both the Declaration and the Confederation had in view the creating of a nation with the usual powers of sovereignty.

So when Mr. Lincoln promulgated the doctrine, in opposition to the secessionists, that "the Union is much older than the Constitution," that no one of the States was ever a State out of the Union, and that "the Union is older than any of the States," he showed himself not only a good historian, well versed in the facts of our early national experience, but an excellent constitutional lawyer, and a close reader of the opinions of our highest court as to the character of our early government.

## III.

## VITAL PRINCIPLES OF THE DECLARATION OF INDEPENDENCE.

The high place which the Declaration of Independence occupies in the esteem of the American people is generally accorded to it as a revolutionary instrument. The era of its publication finds most ready recognition as a revolutionary era, and the war of which it was an episode passes into history as the Revolutionary War. At first blush, this document does not seeem to be marked by constitutional features. Yet there was during the whole era, including the conduct of the war, no characteristic of public action more conspicuous than the conservatism which dominated the movements of the leaders. Trescot well says of them that "they conducted a revolution with the caution of a lawsuit, and justified every step as they advanced by the authority of a precedent." This disposition distinguishes the great Declaration. Revolutionary though it were, in part and for certain purposes, it was at the same so far built upon precedent as to be very distinctly conservative. The safety and the strength of the colonial statesmen, in their entire controversy with the British court, lay in their assertion of and their per-

sistent reliance upon constitutional principles as a part of the birthright of the colonists. This frame of mind is so far reflected in their final deliverance as to give to it in a large sense the character of a constitutional document.

This Declaration was drawn by a constitutional lawyer, and its office was in part the assertion of constitutional rights. It signalizes the culmination of a fifteen years' international debate upon constitutional questions, and it assumes dogmatically the conclusions reached, as a result of that debate, by those for whom it speaks. During its progress, this debate grew not only animated, but acrimonious. It continued in forensic form, until the British government gave the signal for the close of the discussion, by the armed advance upon the Massachusetts military stores at Concord. For a year after this act of war, the colonists maintained their argumentative attitude, and while resisting armed aggression, were at the same time insisting upon their constitutional rights under the British system, and professing, as always before, their continued allegiance to the British crown. Up to this point, they had justified their entire course as constitutional. Convinced now of the necessity of a resort to the purely revolutionary measure of abjuring their allegiance to the king, they so prepared their manifesto as to meet and explain both phases of their situation and their action, the constitutional as well as the revolutionary. Skilfully did the draftsman preserve the line between these two elements. In its revolutionary phases, the document is bold, progressive and daring; and in its constitutional aspects, it is in equal degree firm, conservative and guarded. There was no inconsistency in this duplication of views. Constitutionally,

the colonies had not theretofore been under the general control of the parliament, and the consistent assertion of this feature of the situation manifested the conservatism of the deliverance. But the colonists had been constitutionally under the king's allegiance; and with the frank admission of this fact was coupled a fearless presentation of their charge that the king had by misconduct forfeited that allegiance and had thereby furnished a complete justification for the revolutionary portion of the colonial programme. The acts of parliament complained of were reprobated, not as having made, of themselves, any inroads upon the constitutional rights of the colonies, but as being merely "acts of pretended legislation," which were inherently innocuous. But the king who had once been their king, had been false to his office; and his breach of his constitutional duty, tolerated until toleration ceased to be a virtue, now called for action which the actors freely confessed to be revolutionary.

This was the great crisis in the affairs of colonial America. Constitutionalism was at stake. The predisposition of all the leading colonial statesmen was toward a strictly constitutional system of government, and their experience had developed in them a warm attachment to local democracy. The privilege of maintaining local self-government was now threatened, and hung in the balance. By this Declaration, that privilege was to be further protected and defended. Its revolutionary features were but a means to an end, and that end was the preservation of constitutional rights and liberties. Its revolutionary operation was both claimed and proved to be a necessity to that end. Paradox though it be, this revolutionary instrument marks the first victory gained, against a concerted and dangerous attack, for that constitutional

form of government which is now the pride and glory of the Nation. So this Declaration becomes one of the great quartette of American constitutional documents, of which the others are the Articles of Confederation, the Ordinance of 1787, and the Federal Constitution.

The impress of constitutionalism upon the document is seen in its calm assumption of the existence of certain constitutional principles. The declarants boldly summon these principles to their aid, not as facts to be proved, but as truths of which the "candid world," to which the appeal is made, is expected to take judicial knowledge. No attempt is made in the declaration to marshal these principles in order, or to present them analytically, or to sustain them by argument or illustration. They are tersely and dogmatically stated, in form befitting the summing up of fifteen years' argument. We read between the lines that the whole appeal finds both illustration and justification in these principles, which are among the truths that are "self-evident." They are not labeled "constitutional." Indeed, the Declaration uses the word "constitution" but sparingly; simply protesting, as it does, against the attempt of the king "to subject us to a jurisdiction foreign to our constitution." It is by reason of their inherent quality, not because of any epithet applied to them in the instrument, that they may now be distinguished as constitutional.

Among the principles thus assumed, and placed in position as fundamental to the contention of the colonists, may be named first, the following, which, with the results of the war and the lapse of time, have become of secondary importance:

1. Great Britain and the American colonies have been

integral and separate portions of one empire, subject to the same prince, but each with its own separate legislature.

2. Allegiance and protection are reciprocal.

3. The prince owes duties to his people.

4. One of these duties is to promote proper legislation.

These propositions relate to the colonial past, and adherence to them constituted in part the justification of the colonists in their revolt against the king who had industriously disregarded them.

But a second and larger group of political principles, enunciated in the declaration, whose value did not depend upon the form of the relations between the colonists and their executive, and which therefore did not lose their importance by the severance of those relations, have survived in our institutions, and are now, as they were then, fundamental in our system, namely:

1. The people are the source of political power.

2. The people are entitled to have their charters and constitutions preserved inviolate.

3. The people of each colony are entitled to be represented in their own legislature.

4. Taxes may be levied by the people's representatives only.

5. The local legislatures are to be independent.

6. The military arm of the government is to be subordinated to the civil.

7. No standing armies are to be allowed in time of peace.

8. The judiciary are to be independent.

9. The right of trial by jury is to be preserved.

10. The jury are to be drawn from the vicinage.

To the extent of announcing that these principles had all been parts of that settled polity of the colonial system

of Great Britain, upon which they had relied, the debate had proceeded on the part of the Americans. The theses put forth from time to time by Otis, the Adamses, Dickinson, Wilson and Jefferson, had elaborately argued the correctness of these principles and had cited the British precedents by which they were illustrated. One by one they had been debated, contended for, and sustained. The time for argument had now passed, and further discussion appeared to be superfluous. The Declaration therefore assumes a dogmatic form, and states calmly and succinctly the propositions which it is claimed have been established by the debate, and which are now presented as entitled to recognition on their merits.

The Declaration, following the lines already marked out in the Great Debate, impeaches the king of Great Britain of "a long train of abuses and usurpations, pursuing invariably the same object," all violative of one or more of these constitutional principles, and evincing "a design to reduce them (the colonists) under absolute despotism." Then follows "a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states." The items of this elaborate indictment may be classified in order as follows:

Eight (8) charges against the king of misfeasance in his conduct as a branch of the legislative department of the government of the colonies:

Four (4) charges against him of misfeasance as the executive of that government:

One (1) charge against him of unlawful combination with parliament for unconstitutional ends, as to which there are nine (9) specifications:

And, finally five (5) further charges against him of misfeasance as the executive.

Each of these items names a specific act of misconduct, calculated to trespass upon the constitutional rights and relations whose existence was assumed; and the twenty-six charges together suffice to justify abundantly the act of renouncing that allegiance which the offending prince had forfeited.

Three of the signers of the Declaration had been, for months previously, active and prominent in the public argument in support of these principles, on constitutional grounds. James Wilson in his elaborate pamphlet in 1774, on "The Nature and Extent of the Legislative Authority of the British Parliament," and his public address in January, 1775, on the misfeasances of the king as the executive of the empire; John Adams in his several "Novanglus" pamphlets in 1775; and Thomas Jefferson in his "Proposed Instructions to the Virginia Delegates" in 1774, had exhaustively illustrated the constitutional relations between the colonies and the mother country. The people of the colonies had thereby become well educated in the law of those relations. The Declaration follows closely the lines marked out in these papers, which may be classed as the peroration of the protracted colonial argument. Wilson and Jefferson, in particular, had clearly set forth the constitutional duties of the king, both as the chief executive of the empire, and as a component part of its legislative department. Wilson and Adams had industriously cited the judicial and historical precedents for the principles which they found fundamental in the British constitution. The fact that English sovereigns were initiated into the executive office with a coronation oath, and the character of that oath and the duties which it imposed, had been looked to in explanation of their official relations to their loyal subjects.

Wilson had developed the proposition, as applicable to the existing situation, that allegiance and protection were reciprocal duties, and must stand together, or fall; and had first impeached the king of an unconstitutional conspiracy with other political elements against the colonial liberties. Jefferson, without a like copious citation of authorities, had stated so elaborately and fully, in his "Proposed Instructions," the grievances of colonial America against both king and parliament, as to give this document the character of a gloss upon or a fuller statement of the points summed up in the later Declaration. Here are recited nearly all the constitutional principles which, as we have seen, characterize the Declaration. Jefferson had, in his original draft of the Declaration, embodied other recitals, which he had repeated from those "Proposed Instructions," but which were stricken out in the committee, as superfluous. In these several papers, as in a mirror, can be seen the constitutional considerations which animated the minds of the framers of the Declaration, and which furnished the spirit of that potent instrument. When marshalled before the back-ground of these lucid theses upon the operations of a constitutional monarchy, the dogmatic assertions of the Declaration become illuminated.

The principles which these statesmen thus made the basis of their deliverance are not all now of equal interest to us who enjoy the benefits of their work. The four which are first stated above have a retrospective interest only, for the relation between the king and his colonial subjects, to which they apply, was abolished by the assumption of Independence. The principles were properly noted in the Declaration, for by them was History to judge of the past, and to justify the colonial resistance.

The others, ten in number, were of lasting importance. The revolutionary act of Independence did not lessen their value. These principles had distinguished the operations of the people's local governments in the past; and in the future, under whatsoever power, whether British or American, they were to continue operative; for these are among the fundamentals of government which were and still are dear to the hearts of Americans.

The subsequent history of our country evidences the warmth of the attachment of the American people to the propositions thus laid down, and justifies the movement by which, for the preservation of those principles, the bonds of former union to the British empire were sundered. We have built into the substructures of our governmental edifice other principles, which are of equal value, and are equally cherished. But these which a transatlantic king had endeavored to eradicate, and to preserve which the people had excised that kingship, have never lost their high place in the popular estimation. They have been preserved in our local constitutions, and are guaranteed and protected in our federal constitution, and they live and are perpetuated in the institutions which are part of the daily life of the people, and in the daily administration of the people's government. The annual reading, on Independence Day, of the Declaration which announced to the world the supremacy of these principles, is no perfunctory ceremony, when the language of that Declaration is understood in its relation to both our past and our present constitutional history.

## IV.

## THE BEGINNINGS OF AMERICAN INSTITUTIONS.

Contemporaneous with the framing and adoption of our National Constitution was the movement in France which resulted in the Constitution of 1790. The American experiment enjoyed the happy fortune of success from the beginning. The French experiment was consciously inspired and influenced by, and was largely modeled upon, the American, and it embodied fine theories as to how the people should be governed. But it did not fit the people for whose use it was framed, and it endured but a brief year. This failure was due primarily to the fact that the Third Estate, or the common people, who led in the work of framing that constitution, were unused to the processes and uneducated in the arts of government. The assembling of the States-General, the only mode in which the Third Estate could participate in the work of government, had been studiously suppressed by the Louis XIV school of French statesmen. The convention of that body in 1789, which was so soon converted into the Constituent Assembly, was the first instance in French history since 1614. For 175 years,

French statesmanship had deprived the Third Estate of all experience in government, so that in 1789, neither of the three estates had any adequate conception of the proper place or office of the Third Estate in the administration of affairs. The failure of the Constitution of 1790 was the natural outcome of this inexperience.

During the same period of the enforced exclusion of the French people from all participation in their own government, an entirely different process was operative in the English colonies in America. The time of the settlement of these colonies was nearly contemporaneous with that of the death of Henry IV of France and the last meeting of the French States-General. Favored by their isolation from the mother country, and by the rule of the Constitution of England which attached her colonies to the crown, the American colonists were gradually educated during the same 175 years, into all the arts of government. The end of that period found them prepared to learn by careful study much of the science of popular government, and to institute a plan for its feasible application. Practical education in these arts guaranteed success in the one case, and the want thereof entailed failure in the other case.

The origins of the distinctive characteristics of the American system of government are found scattered throughout the period of colonial development, and some of them are dimly traceable to earlier experiences of the Anglo-Saxon race. The record of the growth, development and final supremacy of these governmental principles is the record of an evolution. Nowhere are the processes of gradual unfolding of the full plant from tiny germs more plainly observable than in these early stages of American history.

The Declaration of Independence is the offspring of the English Bill of Rights, and the grand-child of the Dutch Declaration of 1581. In the same manner has the entire constitutional system of America grown, with "its roots deep in the soil of the past." The tracing of the origin of any of the peculiar features of our system furnishes a fresh instance of the tenacity of our race characteristics.

## I. Sovereignty of the People.

When the colonies declared their independence of the mother country, they asserted, and when they won their independence, they established for themselves the doctrine of the Sovereignty of the People. Although they did not begin the conflict for the purpose of asserting or maintaining that principle, yet belief in the doctrine had been growing with the growth of the colonies, until it had become a part of the fixed political thought of many of the colonists. The aristocratic tendencies in Virginia and the Carolinas, the proprietary rights in Pennsylvania and Maryland, the power of the patroons in New York, and the theocratic ascendancy in Massachusetts, had all so far yielded to the domination of the democratic sentiment, that when the time was ripe for revolution, the colonies were practically assimilated in this respect. The earliest applications of this political principle are found in the small colonies of Connecticut and Rhode Island. In these, which are called the Republican colonies, the people had from the first the privilege of choosing their own Governors. They had assumed this function at the inception of their colonial life, it was secured to them by the charters granted by Charles II, and thus they came to assert and defend it as a right.

But these colonies are entitled to the distinction of being the Republican colonies for the further reason that each was, in its very beginning, an avowed democracy. Each originated in an attempt to establish government of the people, by the people, for the people. Those engaged asserted at the beginning that right which is now acknowledged to be the corner-stone of the American system. This is true of no other English colony, as a colony. Every other colony was established in pursuance of authority emanating from the crown, the King being recognized as the Lord Paramount of the English domains in America, and the source of authority to colonize them.

The leaven of democracy generated by these independent communities was leavening all the New England colonies during the pre-revolutionary period, and Massachusetts, New Hampshire and Vermont were gradually coming to conform to this republican pattern. In 1763 Governor Colden of New York, reporting to the Board of Trade of Great Britain in reference to the dispute as to authority over the New Hampshire grants, said:

> "The New England governments are formed on Republican principles, and these principles are zealously inculcated in their youth, in opposition to the principles of the constitution of Great Britain."

Not long before this, Edmund Burke, in his book entitled, "An Account of the European Settlements in America," had told the British people that the people of New England, "by their being generally freeholders, and by their form of government, have a very free, bold and republican spirit."*

From New England, these principles extended to the other colonies, and gradually came to be recognized as

*(v. 2, p. 155.)

the common property of all the American colonists, and a part of the American system of government.

The sturdy Dutchmen of New Netherland, restive under the burden of the patroon system, viewed with envy the larger freedom than their own, which the New Englanders had developed out of the institutions which both classes had familiarly known in Holland. In the petition of the commonalty of New Netherland to the States General, on July 26, 1649, they said, referring to New England:

> "Neither Patrons, Lords nor Princes are known there; only the People. Each Governor is like a sovereign in his place but comports himself most discreetly. They are, and are esteemed, Governors next to God by their people, so long as the latter please. The People have a new election every year, and have power to make a change, and they would make a change in case of improper behavior."*

In Virginia and the Carolinas, in spite of aristocratic tendencies, democracy was a growing cause for many years before the revolution. When Penn erected his new state in the wilderness, the neighboring examples made the way clear for a liberal introduction of democratic practices.

### 2. Local Self-Government,

which is now a distinguishing feature of the American system, had been growing with the growth of the democratic sentiment. That sentiment occupied itself with introducing and continuing to introduce this principle in government. Its earliest examples were found in the two Republican colonies, and here the most earnest devo-

*Documents Colon. Hist. N. Y., 266.

tion to it has longest survived. The towns are still the political unit, and they enjoy a greater degree of self-government than in any other states. The strong leaning there toward decentralization is shown in the fact that Rhode Island has still two state capitals, an institution which Connecticut gave up so late as 1873. It was because of her democratic traditions that Rhode Island was so extremely deliberate in ratifying the national constitution of 1787; her leading men understood so well that that instrument was clearly *not* a league between sovereign states. The happy combination between general and local governments in Connecticut was cited by her delegates to the federal constitutional convention as the warrant for their suggestion of the dual system of federal government which that convention finally adopted.

### 3. Representative Government,

another distinctive feature of our system, had its origin in the inventive genius of our Teutonic ancestors. Our forefathers brought it with them, to these shores, as an inheritance; and in some form it has distinguished our institutions from the beginning. It first appears in Virginia, where the people, in 1619, demanded of the governor that he should call an assembly of representatives, in order that they might make their own laws; and as the tory historian Hutchinson says, "In the year 1620, a House of Burgesses *broke out* in that colony." In the Massachusetts Bay colony, where the government was at first in the hands of an appointed Governor and Board of Assistants, the first attempt at taxation awoke the inherited Teutonic sentiment. The Board of As-

sisants in 1631 levied a tax to pay for building necessary fortifications. Watertown declined to pay the tax, on the ground that English freemen could be taxed only by their own consent. This led to a change in the government, and the establishment of a Board of Deputies, elected by the people, to sit with the assistants, and these Boards were in 1633 made into the General Court. In 1639, the written constitution of Connecticut provided for a General Court, composed of representatives elected by the people. In the years immediately following, the union of the Rhode Island towns which their people found necessary, led to the evolution of a representative general government, while the towns preserved their local forms of democracies. From these beginnings, the system has grown to be of universal application in America, and in this respect our country stands as a pioneer. In the first course of lectures on American Jurisprudence, delivered in Philadelphia, in 1791, the eminent James Wilson emphasized the fact that "The American States enjoy the glory and the happiness of diffusing this vital principle throughout all the different divisions and departments of the government," and congratulated his countrymen on the circumstance that "Government, founded *solely* on representation, made its first appearance on this, and not on the European side of the Atlantic."*

### 4. National Union,

as a peculiar and distinctive form of federation, is the crowning glory of the American system of government. The framers of the federal constitution are justly lauded for the excellence of this, their great work. Yet, novel

*Wilson's Works; v. 1, p. 389; v. 2, p. 9.

as the scheme was and unique as it still is, for no other people has copied it in full, it had its beginnings in our political past, in the colonial era; and by this sign we may recognize it as especially adapted to the uses of this people. The settlements which were finally merged into the thirteen colonies were independent, and often isolated, generally jealous of and often hostile to each other. Their final union has been a progressive work, resulting in a blending into a homogeneous people. The necessity of common defense first led to combinations and federations, sometimes only temporary; but the process proved to be continuous, and the result promises to be permanent.

The organization of the commonwealth of Connecticut, in 1639, was a union of three independent towns. The towns on the island of Aquedneck confederated in 1641, and those of New Haven in 1643. If there was a compulsory union later between the colonies of Massachusetts and Plymouth, and between those of Connecticut and New Haven, that between the separate settlements of Providence Plantations and Rhode Island was voluntary.

Prior to these compulsory unions, in 1643, the four colonies of Connecticut, New Haven, Plymouth and Massachusetts, under the leadership of the last named, formed the New England confederacy; which, after the absorption of New Haven by Connecticut in 1662, continued for many years as a league of three colonies.

In 1696, William Penn proposed a league among the colonies, designed to strengthen them against their public enemies. In 1701, Robert Livingston proposed consolidation into three governments; and in 1722, Daniel Coxe proposed union under one general government.

In 1754, several plans of union were offered. At a congress of delegates from seven colonies, at Albany, a plan of union was proposed and earnestly urged by Franklin, which was such as he thought then feasible, though it did not entirely meet his views; but, the colonies all rejected it, because it contemplated a closer union than a federation. Various propositions were made by some of the royal governors, and by British statesmen, for some union among the colonies, none of which were acceptable to the colonists, as they generally involved serious interference with local self-government.

Thus far, union of the colonies had been the sentiment of the few. With the close of the French war in 1763, the initiation of the British schemes for taxing the colonies, threatening to involve them all in a common danger, forced to the front the thought of immediate union for self-protection. The stamp-act congress of 1765 was attended by delegates from nine colonies, but its sentiments were those of the entire thirteen, and the measures it concerted were in the interest and for the benefit of all. Christopher Gadsden of South Carolina, the first to respond to the call of Massachusetts for this congress, was outspoken in advocating joint action on a continental basis, "as Americans." The resistance to the enforcement of the Stamp Act was general, and the cause of one colony was espoused as the cause of all; and this general resistance suggested the repeal of the act. The renewal of schemes by the British ministry for enforcing the payment of revenue by the colonies, brought the colonists again into joint action, and this time more closely than before. Samuel Adams in 1768 declared for independence as the only hope of the Amer-

icans. In 1766, Jonathan Mayhew had suggested the plan of Committees of Correspondence, to act in all the colonies, for concerted action. This scheme was set on foot by Samuel Adams in 1772, and in the following year the colonies were actively exchanging views through their committees. Here were the beginnings of the final union of the colonies, which was consummated in 1776. The attempted imposition upon the colonies of the tea tax, and the laws passed for securing revenge upon rebellious Massachusetts, united the colonists still more closely. In the first continental congress of 1774, twelve colonies were represented. Jointly they petitioned and memorialized the British government. The resistance which Massachusetts had made to the British aggressions received the corporate commendation and encouragement. More work was blocked out for the Committees of Correspondence.

England understood that the colonies were committed to united action. "America has resisted," said Lord Chatham. "The King means to try the question with America," said Lord North. And the King prepared for war.

The beginning of hostilities by the king's troops in Massachusetts roused the whole country. At once the British army in Boston was besieged by a volunteer American army, who had gathered themselves together from all New England. The Continental Congress, at its second session, finding war flagrant, directly put itself at the head of the continental affairs. The volunteer army in Massachusetts became the Continental Army, and a Virginian was placed in command. Thenceforward his course and his work were Continental in their scope, purpose and results.

Thomas Paine published his pamphlet entitled "Common Sense" at the beginning of the year 1776. On arriving in the Colonies in 1774, he had found a prevalent inertia against separation from the mother country, which he characterized as an obstinate "attachment to Britain." (p. 143.) To break this attachment and to promote separation and independence was the work to which he set himself in his "Common Sense," and with success. The means he proposed was National Union. His whole argument was on the continental basis. He set forth the interests of the continent of America, and its relations to the whole of Europe, and especially to England under the then existing constitution. (p. 28-29.) He advocated earnestly a continental form of government for America (p. 30), and proposed a plan therefor (p. 31) as one step toward which he suggested a continental conference (p. 32), authorized to frame what he styled "a continental charter" (p. 32).

He declared that at that time "the Continental Belt is too loosely buckled" (p. 48); argued that "Independence is the only bond that will tie and keep us together," (p. 50); and urged that "the independence of America should be considered as dating from and published by the first musket that was fired against her." (p. 49.) This last proposition reappears in 1777, with an amendment, in the 3d pamphlet of his series called "The Crisis," which he closes under date of April 19th, 1777, with the words, "Written this fourth year of the UNION, which God preserve"; wherein he evidently dates the Union from the sitting of the first Continental Congress in 1774.

Paine's appeal was recognized by Washington and all the prominent patriots as the most influential of any

event of the day, upon the public sentiment. That it fell on ready ears is evident. Events rapidly pushed the colonies forward to a closer tightening of the continental belt. No colony undertook, or even thought of any independent action on a matter affecting the common defense. Little Rhode Island in June, 1775, commenced the equipment of the first war vessels, and in August recommended to the Congress the establishment of a Continental Navy. On May 4, 1776, her legislature passed an act abjuring allegiance to the British crown, and ordering all commissions of officers to be issued in the name of "the Governor and Company of the English colony of Rhode Island," and then closed the record with the ejaculation, "GOD SAVE THE UNITED COLONIES," instead of "God save the king," as had previously been customary.*

On July 4, 1776, came the Declaration of Independence. It was the joint declaration of the people of the thirteen colonies. By it they declared themselves to speak the sentiments and the resolves of one people, explaining to a candid world the reasons which had impelled them to break bonds theretofore uniting them to another people. No one colony made any such declaration. No one colony professed to enter by itself upon the stage of national action. United as one, the thirteen colonies raised one flag, together saluted the other nations of the world, and as one nation entered the arena of nations. The work of union was now complete. It was found to be imperfect, and it was afterwards converted into "a more perfect union." But the union was accomplished, once for all, on July 4, 1776; and thence-

*Arnold, Spirit of Rhode Island History.

forward the people of the thirteen former colonies constituted a nation, "now and forever, one and indivisible."

### 5. Constitutionalism,

or the fixed attachment to a constitutional form of government, is a distinctive feature of the political faith of our people. It is so much a basic principle of the political views of the large majority, that it may well be classed as one of our institutions. By this term is not meant the preference for a particular form or style of constitution, but rather the belief in, and devotion to a systematic government according to established rules. In the language of the political philosopher, "System becomes King under a government of law." To have the principles according to which a people are to be governed, fixed and determined, so that all who choose may understand them, and every man may know the measure of his rights, privileges and duties, is to give to the government so administered many manifest advantages. It may not make the work of the executive department easy, because it increases the knowledge by individuals of what are their rights, and thus entails the nicest discrimination in administering the laws, but it adds largely to the general contentment and thus to the common welfare. In America the individual acquaintance with the principles of the government is distinctly accentuated. Von Holst, who understands so much, for one of foreign birth, of what is distinctively American, fails to appreciate this disposition toward constitutionalism at its true worth, and sarcastically calls it our "worship of the Constitution." But there is in fact no American trait that should be held in greater honor, for it was this trait that gained us our liberties and made us a nation. The gradual growth of

this disposition toward a strictly constitutional system of government is visible throughout our colonial history. From the earliest dates, as occasion arose, and in continually increasing power as occasions multiplied, did the people show their preference for, and when opposed, insist upon an administration of affairs according to fixed fundamental rules.

Many causes contributed to the development of this disposition. The written charters under which they operated, aided rather than obstructed it. Question after question arose, to settle which the charter must be appealed to. Our present written constitutions are largely, in the last analysis, an evolution out of those old charters to trading corporations. The distance of the colonies from the parent country promoted independence of research and stimulated a desire for a definite understanding of their mutual relations. The gradual evolution of democratic government brought the people more and more into love of system, for it is a free people who want a government of law; it is at the opposite pole of the political globe that we find tyranny and a government of caprice. So our fathers naturally developed into constitutionalists. Their compacts, such as the Mayflower compact, the Providence compact of 1637, and the Connecticut "Fundamental Orders" of 1639, evince the disposition.

Hutchinson was quite right in saying that a House of Burgesses "broke out" in Virginia in 1620; it was the breaking out of this desire for fixed government, which in Hutchinson's time had become so obnoxious to the Tories. It manifested itself in Massachusetts, in 1631, in the action of Watertown in declining to be taxed except as taxation should go hand in hand with representa-

tion, and in the subsequent addition to the governing body of a Board of Deputies, who in 1644 were made into a separate chamber, with a veto on the Board of Assistants; and Mr. Fiske very properly declares that here was the beginning of American Constitutional History. In 1652, when the New England confederacy came near to rupture over the subject of declaring war against Stuyvesant and the Dutch in New York, the controversy was mainly over the question, not what was the most judicious course, but what were the powers of the Board of Commissioners under the Articles of Union, and here probably were the faint beginnings of our Constitutional Jurisprudence.

The refusal to surrender the charters of Rhode Island and Connecticut, the resistance of Connecticut to the authority of the Governor of New York over her militia, the objections made to the encroachments upon the charter of Massachusetts, all show the same spirit vital throughout the seventeenth century. The disputes between the colonies themselves; those between Massachusetts and her northern neighbors over the control of the territory of New Hampshire and Maine, those between Rhode Island and her neighbors, those over the New Hampshire grants, those over the boundary between New York and Connecticut, and those between Connecticut and Pennsylvania, all grew out of conflicting views of their respective charter rights, and were quasi-legal disputes.

Finally, when the occasion arose for the great quarrel with England, the colonists had become educated into the disposition, and the question at issue furnished them the opportunity, to conduct this, perhaps the greatest debate of modern times, on purely constitutional grounds. Now

it was that the constitutionalism of America attested the strength of its previous training. On every point at issue between them and the mother-country, the colonists appealed to the constitution. They defended what they conceived to be their legal rights, ascertained and fixed by the long-established and long-unquestioned interpretation of the British constitution. At the very inception of the great debate, in 1761, the second year of the reign of George III, Otis opened up the constitutional side of the argument, when, in addition to all other considerations of policy, wisdom, prudence or justice, he opposed the issuance of writs of assistance to collect the British revenues in the colonies, on the further ground of the essential violation of the British constitution. From that time until the Declaration of Independence in 1776, the colonists, in all their troubles, whether over Stamp Tax or Tea Tax, Boston Port Bill, or the Parliamentary declaration of a right to bind the colonies by legislation, entrenched themselves behind the bulwarks of the constitution of the British Empire. All their petitions, memorials and protests, and numbers of the resolutions and proceedings of their town meetings, rest on the same ground. Parliament had no right to tax them for any purpose, because the colonies, like England, had their own assemblies, in whom alone resided the constitutional power to levy taxes. Their charters secured to them all local rights and powers, including the right to tax themselves. Just as in England the king must receive all his revenue by vote of Parliament, so he must in his colony receive it by vote of the Assembly. They were willing to grant all they could, even more than should be demanded by Parliament; but not even a cheaper price on tea could seduce them into admitting

the vicious, unconstitutional principle of Parliamentary taxation. Their non-importation agreement had for its sole motive the defeat of this attempted impairment of their constitutional rights. It is instructive to note the legal, constitutional points, so carefully guarded, even in that episode which at first blush appears to be an act of blind rage, the destruction of the tea in Boston Harbor. The introduction of the taxed tea into the colony would be a violation of the constitutional rights of the colonists. They freely admitted the validity of the general commercial regulations of the empire, established by Parliament, one of which required all vessels to unlade their cargoes within a limited time. The Bostonians, in town meeting assembled, on the last day before the tea must be landed, had sought earnestly for official orders to send the tea back. These orders were refused; the night of the last day had come; the next day the tea must be landed; the town meeting adjourned, and a group of disguised men, in a quiet and decorous manner, emptied the tea into the harbor, and thereby simply prevented the violation of a cherished constitutional right, which they esteemed to be of paramount obligation when it came into conflict with other laws.

Israel Mauduit published in London, in 1774, the second edition of his work on the troubles in the Massachusetts Bay colony, in which he printed, for the first time in England, the first charter of that colony. His design was to confute, on constitutional grounds, the constitutional claims which the Massachusetts colonists were asserting. To faithfully state those claims, he reprinted from the Boston newspapers of September, 1768, the proceedings of the town meeting of September 12th, presided over by James Otis, in which complaint was

made of the proposed quartering of English soldiers in the town of Boston, in time of peace, without the consent of the people, "by representatives of their own free election," as an "infringement of their natural, constitutional and charter rights."

The outbreak of hostilities on April 19, 1775, interrupted the pamphlet discussion between "Novanglus" and "Massachusettensis," which for several months had occupied the attention of New England. "Novanglus," (John Adams) had issued his last pamphlet on April 17th. The subject of several of the later ones of his series had been, the relations of the colonies to the British Empire. In them he had demonstrated, by appeals to English history, statutes, laws and judicial decisions, that the colonial possessions of England were, by her constitution, attached to the crown, and were governed, not by the laws of England, but by their own laws, the allegiance of the colonists being due, not to England as a realm, but to the wearer of the crown of England individually. For fullness of citation of authority and precedent, wealth of illustration, and closeness of logic, Adams's arguments on these constitutional questions are unexcelled.

Jefferson had been arguing the same line of constitutional questions in Virginia. In 1774, he prepared in pamphlet form a series of instructions for the use of the delegates to be sent by the Virginia convention to the First Continental Congress. Though not adopted by the convention, these instructions were printed by private subscription, and were largely influential in moulding public opinion. Jefferson here anticipated many of the propositions urged in the Declaration of Independence. His "Instructions" are, however, much fuller, and

the constitutional views are more elaborately argued. He attacks on legal, constitutional grounds, the objectionable legislation of Parliament. He urges to the front "those political principles which exempt us from the jurisdiction of the British Parliament," and says, "the true ground on which we declare those laws void is, that the British Parliament has no right to exercise authority over us." When Parliament passes its "Act for suspending the legislature of New York," says Jefferson, "one free and independent legislature takes upon itself to suspend the powers of another, free and independent as itself." The allegiance of the colonists was due to the crown; and by reason of this, his majesty "possesses, indeed, the executive power of the laws in every state; but they are the laws of the particular state which he is to administer within that state, and not those of any one within the limits of another."

This great constitutional debate closed with the Declaration of Independence, which is a fitting summary of all the constitutional arguments so earnestly pressed by the colonists. Its most striking features are those of a conservative legal document. It indicts the king for those violations of their constitution which justify the Americans in renouncing forever, as they do, all allegiance to him. It refers in apt terms to the legal grounds upon which they have conducted their side of the great debate. It rests its conclusions securely upon the fact that the colonists had simply adopted, with Great Britain, a common king, thereby laying a foundation for perpetual amity, "but that submission to their parliament was no part of our constitution."

It is not clear to what extent Adams and Jefferson had been cognizant of each other's arguments, prior to the

framing of the Declaration. But the prior State papers of both show that the propositions of this document, so far from being dogmatic, are the legitimate deductions from those elaborate arguments which both had made public during the progress of the great debate.

So the era of what we call the Revolution is, on the part of the Americans, marked by much of conservatism. It was on their part, a constitutional, defensive struggle, from first to last. As Trescot says, "they conducted a revolution with the caution of a law-suit, and justified each step, as they advanced, by the authority of a precedent." This being the dominant disposition of the patriot fathers, it is not strange that the Continental Congress urged the states, when the war became flagrant, to prepare for themselves forms of written constitution. It was the most natural thing in the world, that out of this great constitutional struggle should emerge a vigorous nation, built on and devoted to its written constitution.

## V.

## THE REPUBLICAN COLONIES: TWO EXPERIMENTS IN POPULAR SOVEREIGNTY.

When the American colonies declared their independence of the mother country, they asserted, and when they won their independence, they in their own behalf established the political doctrine of the Sovereignty of the People. Although they did not begin the conflict for the purpose of asserting or maintaining that principle, yet belief in that doctrine had grown during the growth of the colonies, until it had become a part of the fixed political thought of the large majority of the colonists. This growth is traceable in different degrees in the several colonies, at different periods in their history. But the aristocratic tendencies in Virginia, Maryland and the Carolinas, the proprietary rights in Pennsylvania and Maryland, the influence and power of the patroons in New York, and the theocracy in Massachusetts, had all so far yielded to the inevitable domination of the democratic sentiment, that when the time was ripe for revolution, the colonies were practically assimilated in this respect. Though they still exhibited differences in their

forms of government, the influential majority in each colony recognized the sovereignty of the people.

One hundred years of success in the administration of our political system having justified the expectations of its founders, it is interesting now to trace the earliest applications in the colonies of that political principle. These are found in the small and apparently unimportant colonies of Rhode Island and Connecticut. The example of democratic government set by them was, sooner or later, followed by the other colonies, and by the whole people, until it has become the American example.

These two colonies are classed as the Republican Colonies, in a division of all the colonies into three classes, as Royal, Proprietary and Republican Colonies. This distinction has reference to the manner in which their Governors were appointed. In the Royal Colonies it was the Crown, and in the Proprietary Colonies it was the Lord Proprietor, whose right it was to appoint the executive, and as whose deputy that official acted. But in the Republican colonies, the people had from the first the privilege of choosing their own Governors. This privilege, exercised by them at the inception of their colonial life, was secured to them by the charters granted by Charles II, and thus came to be claimed and defended as a right. How the King ever "received his own consent" to make this concession, is a problem to historians. That a Stuart, and the grandson of James I, should have so misapplied his inherited King-craft that, while industriously endeavoring to extend his prerogative at home, he should actively aid in erecting two infant republics on his own domains in America, is one of the anomalies of history.

But it is not alone in this sense that Connecticut and

Rhode Island were the Republican colonies. They are entitled to this distinction because, in their very beginning, each was an avowed democracy. Each originated in a deliberate attempt to establish government of the people, by the people, for the people. Those engaged asserted at the beginning that right which is now acknowledged to be the corner-stone of the American system. This is true of no other colony. No reference is now made to individual opinion or example. Doubtless there were men in every colony who espoused this political dogma. Doubtless this democratic doctrine was in the very air breathed by the Puritans, if not in that breathed by the Cavaliers. Doubtless it was influential in bringing over to several of the colonies many of their foremost men. This is true of Massachusetts, in whose jurisdiction both Roger Williams and Thomas Hooker were colonists, and took early opportunities to urge their peculiar views. The fact to be noted is that every other colony was founded in pursuance of some outside authority, emanating from the King as its source, who was recognized as the Lord Paramount of the English domains in America, and the source of authority to colonize. For whatever purpose the colony was projected, whether as a trading enterprise, or as a transplanting to American soil of an English theocracy, or as an attempt to build up a community on the principle of brotherly love, in all instances but these two, authority was first sought and obtained; and this authority had to be overthrown and repudiated before democracy could rule. The people of the two colonies referred to asserted their own right and power as their authority for the founding of a new state.

It was a democratic tendency which led to the first

planting of Connecticut. The Massachusetts Bay colony had been organized upon the township-parish basis brought from England. An entire church congregation emigrating in a body, established itself as a township in the new world, in a selected territory, the government of which was vested in the members of the church congregation. It was a virtual transplanting of parish government from England to Massachusetts. Thus a town-church, or a church-town, became the unit of the political system. The popular form of this government would have made each of these towns a democracy, if the limitation to church membership of the suffrage had not made it a theocracy. In 1636, three of these congregations, each led by its minister, removed to the Connecticut valley, and there established three new town governments, occupying territory already settled by a few traders and agriculturists from Massachusetts, who were absorbed into the new towns. The immediate object of this removal was to separate for political purposes church from town, and to eliminate the element of theocracy. Permission to make this removal, at first refused by the authorities of the Bay colony, was granted in 1636. Settled in the Connecticut valley, these three towns of Hartford, Windsor and Wethersfield retained for church purposes the identity of church and town, but severed the two for political purposes. In both the colonies, the right of voting was vested in the freemen of the towns, who were those only who might be regularly admitted as freemen. In Massachusetts, these freemen must be church-members. In Connecticut, residents of the town other than church-members might become freemen by taking the oath of allegiance. Thus there were in this colony voters, sharing in the exercise of the functions

of government, who were not members of the church society. The church remained in and a part of the town, and they were to some extent identified, and it naturally followed that the leading men of the church became prominent in civil affairs. But the church as such confined itself to religious matters, while the whole body of freemen united in civil government. The relation thus constituted may be understood by observing the form of government of the American congregational churches, which has grown out of it; the central or religious body governing in purely ecclesiastical affairs, and the outer body or congregation, composed of all who statedly attend the services, being vested with control in business and property matters. Thus began the American system of separation of church from state. The active and successful leader of the movement was the clergyman Thomas Hooker.

In the supposition that the territory they were to occupy was within the limits of the Massachusetts patent, the people of these migrating congregations had secured permission from the General Court of the Bay Colony to remove; and at first they acted in conjunction with and as a part of that colony. It was soon learned that the three towns above named were outside the Bay Colony patent, and thenceforward they acted independently of Massachusetts. The fact of their earnest repudiation of the theocratic feature of the Massachusetts system shows their independence, and justifies the recognition of their first migration as a democratic movement. Once fully cut loose from the parent colony, these three congregations were three infant republics, planted in the wilderness, and fortified by no other authority than the innate right of a community of men to govern themselves.

It was soon felt that a union of these three towns under one general system of government was desirable. Probably a necessity for it was found in the importance of a common defense against their Indian and Dutch enemies. The three were practically isolated, Springfield, which had been once united with them, being now severed from them because remaining under the government of Massachusetts. The manner of union adopted by them again exhibits Connecticut as a pioneer in American democracy.

In 1639, the freemen of these towns, described by themselves as "the inhabitants and residents of Windsor, Hartford and Wethersfield," assembled at Hartford and agreed upon a written plan of union, styled the "Fundamental Orders of Connecticut." The following features of this scheme deserve particular mention.

1. It was the work of a mass meeting of freemen, who in it declare that they "associate and conjoin ourselves to be as one public State or Commonwealth."

2. It contains no reference to King, charter, or privilege, or any other authority for their act, outside of themselves.

3. It provides for an annual election of Governor and Magistrates for the commonwealth.

4. The General Court is to be composed of deputies from the towns, elected by the freemen, at an election of which previous notice or warning has been given by the town constables.

5. Elections are to be by written ballot.

6. The voters are the freemen or the residents who have taken the oath of allegiance.

7. The objects named are "to preserve the liberty and purity of the Gospel," and "in civil affairs to be

guided and governed according to such rules, laws, orders and decrees as shall be made, ordered and decreed."

In this document we find the inception of several features of the present American political system. It was the first written constitution, in the American sense, that is known to history. Earlier documents are found, resembling constitutions, such as the Swiss pact of 1291, which created a league, but not a state, and Magna Carta, which was but a part of a constitution. The compact made in the Mayflower antedated the Connecticut constitution, and so, probably, did the compact of the inhabitants of Providence hereafter referred to. Each of these provided for but one single community, and the Mayflower compact acknowledged the authority of the King. But the Fundamental Orders of Connecticut established a complete frame of government, by the act of the people themselves, in which they created a representative system, upon a democratic basis, separating partially church from state, preserving town government for local purposes while conferring supreme power upon the state for general purposes, and providing for the secret written ballot. Here are discovered the germs of our national institutions.

In seeking to ascertain whether any one person is entitled to the sole or principal credit for any great achievement, such as the framing of this constitution, it is a too common practice to jump at a conclusion. There seems, however, to be abundant evidence to justify the belief that to Thomas Hooker is due the honor of most largely shaping the political life of Connecticut. In the colonial New-England town, the minister was generally the most influential citizen. Hooker had not only brought out of Massachusetts his own congregation, but

had largely aided in the removal of the other two. In the language of Prof. Johnston, he "was undoubtedly the strength of the migration."* While living in Massachusetts, he had openly and notoriously differed on political subjects from Rev. John Cotton, the spokesman of the theocrats, who denied that God ever ordained democracy "as a fit government either for Church or Comonwealth." So aristocratic was the theocracy, that by the exclusion of all but church-members from the voting class, fully five-sixths of the people of Massachusetts were disfranchised, and this disfranchisement continued as late as 1676. Hooker had preached against the strictness practiced in admitting to church membership. Hubbard the historian says that "after Mr. Hooker's coming over, it was observed that many of the freemen grew to be very jealous of their liberties." In the correspondence between Hooker and Winthrop, the latter insisted that it was unsafe to refer matters "of counsel or judicature" to the people, because, as he urged, "the best part is always the least, and of that best part the wiser part is always the lesser." Assenting to Winthrop's suggestion that the people should refer matters of counsel to their counsellors, and matters of judicature to their judges, Hooker urged the questions, (1) "what rule the judge must have to judge by" and (2) "who those counsellors must be." He then declared himself unequivocally on both these two points. (1) "That in the matter which is referred to the judge, the sentence should lie in his breast, or be left to his discretion according to which he should go. I am afraid is a course which wants both safety and warrant. I must confess, I ever looked at it as a way which leads directly to tyr-

*Johnston's Connecticut, p. 69.

anny, and so to confusion." (2) "In matters of greater consequence, which concern the common good, a general council, chosen by all to transact businesses which concern all, I conceive under favor, most suitable to rule and most safe for relief of the whole."*

Thus does the democrat pronounce in favor of a system of law for the judges, established by authority of the whole people, under the representative system.

Direct evidence of Hooker's political agency is found in the sermon which he preached at Hartford in May, 1638, nearly eight months prior to the adoption of the "Fundamental Orders." This distinctively political homily was based on Deut. 1, 13, "Take you wise men, and understanding, and known among your tribes, and I will make them rulers over you"; upon which the homilist discoursed of Doctrine, of Reasons, and of Uses. The doctrines that the choice of public magistrates belongs unto the people, by God's own allowance, and that they who choose the magistrates may set the bounds and limits of their authority, were supported by the reason, first of all, that *the foundation of authority is laid in the free consent of the people,* whereby the preacher was led to exhort his hearers to be persuaded, "as God hath given us liberty, to *take* it."†

If any man deserves to be enrolled in the list of "Makers of America," and to have his biography written as such, that man was certainly Thomas Hooker. Well does the biographer who writes of him as a Maker of America, name him Preacher, Founder and Democrat.‡ If one man is to be singled out as the pio-

*Walker's Thomas Hooker, p. 121, 122.

†Johnston's Connecticut, p. 72.

‡Walker's Thomas Hooker.

neer Democrat of the United States of America, it should be he. This is not to claim him as the instructor of all his contemporaries in democracy, or even the earliest convert to the new school. Other individuals, like Roger Williams, may and will be honored and revered for their political Catholicity; and among them Hooker's civil Mentor might be found. It is the peculiar honor of Hooker that he, first of all Americans, saw how to organize democracy, and accomplished its successful and permanent organization.

He it was at whose instance Connecticut in 1637 made the first overtures toward a union of the New England colonies, which, renewed by Connecticut in 1642, were to his great satisfaction consummated in 1643 by the league of the "United Colonies in New England," which lived till after his death.*

The towns of the New Haven colony were planted in a similar manner to that adopted in the Massachusetts Bay colony, though without the authority of a charter, and not in pursuance of any general plan. New Haven was settled by a party who came to Boston in July, 1637, from England, led by Davenport as minister and Eaton as layman. They had learning, influence and wealth, and the ambition to found a colony of their own kept them from settling in Massachusetts, where a powerful government was in control. The recent Pequot massacre had directed attention to the sea border of Connecticut, and in the spring of 1638, New Haven was settled. Lands were purchased from the Indians and assigned to new parties of emigrants from England, and the settlement of the towns of Milford, Guilford and Stamford followed. These towns became joined together

*Walker's Life of Hooker, p. 130.

as a commonwealth in 1643, as the "Republic of New Haven." Two other towns being added, this Republic continued until absorbed by Connecticut under the charter of 1662.

The government of this Republic was a theocracy after the Massachusetts pattern, with an even more intensified ecclesiasticism. The town of New Haven set the example, and its influence controlled the others. That town in June, 1639, settled her own constitution by the adoption of six "Fundamental Orders," which based all family, church and civil government upon the Scriptures, reserved to the church-members the privilege of voting, holding office and making the laws, and provided for the selection of seven of the church-members as the "seven pillars" who were to govern the church and state, the word of God to be the only rule for the guidance of judges and public officers. The other towns were organized upon the same theocratic model. The same basis in substance was adopted under the confederation of 1643, the towns being represented in a semi-annual General Court, charged with the management of the general affairs of the colony.

So stern a theocracy as this naturally developed an inquisitorial character. The General Court in 1644 ordered that "the judicial laws of God, as they were delivered by Moses," should be binding on all offenders, and be enforced by all courts. Severity of punishment for offences against the Mosaic law had become the rule in the town of New Haven; witness the sentence of Goodman Hunt and his wife, in March, 1643, to be sent out of town within one month, "for keeping the councils of one William Harding, baking him a pasty

and plumcakes, and keeping company with him on the Lord's Day, and she suffering Harding to kiss her."*

Such a system of ecclesiasticism naturally tended to give the colony a reputation for extreme Puritanism, so that it is small wonder that the travesty of the Blue Laws came to be believed in. Stern as was the New Haven code, it ought in justice to be noted that in its final form there were but 15 offences made capital by it, while even as late as 1819, the list of capital crimes in England numbered 223.†

This colony was, like Connecticut, devoid of outside authority for its existence. The undemocratic character of its rule made its government unpopular at home, to a great extent. Comparison with the more democratic character of the Connecticut government made many friends for the latter in the New Haven towns. When in 1662, Connecticut secured a charter which included the New Haven towns in its limits, a large element in those towns were ready to change their allegiance. The grant to the Duke of York of the New York patent with claims reaching to the Connecticut River, made a choice necessary; and as much the least of two evils, the authorities of New Haven chose to submit to the mild democratic rule of Connecticut; and thus ended the new theocracy.

There was an independent attempt to found another Puritan colony at Saybrook, during the years 1635 to 1644, by a company acting under the patent to Lord Say and Sele, and his associates, with John Winthrop Jr., as Governor. The increasing troubles in England embarrassed the plans made for reinforcing this colony,

*Johnston's Connecticut, p. 99.

†Id. p. 105-106.

and the Parliamentary successes at home put a stop to the great Puritan exodus. Connecticut skillfully took advantage of the weakness of the Saybrook patentees to buy up their claims and make the settlement a Connecticut town, advancing Winthrop to position and afterward making him Governor.

During the same period another democracy was, by a somewhat similar process, growing up around Narragansett Bay. There are, however, material variations from the Connecticut example in the case of Rhode Island. The Narragansett towns were not founded by migrating congregations. They grew by the gathering together of migrating individuals, much as mining camps do. Roger Williams was not the founder of a new state, in the sense that Thomas Hooker was the founder of Connecticut, or that Eaton and Davenport were founders of New Haven. He did not aim to found even a town, when he fled to Narragansett Bay. Banished from the Bay Colony because his seditious utterances and conduct gave aid and comfort to the enemies of the Massachusetts Bay charter, which was then in great danger, he at first sought only an asylum for himself, at some point where he could "do the natives good." The disturbances of the time brought to his side other erratic persons, and in 1636, the town of Providence was settled. There was apparently no other bond of union between the settlers than a common desire to find an asylum, and a common antipathy to the theocratic views which ruled in Massachusetts Bay. The same were substantially the facts in the case of the other towns of Newport, Portsmouth and Warwick, which were settled soon after. The political ideal in these towns was even a purer democracy than that of the Connecticut river towns.

Though the Narragansett settlers were mostly, like Williams, men of profound religious views and earnest religious lives, they revolted farther than Hooker and his followers from the church-state system, and declared for the utter abnegation by the state of all interest in church affairs. The freemen in their towns were all the residents who were admitted as freemen, and they favored and practiced the fullest religious toleration.

Thirteen settlers of the town of Providence at an early day signed a compact whereby they erected a democratic community. "We whose names are here underwritten, being desirous to inhabit in the town of Providence, do promise to submit ourselves, in active or passive obedience, to all such orders or agreements as shall be made for the public good of the body, in an orderly way, by the major consent of the present inhabitants, masters of families, incorporated together into a township, and such other whom they shall admit into the same, only in civil things."*

This document is without date, but it is generally attributed to the year 1637. The government thus established was, as will be observed, a pure democracy; and such Providence continued until 1640, up to which time no trace appears of the representative system which afterwards obtained. The limitation of governmental powers to "civil things" will appear later as a continuing characteristic of Rhode Island government.

Mrs. Anne Hutchinson, banished from Massachusetts on account of her religious views, with her associates purchased of the natives the island of Aquedneck, which was named Rhode Island. This became also an asylum for refugees, and on it the towns of Newport and Ports-

*Gammell's Life of Roger Williams, p. 74.

mouth grew up after the example of Providence. The first union of towns in this colony was between these two. At the second General Court held on this island, in 1641, the nature of the union of these two towns was defined as follows:

"It is ordered and unanimously agreed upon, that the government which this body politic doth attend to in this island, and the jurisdiction thereof in favor of our prince, is a democracy, or popular government, that is to say: It is in the power of the body of freemen, orderly assembled, or the major part of them, to make or constitute just laws, by which they will be regulated, and to depute from among them such ministers as shall see them faithfully executed between man and man."*

At the same time this Court adopted a state seal, being a sheaf of arrows bound together, with the motto upon the leash, *"Amor vincet omnia"*; and among the laws then passed was this:

"It was further ordered by the authority of this present court, that none be accounted a delinquent for doctrine, provided, it be not directly repugnant to the government or laws established."†

This was the only attempt at confederation between the Rhode Island towns until 1647, when they united under the Patent of 1643. Each of the other two towns was in all respects a republic in the wilderness, Warwick, though settled by men from Providence, being entirely independent. There was scarcely any common purpose aimed at. Every town was composed of diverse elements, discordant in many things, severe in their judgments of each other, agreed only in their democracy, and

*1 Greene's Hist. of R. I., p. 148.

†Id. p. 149.

driven by the logic of contemporary events to adopt the principles of religious toleration advocated and practiced by Williams, even toward the Quakers whom he reprobated. In both Providence and Portsmouth, the town meeting not only legislated, but adjudicated, decided cases of law and equity, and punished offenses against the public peace and quiet, such as drunkenness, rioting, and restraining liberty of conscience.*

The towns also acted as probate courts, a function which is to this day exercised in Rhode Island by the town council. The points to be observed in these years are, the democratic characteristics of the government, and the autonomy of the towns, features which have asserted themselves ever since.

These eccentric communities, then distinguished principally for what Fiske calls a "turbulence of dissent," were not regarded by the other colonies as entitled to any recognition. The very lands which they had purchased from the natives were claimed as a part of the territory of Plymouth on one side and of Connecticut on the other. The growing supremacy of Parliament at home allowed time for renewed attention to the colonies, and the "let-alone" policy of England might be expected to come to an end. The people of these Narragansett towns might need aid from home for the preservation of their liberties. In 1643, Williams went to England. The Parliamentary party had just created a Board of Commissioners for the colonies. Aided by the influence of Vane, Cromwell and Milton, Williams secured from this Board the patent of 1643. It came when needed, for it followed soon after a patent to Massachusetts, granting to it all the mainland around Narragansett Bay.

*Foster's Town Government, p. 17.

The Williams patent organized the Narragansett towns into a colony by the name of "the Corporation of Providence Plantations in the Narragansett Bay, in New England," and granted to them

"full Power and Authority to rule themselves and such others as shall hereafter inhabit within any Part of the said Tract of land, by such a Form of Civil Government, as by voluntary consent of all, or the greater Part of them, they shall find most suitable to their Estate and Condition; and, for that End, to make and ordain such Civil Laws and Constitutions, and to inflict such punishments upon Transgressors, and for execution thereof, so to place, and displace Officers of Justice, as they, or the greater Part of them, shall by free Consent agree unto. Provided nevertheless, that the said Laws, Constitutions, and Punishments, for the Civil Government of the said Plantations, be conformable to the Laws of England, so far as the Nature and Constitution of the place will admit."

The towns were reluctant to accept this patent. The necessities of their situation compelled them, and in May, 1647, they formed a colonial union under the patent.

The grant of this patent, to "make and ordain civil laws and constitutions," has been construed as exclusive of any ecclesiastical authority, and as requiring "that the government should concern civil things alone."*

The basis of organization under this patent was peculiarly democratic. The government was placed in a legislative body, consisting of a President, Assistants and Commissioners. But the people still made their own laws. All laws were to be first discussed in the towns, and not until each of the four towns had approved it could the legislative body pass any law.†

This union lasted but four years, when it fell apart, and the towns being thus left to themselves, Portsmouth

*Gammell's Rhode Island, p. 120.

†Foster's Town Government, p. 19.

and Newport resumed their joint relations, and Providence and Warwick formed a similar union. Three years later, in 1654, the influence of Vane and Williams led the towns to reunite, and thus matters stood with the colony until the charter of 1663.

The restoration had occurred in England and a Stuart was on the throne of his ancestors. The New England democracies had thrived because they had been let alone. Though they had never openly acknowledged allegiance to a King across the sea, this was largely because they had taken advantage of the King's embarrassments. It must have been always in the air, that they expected to admit allegiance, democrats as they were, in case it should become necessary.

Troublesome neighbors who laid claim to their territories, and a King on the throne who was son of the one whose persecutions had driven them from England, (for Hooker, Cotton, Williams and Davenport had all fled from the hostility of Archbishop Laud), were ample reasons for seeking the protection of a charter. Connecticut anticipated New Haven in declaring Charles II King, and in sending over an agent to ask for a charter to take the place of the Say and Sele patent. Gov. Winthrop went to England in 1661, armed with the loving and filial protestations of his fellow democrats in Connecticut, and returned with the charter of 1662, probably drawn by himself or at his instance, as the petition which he presented tenders to the consideration of the King the draft of such an instrument.

By this charter it was provided that

"there shall be One Governor, One Deputy-Governor, and twelve Assistants, to be from Time to Time constituted, elected and chosen out of the Freemen of the said Company

for the Time being, in such Manner and Form as hereafter in these Presents is expressed."

"The Assistants, and Freemen of the said Company, or such of them (not exceeding Two Persons from each Place, Town or City) who shall be from Time to Time thereunto elected or deputed by the Major part of the Freemen of the respective Towns, Cities, and Places for which they shall be elected or deputed, shall have a General Meeting, or Assembly, then and there to consult and advise in and about the Affairs and Business of the said Company:

. . . . . .

"And to elect and constitute such officers as they shall think fit and requisite for the ordering, managing and disposing of the Affairs of the said Governor and Company, and their Successors; and also from Time to Time to Make, Ordain, and Establish all manner of wholesome, and reasonable Laws, Statutes, Ordinances, Directions, and Instructions, not Contrary to the Laws of this Realm of England, as well for settling the Forms, and Ceremonies of Government, and Magistracy, fit and necessary for the said Plantation, and the Inhabitants there, as for Naming, and Stiling all Sorts of Officers, both Superior and Inferior, which they shall find Needful for the Government, and Plantation of the said Colony, and the distinguishing and setting forth of the several Duties, Powers, and Limits of every such Office and Place, commanding and requiring, and by these Presents for Us, Our Heirs and Successors, ordaining and appointing, that all such Laws, Statutes and Ordinances, Instructions, Impositions and Directions as shall be so made by the Governor, Deputy-Governor, and Assistants aforesaid, and published in Writing under their Common Seal, shall carefully and duly be observed, kept, performed, and put in Execution, according to the true Intent and Meaning of the same."

No greater concessions than these to the spirit or practice of democracy could be expected from even a liberal King, and the Connecticut men must have found their fondest hopes more than realized. Perhaps the audacity which asked for this charter was the strongest inducement to Charles to grant it. It was not only the broadest charter that had then been ever granted, but it continued in practice and successful operation until long after the Revolution. How the people of Connecticut then esteemed it is seen in the nominal constitution which

they adopted in 1776, at the instance of the continental congress.

"The People of this State, being by the Providence of God, free and independent, have the sole and exclusive Right of governing themselves as a free, sovereign, and independent State; and having from their Ancestors derived a free and excellent Constitution of Government whereby the Legislature depends on the free and annual Election of the People, they have the best Security for the Preservation of thir civil and religious Rights and Liberties. And forasmuch as the free Fruition of such Liberties and Privileges as Humanity, Civility and Christianity call for, as is due to every Man in his Place and Proportion, without Impeachment and Infringement, hath ever been, and will be the Tranquility and Stability of Churches and Commonwealths; and the Denial thereof, the Disturbance, if not the Ruin of both.

Paragraph I. Be it enacted and declared by the Governor, and Council, and House of Representatives, in General Court assembled, That the ancient Form of Civil Government, contained in the Charter from Charles the Second, King of England, and adopted by the People of this State, shall be and remain the Civil Constitution of this State, under the sole authority of the People thereof, independent of any King or Prince whatever."*

Roger Williams had been to England in 1652 and 1653, where he had again met Cromwell and Vane, engaging their active and sympathetic assistance in the troubles of the Rhode Island democracy. But this colony, like Connecticut, felt the necessity of making terms with the crown. Williams and John Clarke were sent to England. Probably they were not authorized to agree to so centralized a government as the one which they secured, but they gained the assent of their own people to it, as well as that of the King. Its kingly concessions exceeded even those made to Connecticut. "It was the freest charter that ever bore the signature of a King, and it was the astonishment of the age in which it was granted."†

*Constitution of Connecticut, 1776.

†Gammell's R. I., p. 182.

Among its provisions were these:

"That our royall will and pleasure is, that noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and every person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye have and enjoye his and theire owne judgments and consciences, in matters of religious concernments, throughout the tract of lande hereafter mentioned; they behaving themselves peacablie and quietlie, and not useing this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbeance of others; any Lawe, statute, or clause, therein contayned, or to bee contayned, usage or custome of this realme, to the contrary hereof, in any wise, notwithstanding."

"There shall bee one Governour, one Deputie-Governour and ten Assistants, to bee from tyme to tyme, constituted, elected and chosen, out of the freemen of the sayd Company, for the tyme beinge, in such manner and fforme as is hereafter in these presents expressed;

"And that forever, hereafter, twice in every year, that is to say, on every first Wednesday in the month of May, and on every last Wednesday in October, or oftener, in case it shall be requisite, the Assistants, and such of the ffreemen of the Company, not exceedinge six persons ffor Newport, ffoure persons ffor each of the respective townes of Providence, Portsmouth and Warwicke, and two persons for each other place, towne or city, whoe shall bee, from tyme to tyme thereunto elected or deputed by the majour parte of the ffreemen of the respective townes or places ffor which they shall bee so elected or deputed, shall have a generale meetinge, or Assembly then and there to consult, advise and determine, in and about the affairs and businesse of the said Company and Plantations; and to elect and constitute such offices and officers, and to graunt such needfull commissions, as they shall thinke fitt and requisite, ffor the ordering, managing and dispatching of the affaires of the sayd Governour and Company, and their successors; and from tyme to tyme, to make, ordeyne, constitute or repeal, such lawes, statutes orders and ordinances, fformes and ceremonies of government and magistracye as to them shall seeme meete for the good and welfare of the sayd Company, and for the Government and ordering of the landes and hereditaments, hereinafter mentioned to be graunted, and of the people that doe, or att any tyme hereafter shall, inhabitt or bee within the same; soe as such lawes, ordinances and constitutiones, soe made, bee not contrary and repugnant unto, butt, as neare as

may bee, agreeable to the lawes of this realme of England, considering the nature and constitutione of the place and people there;

"And ffurther, our will and pleasure is, and wee doe hereby, for us, oure heires and successors, establish and ordeyne, that yearelie, once in the yeare, forever hereafter, namely, the aforesayd Wednesday in May, and at the towne of Newport, or elsewhere, if urgent occasion doe require, the Governour, Deputy-Governour and Assistants of the sayd Company, and other officers of the sayd Company, or such of them as the General Assemblye shall thinke fitt, shall bee, in the sayd Generall Court or Assemblye to bee held from that daye or tyme, newely chosen for the yeare ensueing, by such greater part of the sayd Company, for the tyme beinge, as shall bee then and there present."

Herein was an advance upon the privileges conceded to Connecticut in two important respects; (1) the affirmative recognition of religious toleration, and (2) a broader liberty of local legislation; for while Connecticut was granted power to make laws "not contrary to the laws of England," the privilege of Rhode Island was to make all such laws as should be "as near as may be, agreeable to the laws of this realm of England, considering the nature and constitution of the place and people there." Our surprise was exhausted in observing the liberality of the Connecticut charter, and we take this one for granted, without marvel that the people of Rhode Island could live under it uninterruptedly for 180 years.

Brought into a kind of similarity by these charters, the governments of these two states continued to give free play to the democratic tastes of their people, that of Connecticut until 1818 and that of Rhode Island until 1843. It will be observed that in both states, each town was originally a little republic by itself, and the state was a sort of federal republic. The growth of the towns as democracies was more free than in Massachusetts, because there they were at an early day hampered by the central power of the Commonweath.

Republicanism exhibited itself characteristically in 1687, when Andros was Governor, nominally, of all New England. Both these charters had been rescinded by decrees in England, but the decrees were not executed in form. Andros went to Hartford to seize the Connecticut charter, and the Charter Oak incident foiled him. The colonial Secretary wrote "Finis" on the records and the colonial offices were closed. Andros did not attempt to seize the Rhode Island charter, but the General Assembly had already dissolved, after having voted to authorize the towns to take care of their own affairs. So in both colonies, the towns governed themselves without difficulty, until the accession of William and Mary permitted the colonial governments to resume their functions.

From this time down to 1760, in Rhode Island, the freemen of the colony semi-annually assembled at Newport, voting in person or by proxy, to elect their legislature.*

Two episodes will illustrate the style of the Connecticut democrats, as displayed in the Charter Oak incident, showing them men of decisive action when action was necessary. In 1675, when King Philip's war had broken out, the Hartford authorities, learning that Governor Andros of New York was on his way through the Sound to the seat of war, sent instructions to the troops at Saybrook to tell Andros that the colony had taken all needed precautions against the Indians, and not to permit the forces of Andros to land. In 1693, Governor Fletcher of New York appeared at Hartford with a royal commission as commander in chief of the New England militia, and ordered out the troops for review. Captain Wadsworth, of Charter Oak fame, was in command. When

*Foster, Town Government, p. 26.

Fletcher began to read his commission, Wadsworth ordered the drums to beat, and kept them beating until Fletcher retired.

The early republicanism of these two states has never ceased to distinguish them. The towns are still proportionately more important than in any other state, so that the disposition toward decentralization is strongest in these states. As witness to this, it may be noted that Rhode Island alone still has two state capitals, (though not of equal rank), a practice which Connecticut gave up so late as 1873. In Rhode Island, the Presidential Electors meet at another town than either of the capitals; and each town in the state is separately represented in the State Senate. The city of Providence still continues to hold an annual town-meeting. In this state, the Governor has no veto power. The reason why this little state delayed so long to ratify the Federal Constitution is to be found in her democratic devotion to local interests in the form of State rights; her leading men were clear that the Constitution was not a league between Sovereign States, and they disliked it for that reason.*

We have seen the Connecticut form of republicanism organized upon the basis of the identity of town and parish; a great advance upon the theocracy of Massachusetts, but far from the present American ideal. The seeds of democracy sown by Hooker finally bore fruit in the emancipation of the State from all church control. At first the freemen of the towns, not church members, could vote on all civil matters, but they were compelled to vote taxes and to pay them, for the support of ministers called by church members only. Herein arose the first dissatisfaction. The first change was made in 1669, by allowing the creation of a new or second church within the limits

*Foster's Town Gov't. in R. I., p. 34.

of a town, which of course could share in the proceeds of the taxes. Partition of the old churches was promoted by dissensions on the subject of the Half-way covenant, adopted at Boston in 1657, which gave the baptized children of church members a voice in church affairs. Down to 1818 there was almost continual turmoil in the Connecticut churches. The "Saybrook platform" of 1708 created a state form of church government tending to Presbyterianism. The feud between the "old lights" and the "new lights" caused the creation of a number of separate churches, not licensed by the general court, and not sharing in the benefit of the taxes which their members paid. In 1706, the Episcopalian denomination appeared, and increased so that in 1727 a law was passed allowing a society of that church to be formed into a town, and to control their own church rates independent of the Congregational or State Minister. In 1729 this law was extended for the like benefit of Baptists and Quakers. All other dissenting sects had a common grievance, which grew stronger with their growth, until 1818, when the new constitution put all religious societies and denominations on an independent footing in all respects.

Between these two colonies we must divide the honor of contributing more than all others to those American institutions which have become peculiarly and permanently ours. To Rhode Island we owe the principles of absolute religious freedom and entire separation of church from state, to which Connecticut was obliged to advance in order to realize the full measure of her own democracy. Connecticut gave us the written constitution and the written ballot, and with them that dual system of government, by which the States control in all local affairs, while the central authority is supreme in all matters of

general interest; for it was the Connecticut delegates to the Constitutional convention of 1787 whose state education and inherited political ideas led them to propose the plan of government under which the dual system has proved so great a success.

## VI.

## RELIGIOUS LIBERTY IN AMERICA.

Mr. Charles Francis Adams opened his thesis on "Massachusetts, Its Historians and Its History," with a picture of the two inscriptions on the front of the water-gate at the World's Fair at Chicago; the one on the left hand bearing the words, "Civil Liberty the Means of Building up Personal and National Character," and that on the right hand reading, "Toleration in Religion the Best Fruit of the last Four Centuries." To develope the thought of these two political principles, operating conjointly, and of equal importance and value, was in part the aim of Mr. Adams in that thesis. This, he said, "constitutes the theme of modern history," The second motto above named might, with better grace and more truth, have ascribed the fullness of its praise to the principle of Religious Liberty. Mr. Adams proceeded to discourse conservatively of Toleration in Religion, and thus followed in words his chosen motto; but his thought seems to have risen higher than his words, and thus to have reached the height of charity in religious matters which American political practice has developed; for his illustrations showed the people to be in fact in possession of full Religious Liberty.

## The American Idea.

The attitude of America toward the subject of freedom in religious affairs was, when first assumed, unique; nor does it seem to be otherwise even now, for our pattern has not been copied by other peoples. The conception of a complete separation of church from state, presenting the church as an institution standing by itself, entirely independent of the state and of all other institutions, and the state as an institution indifferent to the church in all its aspects save its independence, was a startling proposition originally. It is such now to many conservative thinkers of the old world. Yet this has ever been a feature of American constitutional government. The principle was introduced into the policies of the world contemporaneously with our Declaration of Independence. The political freedom announced by that instrument embraced as one of its factors an absolute freedom in entertaining and expressing religious opinions, and in the practice of religious worship; and this freedom was to be achieved and preserved by the perpetual divorcement of Church from State.

The right thus secured and established is purely personal; it pertains to the individual. Can it then be properly considered a matter of governmental policy? As it concerns the individual alone, is it not true that in America the government has no religious policy whatsoever? These doubts are dispelled when we observe that the principle of Separation of Church from State operates not negatively but positively. The people's government does not content itself with letting the individual alone in this respect; it guarantees that he shall be continuously let alone. It denudes itself of office, mission and duty as to

all religious questions. It disclaims the right to interfere with the individual conscience, and it proclaims that no such interference shall be allowed. Thus the right of private opinion, and the right of free worship, become constitutional rights, to protect which the government is affirmatively pledged.

The American doctrine on this subject has been by no one more clearly stated than Dr. Philip Schaff, in his thesis on "Church and State in the United States," as providing for

"*A free church in a free State,*" or in other words, "*A self-supporting and self-governing Christianity, in independent but friendly relation to the Civil Government.*"*

This political principle stands as the culmination of a long and progressive development, continuing throughout the whole period of our colonial history.

How far Europe still falls short of attaining to the American standard will appear in the presentations made by British writers of the existing system in England. Mr. Lecky, who discourses so instructively of "Democracy and Liberty," argues that there has been practical religious freedom in England since 1813, "when Unitarians at last received the legal recognition which had long been granted to other Dissenters,"† and claims that all forms of religious worship that do not offend morality are "perfectly unrestricted."‡ It is immaterial that there are still unrepealed statutes against Jesuits and some other religionists, because these are practically obsolete. But Lecky does not consider the question of the establishment

*Schaff's Church and State, p. 9.

†Lecky, Democracy and Liberty, vol. I, p. 509.

‡Id. p. 510.

or disestablishment of a state-church as pertaining to the subject of religious liberty,* while he admits that

> "In the full concession of political rights to non-conforming bodies, England has been much behind some other nations; the United States led the way."†

Mr. James Paterson, whose treatise on "The Liberty of the Press, Speech and Public Worship," appeared in 1880, lauding the freedom enjoyed by British subjects, and professing to be a standard treatise on the subject, says that "Dissent, after having long been an unquestionable crime, has ended by becoming *almost a corner-stone* of the glory of civilization," and that "the substantial rights, duties and possessions of Dissenters now, *to a great extent*, coincide with those of the Established Church."‡ He then proceeds to elucidate the rights of those outside the establishment under the title, "Toleration and Dissenters."§ Evidently the first step in Great Britain toward religious liberty of the American standard must be the abolition of "conformity."

## The Old-World Theory.

The Old-World ideas of the proper relation between State and Church, and of the relation of both State and Church toward the individual in respect to "matters of religious concernment," have been wholly abandoned under the American system. The American conception of religious liberty is, let it be repeated, unique. It is not to be mistaken for or identified with Toleration, on the

†Lecky, Democracy and Liberty, vol. 1, p. 573.

*Id. p. 515.

‡Id. p. xii.

§Id. p. 515.

one hand. It is not a modification or an extension of Toleration; it is rather the complete and irreconcileable antithesis of Toleration; for Toleration is a gift, tendered with the implication of a right to withhold, while religious liberty is an inherent and inalienable right. Nor, on the other hand, is the American idea to be confounded with freedom of conscience; for to assert that the conscience is free is to state merely a psychological truism; while the political conception includes the element of Freedom of Worship. This conception should be postulated in its distinctive individuality. Over against it stands the old-world conception of a system which at numerous points brings the political relations of the citizen into interference with his religious views and practices. The prevailing thought in Europe has been that there was a necessary union between the church and the state; a union necessary to both. Various phases of this union have been in vogue, in all of which the central thought was that the rights, privileges and interests of the church require support by and protection from the state. So firmly fixed was this ancient assumption in the policies of the old world that not all the agitation of the era of the Protestant Reformation sufficed to shake it. As it was well and tersely stated in the recent excellent treatise of Mr. Sanford H. Cobb:

"In the immediate Reformation era there was in all the Protestant churches a practical unanimity of opinion, that to the civil magistrate belonged a religious function, in some, intimately related to the very life of the church, in others, restricted to the suppression of heresy. * * * Bossuet was substantially correct in saying, that on one point all Christendom had long been unanimous, the right of the civil magistrate to propagate truth by the sword; that even heretics were orthodox on this point."*

*Cobb on Rise of Religious Liberty, p. 57, 60.

Yet the genesis of the principles of religious liberty which have wrought the total separation of Church from State in America is to be found in the Protestant Reformation. The evolution was protracted and of slow progress, as are all such orderly developments. Indeed, the Reformation at first gave little promise of the grand result; for the success of the great Lutheran phase of the new order brought merely a change from one State-church to another, from Roman Catholicism to Lutheranism. The effect of the Thirty Years' War was to divide the German states into two classes, respectively Protestant and Roman Catholic; but each class of States maintained its especial established Church, and as divided by the Peace of Westphalia, those States remain substantially to this day.

But the Calvinistic side of the Reformation worked otherwise. Calvin's central thought of the individual responsibility of each man to his God, and of the resulting individual relationship, made intelligent and thinking men independent of Kings and Princes, and sapped the foundations of earthly allegiance, and thus bred democrats. So the Calvinist peoples first practiced toleration, thereby stimulating dissent and promoting the growth of sects; and came gradually to grant sectarian independence and equality, from which the advance, though slow, was natural, to full religious liberty and the dissolution of all organic relations between Church and State.

This phase of the tendencies of the Reformation era was a return to and an adoption in part of the principles advocated in theory by the Anabaptists at the very dawn of the era. This sect declared, as early as 1524, that

freedom of conscience and worship was an inherent right, which ought never to be interfered with by the civil power. The theory met with no favor from governments until the succeeding century. It was among the Dutch Calvinists, who were brought into hostile relations with their near Romanist neighbors, that toleration appeared. It was at Amsterdam, in 1611, that the English Baptists put forth, as a part of their "Confession or Declaration of Faith," the proposition that

> "The magistrate is not to meddle with religion, or matters of conscience, nor compel men to this or that form of religion; because Christ is the King and Lawgiver of the Church and conscience."*

From this source was derived the American doctrine. It was in that part of England which had received infusions of emigration from the persecuted Netherlanders that the Separatist or Independent sect arose, some of whom later became Pilgrims; and it was among Calvinists of Dutch, French, and English birth, who had dwelt in Holland, that the companies of earnest adventurers were organized, who settled so large a portion of the American colonies and therein laid the foundations upon which the religious liberty of this century was built.

In Europe, the teachings of the Anabaptists and the Dutch-Anglican Baptists remained but a theory. Prior to the eighteenth century, the only state in which religious liberty was experienced in fact was the kingdom of Utopia. There, as Sir Thomas More had told Europe in 1515, "This is one of the ancientest laws among them, that no man shall be blamed for reasoning in the maintenance of his own religion; for King Utopus, even at

*Straus's Roger Williams, p. 132.

the first beginning, made a decree that it should be lawful for every man to favor and follow what religion he would." * More was but a prophet crying in the wilderness, the John Baptist of Religious Liberty.

The vital principles which underlay the Renaissance and the Reformation needed for their development and full fruition, other soil than that of the Europe in which the movement had its inception. The discovery and the colonization of America were opportune; the virgin soil of a new continent was well adapted for the implantation of the new ideas, unfettered by old customs or traditions; and so America sent back to Europe the ripe fruit for the growth of which the older country had furnished only the seeds.

The attainment on this continent to the present elevated type of religious liberty was by no means a holiday episode. The advance was a gradual one, traceable through a succession of struggles. The peculiar features of the present system are distinctively American, and have been developed on our soil, their origin being found in the colonial beginnings of our republican institutions. Various phases of the European theory of the relations between church and state, and of the relations of the individual to both, were generated in Europe, in the troublous times following the Reformation, and were brought from thence to America, here to be shocked by sharp conflict with the "soul-liberty" championed by Roger Williams. The Church-town, the established State-Church, antipathy to the Roman Catholic church, suppression of "Papists," the profession of religion as a qualification for office, the statutory observance of the Sabbath, and other modes of legal compulsion to the discharge of religious

*More's Utopia, p. 146.

duty, appeared in the colonies, many of them manifesting great persistence. But all of these have gradually yielded to the mild influence of the democratic idea that political liberty requires, not toleration, but religious freedom.

## Early Advances.

One of the first advances made in the colonies was the unsectarianism practiced by the Pilgrims who founded Plymouth. This doubtless followed logically, according to their reasoning, from their independence of the established church which was the corner stone of their own foundation. Among the families who came to Plymouth in the first three vessels reaching that colony, and who were called "the first-comers," were several of French and Dutch descent, members of the Reformed Church at Leyden, who were admitted into full fellowship with the church at Plymouth; and this practice the Pilgrims defended in argument when criticised. Here was a distinct weakening of the strength of sectarianism. Gov. Winslow refers to the case of Moses Symonson (afterwards Simmons), a member of the Reformed Dutch Church, as follows:

> "A child of one that was in communion with the Dutch Church at Leyden, is admitted into church fellowship at Plymouth in New England, and his children also to baptism as well as our own."*

In the Pilgrim commonwealth, the State did not punish by ecclesiastical censures, for these were matters of spiritual concern.† Nor was citizenship, with them, confined to those who were church members.

*Arber, The Pilgrim Fathers, p. 179.

†Cobb on Rise of Religious Liberty, pp. 138-148.

The next important step in the evolution, and the very entering wedge to the ultimate general cleavage between Church and State, was the emigration of three church-congregations from Massachusetts, and their settlement in the wilds upon the Connecticut River. The Massachusetts Bay Colony was a government in which the political unit was the church-town, the religious and the political entity being substantially identical, and the right to share in the government being limited to church-members. By way of protest against this form of church establishment, three of these church-towns left the Bay Colony bodily, under the lead of Thomas Hooker, and on the Connecticut River they re-established their towns, each with its allied church, the franchise for political matters being extended to all adult males who should take the oath of allegiance.

In introducing this radical change in church administration, Hooker and his colleagues were intentionally and effectually promoting civil and political liberty, while they were at the same time introducing the beginnings of a larger religious liberty. By the separation of church from state, the freedom of the individual in both civil and religious matters is enhanced. It has often been argued that freedom needs protection and support; and good men have thought a free church needed some political assistance. The American idea of freedom is based on individual strength. "He is a freeman whom the truth makes free," is true both of the religious conscience and the political conviction. It is the peculiar glory of America that she has developed a form of religious liberty which is manifest in the fully independent consciences of members of all sects.

The development was by no means regular, nor did

freedom of conscience ultimately prevail except at the cost of many conflicts. In Virginia, the Church of England was established by law and favored by the people.* And yet, as Bancroft says, "Virginia was the first state in the world, composed of separate boroughs diffused over an extensive surface, where representation was organized on the principle of universal suffrage."† So true is it that universal suffrage and religious intolerance are incompatible, that we shall later see Virginia leading in the declaration of full religious liberty.

In early Rhode Island, toleration went farther than in any of the other colonies. Government in that colony followed the settlement of the towns by individuals and groups, who had gathered there without previous concert, and these groups comprised people of various doctrinal views, among whom toleration became a tacit essential of joint action. In the Providence compact of 1637, the agreement was to form a democratic government whose laws should be obeyed "*only in civil things.*"‡

The second General Court on the island of Aquedneck, formed by the union of the towns of Newport and Portsmouth, which was held in 1641, adopted a State seal bearing the motto "Amor Vincet Omnia," and passed a law "that none be accounted a delinquent for doctrine, provided it be not directly repugnant to the government or laws established."§

Such liberality was of course reprobated in Massachusetts. Cotton Mather said in 1665; "Rhode Island colony is a collection of Antinomians, Familists, Anabaptists,

*Landon's Const. Hist., p. 28.

†Id. p. 29.

‡Gammell's Roger Williams, p. 74.

§Greene's Hist. R. I., p. 149.

Antisabbatarians, Arminians, Socinians, Quakers, Ranters, and everything but Roman Catholics and good Christians." And yet it is recorded that in 1688 an inhabitant of Rhode Island was fined by the Quarter Sessions for planting a peach-tree on Sunday.*

There was growth toward liberality in theocratic Massachusetts. Until about 1676, there was extended disfranchisement by reason of the restriction of the suffrage to church-members, a disfranchisement which at one time included five-sixths of the adult inhabitants. Intolerance was somewhat mitigated by the extension of the suffrage. In 1691, Massachusetts was compelled by law to become still more tolerant, the charter granted by William and Mary requiring that there should be "liberty of conscience allowed in the worship of God to all Christians except Papists."† This was a reproduction of the provision of the Commission for New Hampshire, of 1680, commanding "liberty of conscience to be allowed to all Protestants."‡

## Under the Colonial Charters.

The different colonial charters and patents exhibit stages of progress in respect to religious and church matters, out of intolerance, and into greater and greater toleration. The provisions of these royal grants are milestones along the road leading to religious liberty. Granted by a government of which an established church was an essential feature, they exhibit a progress, not so much in the views of that government as in the convictions of the people at whose request those privileges were con-

*Landon's Constitutional History, p. 30.

†Poore's Charters and Constitutions, p. 950.

‡Id. p. 1277.

ceded; the indulgence of the government increased in proportion to the importunities of the governed. That the limited character of the concessions reflects in some instances the prevalent jealousy toward the Roman Catholic faith, is a circumstance which indicates more clearly the extent and character of the intolerance which was the bulwark of the opposition to full religious freedom, and thus helps to illustrate the greatness of the ultimate triumph.

A prominent milestone is the early activity of Rhode Island in securing a grant of the right to exercise religious toleration. From time to time may be observed the extent of the influence of the principles inculcated and practiced by Rhode Island and Connecticut in promoting freedom of opinion. With gratitude should all Americans who honor their country for the religious liberty which it guarantees, acknowledge our indebtedness to these two small colonies.

Roger Williams in 1643 applied to the Parliamentary government in England, and received from it a patent organizing the towns on Narragansett Bay into the colony of Providence Plantations, with power to make and ordain civil laws "*for the Civil Government of said Plantations.*" The language of this grant, doubtless employed at the instance of Williams, so closely follows that used in the early compacts of the Narragansett settlers, as to imply that the English government for the time being understood and shared in the colonial idea that religious subjects should be excepted out of the grant. Accordingly, this idea has become an accepted principle of the Rhode Island constitution, and the language quoted has been construed as excluding all ecclesiastical authority, and

requiring "that the government should concern civil things alone."*

In 1657, the Great Assembly of Rhode Island, acting under this patent, when requested by the Commissioners of the United Colonies of New England to join in the general persecution of the Quakers, positively declined, and said: "Freedom of different consciences to be protected from enforcements, was the principal ground of our charter, both with respect to our humble suit for it, as also to the true intent of the honorable and renowned Parliament of England in granting the same to us, which freedom we still prize."†

After the Restoration of the Stuarts, these democratic colonies deemed it prudent to secure the royal recognition. Connecticut secured the lead, and received in 1662 her famous charter, drawn by Governor Winthrop, who presented it to the Court, and which liberally allowed the colony to continue to govern itself as theretofore, but made no reference to religious questions. But this charter added the territory of New Haven to Connecticut, and substituted the Connecticut system for the stern theocracy of early New Haven, thus extending the field of operation of the Connecticut idea.

In the following year, Roger Williams and John Clarke being in England, secured from the King the charter of Rhode Island, the glory of which was, that it contained an affirmation of that freedom of conscience which was so dear to the Narragansett colonists, in the declaration "that all and every person and persons may, from tyme to tyme and at all tymes hereafter, freelye and fullye have and enjoye his and theire owne judgments and conscien-

*Gammell's Hist. R. I., p. 120.

†Straus's Roger Williams, p. 203.

ces, in matters of religious concernments, throughout the tract of lande hereafter mentioned."*

This was the charter under which the people of Rhode Island lived and thrived for 180 years, or until more than half a century after the establishment of the government under the Federal Constitution.

The Rhode Island example proved contagious. It was soon after followed, in the Concessions made by the Proprietors to East Jersey in 1665, in Locke's Carolina Constitution in 1669, and in the Concessions made by the Proprietors to West Jersey in 1677, each of which granted freedom of conscience to all within those colonies respectively.

A reaction was visible in the Commission for New Hampshire in 1680, which granted liberty of conscience to all Protestants, and particularly recommended conformity to the Church of England, and in the Massachusetts Charter of 1691, which gave liberty of conscience "to all Christians except Papists." This reaction was apparently an outgrowth of the Puritan strictness of views and practice.

During the same period, the modified church-establishment of Connecticut was furnishing a strong contrast to her theocratic neighbor Massachusetts, and was materially encouraging the liberal practice of Rhode Island, toward which it was tending. The established church was maintained and fostered by the state, but without repression or intolerance of differing religious opinions. The spirit of the government of Connecticut has been well characterized by Mr. Cobb as a fatherly care and watchfulness over the interests of the Church.† It was an easy step, later, to the attitude of religious liberty.

*Poore's Charters and Constitutions, p. 1597.

†Cobb, Rel. Lib., p. 246.

In the early part of the 18th century, the church-town system in Connecticut was modified by allowing Episcopalians, Quakers, and Baptists to establish their own churches and pay their rates to their own minister instead of to the state-church; and the close of the century found this privilege extended throughout New England, and to all denominations of Christians.

The charter for the province of Pennsylvania, granted to William Penn in 1681, gave him as the Proprietary almost unlimited power over the government; and the first "Frame of Government" proposed by Penn for his province assured to his people full freedom of conscience and worship, while confining the right of holding office to "such as profess faith in Jesus Christ."* The legislation of the colonial assembly conformed to these provisions of the fundamental law. Penn had announced in 1670 that he was "a friend of universal toleration in faith and worship."† He sincerely endeavored to establish his ideal in Pennsylvania. But Penn was hampered by the unsympathetic action of the English government, which was all unready to allow his degree of toleration. The laws of the colonial assembly of 1682, virtually enfranchising the Roman Catholic citizens of the province, were annulled by William and Mary in 1693; but the Assembly re-enacted them. Penn's "Charter of Privileges" of 1701 again promised freedom of faith and worship to all those "who shall confess and acknowledge one Almighty God," and the right of officeholding "to all persons who also profess to believe in Jesus Christ."‡ But under the pres-

*Poore's Charters and Constitutions, p. 1526.

†Sharpless, Quaker Experiment, p. 119.

‡Poore's Charters and Constitutions, p. 1537.

sure of an Order from the Queen in Council, in 1702, repeating orders previously made to similar effect, the Assembly was compelled to require of all public officers a conformity to the test oath prescribed by the English Toleration act of 1689. This limitation upon the religious freedom desired by the Pennsylvanians was continued in force until the Revolution.

The experience of Delaware was the same as that of Pennsylvania down to 1702, until which time she was a part of Pennsylvania; but after the separation from the larger colony, Delaware seems to have been largely exempted from the strict rules which were imposed upon Pennsylvania, and she grew into a general spirit of liberal indifference to religious tests.

In Maryland, the proprietary charter granted to Lord Baltimore provided that the Church of England should be established. But as Baltimore and his principal followers were Roman Catholics, religious toleration became a necessity. In 1691, the royal government which displaced the proprietary system denied liberty of worship to the Roman Catholics. But in 1714, the proprietary government was restored, and thenceforth toleration prevailed.

In the Carolinas, while the constitution prepared by Locke was shortlived, the toleration thereby initiated continued, largely by reason of the fact that the settlers were a confused mass of emigrants from many different districts and peoples of Europe, numbers of whom had emigrated in order to escape religious persecution.

The Georgia charter of 1732 allowed the free exercise of religion to all persons "except Papists." But the charter government continued only twenty years. In 1758, the Church of England was established, but its active ad-

herents were few and its power and influence before the revolution were but slight.

In New York, the early settlers belonged largely to the Reformed Dutch Church. Though after the English conquest of this colony, an effort was made to introduce the established church, it failed because of the sturdy Dutch devotion to the tenets of the Reformed Church; and the general disposition was toward freedom of religious opinion and worship. In 1695, an act of the colonial legislature allowed the vestrymen and wardens of the English church to call a dissenting minister if they wished.

During the colonial period, the advocacy of the independence of churches and of the abandonment of all governmental connection with church affairs had been conducted principally by the members of the Baptist, Congregational and Quaker denominations. The similarity of the practice of these denominations in the matter of church organization and government brought them readily into alliance on the subject of their relation to the state. The Baptists were the most openly and actively aggressive in public advocacy of a separation between church and state. The early Baptist championship of religious liberty, which has been already noted, had not ceased to distinguish this denomination. Their aggressiveness in this respect won for them sharp discriminations in many colonies; discriminations which in Massachusetts and Virginia degenerated into persecutions. It was the persecution of Baptist clergymen by the colonial authorities in Virginia, which first awoke the zeal of Madison and Jefferson in favor of religious liberty. This denomination enjoys the honor of having sustained, through decades of denunciation and persecu-

tion in America, the banner of independence in matters of conscience, which they had so early raised in Europe.

## The Revolutionary Era.

Progress had thus been made, with varying completeness in different localities, toward the realization of full religious liberty, when the advent of the Revolutionary contest, and the new necessity of separation from the mother country, set men's minds generally to considering the proper relation of the State to the Church. Thus far, only toleration, either total or partial, had been attained, save in the one state of Rhode Island. Now the first steps were to be taken toward the supremacy of actual religious freedom. There were Congregationalists in New England and New Jersey; Episcopalians in Virginia, New York, Connecticut and the southern colonies; the Reformed Dutch Church in New York; Baptists in Rhode Island; Quakers in Pennsylvania; Roman Catholics in Maryland; and Presbyterians, Methodists, Lutherans and other sects scattered through the colonies. Under the new government, who should tolerate and who should be tolerated?

Religious liberty dawned upon the world as an accomplished fact, in June, 1776, when the Virginia Bill of Rights declared that "Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force and violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other."*

*Poore's Charters and Constitutions, p. 1909.

Equally pronounced declarations of religious freedom were made in the Pennsylvania and Maryland Constitutions of 1776. In the same year, Delaware forbade the establishment of any one religious sect in preference to another, and New Jersey did likewise, while admitting only Protestants to office; and North Carolina, though declaring for freedom of conscience and forbidding any established church, excluded from office those who denied God, the Bible or the Protestant religion.

In 1777, Georgia, New York and Vermont declared religious freedom in their Constitutions, the last named state, however, then insisting on Sabbath observance by every "sect or denomination of people."*

In 1778, South Carolina decided to make the Christian Protestant religion the established religion, and to tolerate all religious societies who acknowledge a God and a future state of rewards and punishments. In the same year, Massachusetts and New Hampshire each rejected a Constitution which provided for full religious liberty.

The Massachusetts Constitution of 1780 allowed religious freedom, but empowered the legislature to require revenue to be raised for the support of Protestant worship, and to require church attendance of all citizens when practicable.

The New Hampshire constitution of 1784 adopted similar provisions except that requiring church attendance, but added that no one not a Protestant could be elected Senator.

The Vermont constitution of 1786 repeated the Pennsylvania provisions of 1776 for full religious liberty. Connecticut and Rhode Island only, of the thirteen original states, failed to adopt new constitutions, but it will

*Poore's Charters and Constitutions, p. 1859.

be remembered how thoroughly they had already endorsed freedom of conscience.

Eight of the original states were thus early committed to what has now become the American doctrine, while five hesitated to go to the same length, evidently feeling that some sort of State protection to the Protestant faith was still necessary.

An interesting discussion arose in the American Historical Association in 1886, and was continued in 1887, over the question whether Virginia or Pennsylvania had made the earlier declaration in favor of religious liberty. Virginia made hers in her Bill of Rights in June, 1776; and Pennsylvania made a similar declaration in similar form, in September following. Mr. William Wirt Henry's claim of priority for Virginia was contested by Mr. Charles J. Stille, who assigned the honor to Pennsylvania on the ground that the Bill of Rights was part and parcel of her Constitution, while that of Virginia was a separate document, which, as Mr. Stille claimed, left it without binding force in itself, a mere statement of something desirable. Unfortunately for Mr. Stille, history and jurisprudence were against his contention; for the courts in Virginia long ago held that the Bill of Rights of that state was a part of her constitution, and had given force and effect accordingly to the announcement of religious liberty in the Bill of Rights. So Virginia must be accorded the honor of making the first governmental declaration of the American principle, while Rhode Island enjoys the distinction of having introduced the practice of religious freedom, and continued it for over a century, with no other governmental statement on the subject than the privilege accorded in its charter.

The adoption of the Constitution of the United States accentuated the American position. This instrument declared (Art. VI, Sec. 3) that "no religious test shall ever be required as a qualification to any office or public trust under the United States." While limited to the sphere of the National Government, and having no effect within the State spheres, this provision extended the operation of a principle already deemed precious in many of the States. In the Constitutional convention, North Carolina alone voted "no" on this proposition, while Maryland was divided. The abolition of religious tests for office had been progressing for many years prior to the Revolution. At one time, these tests were in force in all the colonies except Rhode Island. Even in Pennsylvania, contrary to the designs of Penn, all officials were required to disclaim belief in certain Roman Catholic doctrines, and avow belief in the Trinity and the inspiration of the Bible, from 1703 to 1776, when through the influence of Franklin, the new constitution abolished this test.

Strangely enough, this clause of the new Federal constitution aroused opposition in several states, notably in Massachusetts and North Carolina, from the fear that Roman Catholics, Jews and infidels might secure office, and might even get control of the government of the United States. The opposition was strongest in the convention of Massachusetts, in which Major Lusk and Colonel Jones shuddered at the thought that Romanists or Pagans might be placed in office, while Rev. Messrs. Backus, Shute and Payson argued that religion must be left to be a matter between each individual and his God, and that it would naturally gain strength by being left free from compulsion.

But in Virginia, the mere exclusion of religious tests was regarded by the party of religious liberty as insufficient. That state had already, in 1785, carried out the principles of the Bill of Rights of 1776, by an act disestablishing the Church of England and granting liberty of conscience to all forms of belief. A movement was early set on foot for the adoption of an amendment to the Federal Constitution, which was seconded by New York and Pennsylvania, and these States, with New Hampshire and Rhode Island, accompanied their ratifications of the Constitution with the demand for what afterwards became the First Amendment, adopted in 1791, which prescribes that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Thus was the cap-stone placed upon the monument which testifies to American religious liberty. The states have been left free to adhere to their ancient discriminations, but they have usually not done so. Most of the states have placed in their constitutions provisions similar to the First Amendment. Two of them still limit office-holding to those who believe in a God and "a future state of rewards and punishments." During the nineteenth century, two of the original states struck out of their eighteenth century constitutions provisions limiting the holding of certain offices to Protestants. Since the adoption of the Federal Constitution, the only attempt to establish a religion by law was the one made in Utah. Practically, the people in each state are in accord with that which the people of the United States have made the American doctrine.

That the brief and simple language of the First Amendment to the Federal Constitution was intended to,

and did in fact establish Religious Liberty as the national doctrine and practice, is attested by the position taken and maintained by the United States Supreme Court. In the case of Reynolds vs. United States,* the American type of Religious Freedom was perspicuously described and its rise and progress were briefly discussed. In Davis vs. Beason,† eleven years later, the views advanced in the Reynolds case were reiterated with approval, and the court declared itself as follows:

"The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. * * * With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief in those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with."

The Supreme Court furnishes an apt illustration of the differences between the respective fields of State and Church, in matters of religious concernment. Mr. Chief Justice Waite, in the Reynolds case, refers to the Virginia law of 1785 "for establishing religious freedom," drafted by Mr. Jefferson, as defining the freedom which it establishes, and adds:

"After a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain

*98 U. S., p. 145.

†133 U. S., p. 333.

the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,' it is declared 'that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.' In these two sentences is found the true distinction between what properly belongs to the Church and what to the State." *

## Results.

Thus did the United States of America, as Dr. Schaff suggests, furnish the first example in history of a government abolishing forever the tyranny of a state religion, deliberately depriving itself of all power to exercise control over conscience, and securing to all its citizens that most sacred of all liberties, the liberty of the free exercise of religious worship.†

But while this example finds apparent approval on the political or governmental side of popular institutions, how does it fare with religion herself, the state control over which was so long regarded by stable governments as "the chief support of public morality, order, peace and prosperity"?‡ Let the records of religious activity and achievement in America answer this question. In no other land is there more or higher religious enthusiasm, or a stronger or deeper faith in the truths of religion or a broader missionary zeal. In no other land are there more earnest Bible students, or a broader circulation of the Bible. In no other land are the fraternal and humanitarian principles of the Bible so generally carried into practical utility in plans of both public and private charity. Religion in America has grown stronger

*Reynolds vs. U. S., 98 U. S., p. 163.

†Schaff's Church and State, p. 23.

‡Id.

and more vigorous by being freed from the supports upon which she was elsewhere taught to lean; she is no longer a vine, but an oak.

The work is finished in America, of which the Reformation in Europe was the beginning.

To one illustrious American belongs so much of the credit of promoting this great consummation, that such credit should not be omitted in this connection. The entrance of James Madison into public life was as a delegate to the Virginia constitutional convention of 1776. Religious liberty had been the thought of his mind for years, and he had declaimed against the intolerance which he saw prevalent. In a letter to a friend in 1774, he said, "There are at this time in the adjacent country not less than five or six well meaning men in close jail for publishing their religious sentiments, which are in the main very orthodox." In the Virginia convention of 1776, an article was proposed for the Bill of Rights, providing that "all men should enjoy the fullest toleration in the exercise of religion." Madison opposed this, on the ground that toleration implies a right to prescribe doctrine, which is inconsistent with freedom, and at his suggestion, and influenced by his arguments, the convention adopted the article before mentioned, and at last there was a governmental declaration of religious liberty.

He renewed his active support of this principle, as a member of the Legislature in 1785, by successfully championing the act for the disestablishment of the English church, drafted by Jefferson, and which became the law in Virginia fifty years before Massachusetts ceased to tax her people for the benefit of religious teachers.

And it was Madison who, as a member of Congress in 1789, took the lead in moving to propose to the country the adoption of the First Amendment to the Federal Constitution, which he urged upon the ground of the duty of Congress to assure the people that they were not to be deprived of "the liberty for which they valiantly fought and honorably bled." To him Dr. Schaff accords the honor of being "the chief advocate of this amendment in Congress."* Writing to Edward Livingston in 1822, Madison joyfully said: "It is impossible to deny that in Virginia religion prevails with more zeal and a more exemplary priesthood than it ever did when established and patronized by public authority."†

It is not without significance that the names of Roger Williams, Thomas Hooker, James Madison and Thomas Jefferson, who have appeared conspicuously as the apostles of Religious Liberty, are closely identified with the advocacy and achievement of individual civil liberty. As has been already suggested in these pages, the practice of individuality in religion stimulates democracy in government. Civil liberty and religious liberty go hand in hand; they are but two types or manifestations of the liberty of the individual. That these two forms of liberty are intimately correlated has been seen and announced by critical students of the subject with exceeding frequency; by Mr. Adams and Mr. Lecky in their writings referred to above, by Story in his Commentaries on the American Constitution, and by Montesquieu in his "Spirit of Laws." Episodes and movements which sustain this view are numerous in our history. Independency and toleration in religion led the Pilgrims into a democratic form of government at Plymouth.

*Schaff's Church and State, p. 34.

†Id.

The colonists of Massachusetts Bay, in founding their theocratic government, went so far in their political independence of England, and became so devoted to local self-government, that their Democracy reacted upon and finally abolished their Theocracy. The Narragansett settlers found that the soul-liberty which they joined Roger Williams in maintaining, necessarily implied individual liberty in politics, and they accordingly adopted this principle as the corollary of the other. Democratic government, encouraged by the established church in Connecticut, proved so successful that it eventually led the establishment to disestablish itself. The experiences of the other colonies, if not so plainly didactic in this respect, still serve to illustrate the proposition. Mr. Cobb* cites an interesting example from the early history of Maryland. The first assembly held in that colony was composed wholly of Roman Catholics. Lord Baltimore, the proprietary, who aimed to secure for the colony freedom of conscience, sent over a prepared "Body of Laws" to be enacted by the assembly. It was promptly rejected by this body, which appointed a committee to prepare a code. In a few days, the committee reported the same code lately rejected, and the assembly hastened to adopt the report and enact the "Body of Laws." The spirit of independence and individual liberty refused to accept the dictation of a friendly and sympathetic proprietary, and insisted that the people's law, by whomsoever framed, must emanate from the people's representatives. Upon small matters like this hinged many a conflict between colonial legislatures and European authorities. Thus early did religious liberty again serve to stimulate and encourage constitutional civil liberty.

*Rise of Religious Liberty, p. 371.

## VII.

## SOME LEGACIES OF THE ORDINANCE OF 1787.*

It is not the aim of this paper to explain the place of the Ordinance of 1787 as a constitutional document, or the details of the movement of which it was the culmination. The general history of that period has been abundantly written, and the evolution of the Ordinance has been elaborately traced. While the present age has recognized this as one of the great constitutional acts in the larger history of our country, the extent of our indebtedness to it has not been generally observed. We are now so far removed from that epoch that we can distinguish some of the legacies which that Ordinance has left for the welfare and prosperity of the present generation, and for which it and its wise promoters deserve our gratitude.

### Nationality.

It is not often possible to mark the precise time when

*From the Minnesota Historical Society Collections, Vol. IX., p. 509. Read March 13, 1899.

a people became a Nation, or the final step which made it such. All students recognize historical processes as gradual, including those by which great governments grow. The historian sees a people at a certain date unformed, with no institutions definitely or permanently established, and he does not ascribe to them statehood. At a later period, the same people are recognized as a fully formed nation. In the intervening time, one can note only a general progress from the earlier status toward the later, without being able to assign any particular date as that when the change was consummated. There is a period in American history which presents difficulties of this character.

On July 4th, 1776, our country ceased to be thirteen British colonies, and she never reverted to that status. The adoption of the Federal Constitution, and the commencement of its operations in 1789, exhibit her as a Nation. It is not easy to define her exact political status at any time during the interim. There has been extended discussion upon this subject, developing many and persistent differences of opinion. It is not necessary to attempt to settle these disputes, in order to distinguish the whole revolutionary and confederate period as one of progress, from the League of 1774 to the Nation of 1789. There are some well-meaning and patriotic persons, who argue that it was not until the results of the Civil War had removed all doubts, and had cemented the interests of the two previously discordant sections, that full nationality resulted. The majority of students of our history, however, now agree, as the Supreme Court of the United States has so often held, that the work was accomplished when the Constitution went into operation in 1789. If we do not concede that the Dec-

laration of Independence initiated nationality, as many constitutionalists claim, it is easy to conceive of the period of 1776 to 1789 as one of transition, during which the people were considering the merits of two rival plans of confederation, and were gradually making their choice between a League and a Nation. The Ordinance of 1787 furnishes evidence that the choice was made, and that the people had determined upon the higher and more vigorous form of political life.

Many of the intervening steps taken by the people indicated that such was their choice; but it has been argued that these steps were not necessarily irrevocable or final. The Declaration of Independence itself, professing to be the act of "one people," seemed to imply the creation of a nation composed of thirteen states; and it has often been urged that this was a complete and determinate act, and that we were thus "born United States." So the Continental Congress, which was the sole head of the revolutionary government, raised a Continental Army and placed a general at its head, put afloat a Continental Navy, created an Appellate Prize Court, sent diplomats abroad, negotiated and entered into treaties, and discharged other functions properly pertaining only to a nation.

On the other hand, it is urged that these acts do not indicate the deliberate choice of the people to become a nation, because they were compulsory, by reason of the war then existing. May it not be that these were only temporary expedients, assertions of central sovereignty which was but a simulacrum, and which the states tolerated only under the pressure of a foreign war? The scanty grants of power to "the United States in Congress assembled," under the Articles of Confederation,

and the reservations made therein to the states, have been appealed to as indicating that the people were not ready to establish more than a league. It is true, they had adopted one flag, under which the army drove out or captured the invaders, under which the navy swept the seas; but may this not have been the flag of a league, and could it not have been divided into thirteen flags, with one star each, if the people so desired? What they chose to do while engaged in resisting Britain, they might prefer not to do when the pressure of war was removed, and peace succeeded.

If we concede that these considerations leave it doubtful whether the people had theretofore chosen to become a nation, the doubts are resolved when we come to observe the Ordinance of 1787. In that instrument is found evidence of a deliberate choice made in the time of peace, after an extended discussion commencing in the time of war. This debate was protracted for ten years, and was at times exceedingly heated. The diverse views presented were ardently advocated, and several plans were offered for governing and dividing the Northwestern Territory. When, with all this consideration, after the pressure of foreign war had been removed, an ordinance of a distinctly national character was adopted, this may well be taken as the final determination of the people. By this instrument there was placed upon our government the stamp of Nationality. This was before the Federal Convention at Philadelphia had completed its draft of a constitution. It was fore-ordained that the work of that body should be the constitution of a Nation.

The precedent discussion involved the determination of this precise question, Should America be a Nation or

a League? The matter under dispute had been the proper control of the unsettled western lands, over which, as a result of the war, Great Britain relinquished authority. Four of the states laid claim to some of these lands; and Virginia, whose pretensions seemed most plausible, claimed all, and proposed to settle for herself their destiny. Before the war had closed, the smaller colonies, with Maryland in the lead, were resisting the Virginia theory, and claiming that the western lands would belong to the Union of States, because the states had united to wrest them from Great Britain. Maryland had declined to ratify the Articles of Confederation unless her position in regard to the western lands was adopted, and she yielded her assent to those Articles only when assured that those lands would be ceded to the general government. It is true that Virginia and the other colonies voluntarily ceded their claims to these lands to the United States. But it is clear that they did so in response to that demand, and for the sake of cementing and perfecting the Union of the States. The Act of session by New York recited that it was designed "to facilitate the completion of the Articles of Confederation." So the question becomes pertinent, Upon what legal ground was the claim of Maryland based? To what theory did Virginia and New York and Massachusetts and Connecticut yield, when they chose to cede the lands?

Under the British law, the colonies were crown property. They belonged to the sovereign. All the American charters were based upon this principle. From the time of James I, this had been conceded as a canon of the British constitution. It was the war jointly conducted, and the victory of the Americans, which secured these

western lands by the concession in the treaty of peace. The respective colonial charters gave their holders title only to such lands as they had respectively occupied with their settlements, which did not reach beyond the Ohio river. And as it was by war and conquest, carried on by a united people, that these lands had been acquired, what power had thereby succeeded as sovereign to the rights of King George III? Manifestly, the people of the United States, that power which had conquered the territory from him.

The idea that these lands were by right common property anticipated their actual conquest by many years. Immediately following the Declaration of Independence, and before any steps toward a Union had been taken, the Maryland Constitutional Convention, on October 30th, 1776, resolved that "if the dominion over these lands should be established by the blood and treasure of the United States, such lands ought to be considered as a common stock, to be parcelled out at proper times into convenient, free and independent governments." The substance of this proposition was offered in Congress in October, 1777, before the Articles of Confederation were submitted for ratification, but it received the support of Maryland alone. In 1778, Maryland instructed her delegates not to ratify those articles until this question should be settled upon the basis that the lands, "if wrested from the common enemy by the blood and treasure of the thirteen states, should be considered as a common property, subject to be parcelled out by Congress into free, convenient and independent governments." These instructions, when read in Congress in May, 1779, brought protest and remonstrance from Virginia, based on her claim to individual sovereignty over these lands.

Delaware, New Jersey, and Rhode Island desired to have the unoccupied lands sold for the common benefit, not claiming more than that at first. In connection with a certain contemplated treaty with the Cayuga Indians, it was proposed, in 1779, that the Six Nations should cede a part of their territory "for the benefit of the United States in general."

The controversy of Maryland *versus* Virginia had progressed so far in 1780 as to imperil the success of the contemplated Union under the Articles of Confederation, so that it was proposed that the "landed" states should cede their lands to the Union in order to save the Union. In October Congress resolved that the western lands, to be ceded by the states, should be formed into distinct republican states, which should become members of the Federal Union on equal terms with the other states. New York had already offered to cede her claims in order "to facilitate the completion of the Articles of Confederation and perpetual Union." In 1781, Virginia offered to cede her claims, on certain conditions, one being the division into new states; and Maryland, having substantially won her controversy, ratified the Articles of Confederation, not relinquishing "any right or interest she hath, with the other United or Confederated states, to the back country." In 1782, Congress, on the motion of Maryland, accepted the offer of New York, and in 1783 that of Virginia. The cession of Virginia was executed in March, 1784; that of Massachusetts, in April, 1785; and that of Connecticut, in September, 1786.

The other branch of the controversy, namely, as to the legal title to the territory, arose, in an acrid form, in 1782. In the discussion over the terms of the proposed treaty of peace with Great Britain, as to the title to the

lands to be recovered, the claim of the United States as successor to the British crown was advocated by Rutledge of South Carolina and Witherspoon of New Jersey. A committee of Congress submitted to it two alternative propositions, one that the individual states had succeeded to the rights of the crown, and the other, that these lands "can be deemed to have been the property of his Britannic Majesty, and to be now devolved upon the United States collectively taken." The last named proposition was further expounded by the committee as follows: "The character in which the king was seized was that of king of the thirteen colonies collectively taken. Being stripped of this character, its rights descended to the United States for the following reasons: 1. The United States are to be considered in many respects as an undivided independent nation, inheriting those rights which the King of Great Britain enjoyed as not appertaining to any particular state, while *he* was, what *they* are now, the superintending governor of the whole. 2. The King of Great Britain has been dethroned as king of the United States by the joint efforts of the whole. 3. The very country in question hath been conquered through the means of the common labor of the United States." The Virginia delegates protested against this proposition, asserting the individual sovereignty of their state. Witherspoon argued for the national view, saying: "The several states are known to the powers of Europe only as one nation, under the style and title of the United States; this nation is known to be settled along the coasts to a certain extent." To minimize this controversy, the report was recommitted.

It soon arose more sharply, when the petition of the inhabitants of Kentucky was received, on August 27th.

1782, asking that they be admitted on their own application as a separate and independent state, on the grounds that they were "subjects of the United States, and not of Virginia," and that as a result of the dissolution of the charter of Virginia, "the country had reverted to the crown of Great Britain, and that by virtue of the Revolution the right of the crown devolved on the United States." Lee and Madison of Virginia controverted, while McKean of Delaware, Howell of Rhode Island, and Witherspoon of New Jersey, maintained the theory of the succession of the United States to the rights of the crown.

In 1783, in connection with the question of organizing the Northwestern Territory, Carroll of Maryland offered in Congress a resolution claiming the sovereignty of the United States over that territory, "as one undivided and independent nation, with all and every power and right exercised by the king of Great Britain over the said territory." Congress was not ready to adopt the proposition in that form. Then followed the acceptance of Virginia's offer of cession, provided she withdrew certain objectionable conditions, and the appointment of a committee to report a plan for the government of the territory; and, later, the deed of cession by Virginia, Jefferson's ordinance of 1784, and the deeds of cession by Massachusetts and Connecticut, gradually paving the way for the authoritative and comprehensive Ordinance of 1787.

It was, then, the argument of the smaller colonies which prevailed, and to which the larger colonies yielded. The fact of a deed of cession by Virginia does not imply, as Professor Tucker has argued in his Commentaries on the Constitution, that all parties acknowledged the sovereignty of Virginia, because the deeds of cession did

not stand alone. They were given to facilitate the Union of the States, and to enable the general government to exercise her sovereignty over the western territory. What was in fact done with these lands by the United States, with the assent of the larger colonies, is of greater weight, in ascertaining the ultimate purpose, than the verbal protests of certain dissatisfied statesmen. That final action was the assertion of full sovereignty by the United States, and the exertion of that sovereignty in establishing government. "Be it ordained, by the United States in Congress assembled," is the language of self-conscious sovereignty.

It was this legal proposition, advanced by the smaller colonies as their ultimatum in the western land controversy, which the Supreme Court of the United States approved, in the case of Chisholm v. Georgia, as just and sound, saying: "From the crown of Great Britain, the sovereignty of their [this] country passed to the people of it, and it was then not an uncommon opinion that the unappropriated lands, which belonged to that crown, passed not to the people of the colony or state within whose limits they were situated, but to the whole people; on whatever principles this opinion rested, *it did not give way to the other.*"

This proposition of necessity imputed nationality to the people of the United States, and denied the existence of a league. To this proposition both Virginia and New York assented when they ceded their western lands. By her action in ceding these lands and participating in the adoption of the Ordinance of 1787, Virginia, no less than New York, was in good faith and in honor estopped from ever claiming any other position than that of a Commonwealth in subordination to the Nation. That

Ordinance, legislating authoritatively for the government of the territory so acquired, was a national act. It was the deliberate act of the people of the United States, assuming to themselves the power of a nation. Whether America should be a nation or a league, became then a closed question. Thenceforward, it remained only to establish finally the nationality which the people had assumed, by the framing and adoption of the Federal Constitution.

## The Dual System of Government.

The American system of federal government is unique. It is a happy combination of a strong but limited central government, for all general and external purposes, with state governments which control all local matters and all those affairs which most concern the body of the citizens in their daily lives. It was the first experiment of the kind on a large scale, and it has had a conspicuous success. The novelty consisted in binding together a league of states in such a manner as to give them a supreme central government which should act directly upon and command obedience from the individuals of all sections of the country. Thus every citizen is subordinated at the same time to two governments, and has a dual citizenship.

The American plan contemplates additions to the group of states by admission of new ones on equal terms with the first members. It involves the assertion and exercise, by the people of the entire nation, of their inherent sovereignty; for no less a power would be competent to ordain, by authoritative law, the enlargement of the galaxy of states by the admission of new ones, possessed of equal rights and privileges, and bound by

equal responsibilities and duties, with the older states. The sovereign people thus establish the central government, which secures respect and honor for the flag abroad, and authorize and guarantee the state governments which foster and protect all the domestic privileges and rights of individuals. The people of all the states finally adopted this plan when they ratified the Constitution.

The plan was first proposed in connection with the Ordinance for the government of the Northwestern Territory. While the Revolutionary War was still in progress, and before it was settled that America should hold that territory, it was proposed to divide it up, as fast as sufficiently populated, into new states, which were to be admitted to the Union on equal terms with the original thirteen. This provision the people approved, and it was embodied in the Ordinance, and thus became the American plan. Under it, three states were admitted to the Union before the time came for Ohio, a part of the Northwestern Territory, to apply. This form of federalism has succeeded far beyond any possible expectation of its first proposers. To it America owes her great constitutional expansion, the cementing of all her various local interests and feelings, her unusual strength as a large representative republic, and her present proud position among the nations of the earth. The Ordinance in question (including in this term the whole movement for establishing government in the Northwestern Territory) was the first evidence that this had been adopted by the American people as their ideal of government.

### Freedom.

The war for the preservation of the Union purged the

nation from the reproach, and its flag from the stain of African slavery. This result was not an accident. Its causes were early implanted in our national life. The power that achieved this great work was the strong arms of freemen who were bred in the life of freedom, and devoted as by native instinct to her service. It was largely through the consecration of the Northwestern Territory to freedom by the Ordinance of 1787, that the ultimate nationalizing of liberty became possible. The dedication of that vast domain as the home of a race of freemen furnished the recruiting ground from which to enlist the legions who should sustain the banner of freedom against fierce opposition. If slavery was entrenched by the compromises of the constitution so as to necessitate an internecine struggle for its final overthrow, so was freedom by the Ordinance of 1787 so thoroughly entrenched as to make her banner and her army invincible when the crisis came.

The circumstance that, in the organization of the Southwestern Territory, Congress applied to it all the provisions of the famous Ordinance, except that prohibiting slavery, only emphasizes the worth of the prohibition as to the Northwestern Territory. No one will now dispute the superior value of the Northwestern over the Southwestern plan of organizing territorial government.

The labored attempt of Chief Justice Taney, in the Dred Scott case, to decry the efficacy of the Ordinance as a charter of freedom, because of a want of expressly granted power, in the Articles of Confederation, for its enactment by Congress, has proved futile. That decision has become null, because it ran counter to the express opinion of the people. The Ordinance did not suffer for want of authority as a charter of freedom, because

the people authorized and ratified it; and the well-nigh unanimous opinion of the people, since the close of the Civil War, concurs with and enforces that original opinion, and justifies the far-seeing wisdom of the men who were instrumental in dedicating an empire to freedom by an authoritative law.



were first adopted, as national ideals, by this Ordinance. They thus became a part of the birthright of the people of the states carved out of the Northwestern Territory. Though these principles were already adopted as fundamental by many of the states, they were by this Ordinance established in advance as parts of the foundations of other states whose ultimate greatness was foreseen. Never before did any great state paper operate to develope these principles on so large a scale.

Most natural was it, that the adjacent portions of the Louisiana Purchase, when organized, should be blessed with the same precious guarantees of education and free thought, by the incorporation of like provisions into the Ordinances enacted for their government. Thus did these peculiarly American institutions, the free church and the free school, become a part of our national no less than of our state life. Broadened by it from local into continental operation, they are not the least among the priceless legacies left to the citizens of America by the Ordinance of 1787.

## VIII.

## THE ETHICS OF SECESSION.*

The results of the Civil War have come to be very generally accepted. Those who failed have outlived their first keen sense of disappointment at the outcome, and are able to weigh the extent of loss and gain. As time lengthens the vista, the benefits following the triumph of the Republic are more clearly seen; benefits in which the vanquished as well as the victors participate. The Republic emerged from the conflict, the gainer therefrom in three distinct respects. First, she was stronger than before, as a result of her titanic struggle. Secondly, the question of the perpetuity of the Union was forever settled, by a final denial of both the right and the possibility of secession. Thirdly, the constitution was purged of its shifty excuses for the sanction of human slavery, and the flag was cleansed from its one stain.

In all of these enlargements of the honor, the vigor and the virtue of the Republic, the whole people, South as well as North, were the beneficiaries. The full measure of all that was accomplished has but recently come to be generally seen and understood. Had the outcome

*Address before the Minnesota Commandery of the Military Order of the Loyal Legion, May 8, 1900.

of that war been other than it was, there would have been no nation in 1898, capable of assuming the role of authoritative peace-maker between Spain and Cuba, as did the United States of America; and neither this or any other Republic would have become, in 1899 and 1900, the cynosure of empires and monarchies, the exemplar of what a great democracy can do in war, the leader in the peaceful achievements of diplomacy.

During the closing one-third of the century, there has been growing among the Confederate veterans an appreciation of their own interest in the welfare and the progress of the preserved Republic. Patriotism has gradually resumed its sway over those who were for a time alienated. Now, in all the world-wide honors and unstinted acclaims which greet the flag wherever it floats, the Confederate soldiers of 1861 justly exult, and in their delight the Federal soldiers of 1861 heartily rejoice.

### Revival of the Secession Theory.

But even in this noon-day of national sunshine, the ghosts of the dark past are often seen abroad. Many of the defeated still remain unwilling to admit that the decision of the arbitrament of arms was intrinsically just. This frame of mind acquiesces in the result, but on the ground alone that it was dictated by the God of Battles. By some strange vagary of theology, it is whispered that the God of Justice was asleep when the secession flag went down, and that His intervention would have assured the success which their cause deserved.

A studied purpose is manifest, and a studied attempt is now made, to write into our national history a justification of the secession theory. It is claimed that under

our constitution, the right of secession pertained in 1861 to every State of the Union, so that those States which then undertook to secede committed neither political nor moral wrong. The most ambitious effort in this direction is the two-volume work of Mr. Jefferson Davis, on "The Rise and Fall of the Confederate Government." Writing in a calm, dispassionate style, he disclaims any intent to encourage further attempts at State secession, but urges that the whole truth as to the past should be known, in order that "the Union may promote the general welfare." To state his purpose in his own words:

> "My first object in this work was to prove, by historical authority, that each of the States, as sovereign parties to the compact of Union, had the reserved power to secede from it, whenever it should be found not to answer the ends for which it was established. If this has been done, it follows that the war, on the part of the United States Government, was one of aggression and usurpation, and on the part of the South was for the defense of an inherent, unalienable right." (v. 2, p. 764.)

This is a summary statement of the doctrine, the armed advocacy of which by the Confederates in 1861, brought into the field the loyal millions for the defense of the integrity of mother-land. Despite Mr. Davis' disclaimer of any desire to promote further attempts at secession, such reiterations of the rightfulness of the secession war are calculated to disturb the future peace of the Republic, by inculcating and stimulating a belief in the justice of the secession cause, among those who may fail to examine the question on its merits.

Mr. Stephens in his equally pretentious volumes, Mr. Curry in his modest monograph, and other secessionist writers, have since the war championed the Lost Cause in a like temperate tone, professing only to place our history in its true aspects before posterity. The bitterness and virulence of Pollard, the early post bellum his-

torian of that cause, have happily been abandoned. But the academic character of the recent discussion makes the justification of secession only the more plausible. Following the lead of these specious advocates, public speakers at Decoration Day and other gatherings frequently exalt their "Lost Cause" in brilliant rhetoric. Recently, on such an occasion, a Governor of a State declared with intense earnestness that the cause for which the Confederate soldiers battled was unqualifiedly and eternally right; and at the next similar occasion a few days later, a high dignitary of the church echoed back his approval, declaring that that cause was constitutionally right.*

No true patriot ought to shrink from the inquiry thus suggested. The history of our country ought to be, and indeed it will ultimately be written in exact accordance with the facts. The time is ripe for examining into and stating fearlessly the truth.

Both sides in the late Civil War could not have been inherently and ethically right. If the secession contention was correct, and if the southern states had real justification for their attempt to sever the Union, then the war to compel them to remain was an unjust war; it was, as the secessionists contend, a war of subjugation merely, without right; and those who fought for the

*"One of the bishops who has not made his appearance at the Episcopal convention is Bishop Quintard, of Tennessee. If not attending the convention, however, he has been heard from, for a press despatch from Nashville credits him with using strong words at a Confederate reunion. The dispatch referred to is as follows:

" 'Nashville, Tenn.—Tuesday at a Confederate reunion, held near Murfreesborough, Bishop Quintard, of the Episcopal Church, in commending Gov. Turney's Chattanooga speech, said: "As I stand before you to-day, comrades, and say I believe in a God and his Son, Jesus Christ, so do I stand and say that I was right in supporting Confederacy. It is no matter of opinion with me, and no mere thinking we were right. I know we were right, constitutionally right." He was enthusiastically applauded.' " (Southern newspaper.)

Union waged an unholy contest, whose only justification was its success.

Is such the truth of history? Should the cheeks of those who upheld their country's flag in that contest, blush with shame at the reflection that they by force deprived their brothers of their constitutional rights?

This bold claim, as presented in the above extract from Mr. Davis, rests on two propositions; first, the Constitution of the United States was a compact; and second, the parties to that compact were Sovereign States. These assumed premises have been the parents of three heresies: the theory of Independent State Judgment, as expounded in the Kentucky and Virginia resolutions of 1798; the theory of State Nullification propounded by Calhoun; and the theory of State Secession defended by Davis and Stephens. The logic is good which from those assumed premises leads to either of these conclusions. Concede to a logician his premises, and he can prove almost anything. The inherent vice in each of these theories is that neither of its premises was true in fact. The constitution was not a compact; and the States whose people established the constitution were not, in the true sense, Sovereign States.

The studied exploitation of these false theories is not confined to our Confederate friends. Others, among whom are some who were not engaged in the secession conflict, have undertaken to teach this as American history, and are assuming as correct the premises from which these theories are deduced, and are industriously endeavoring to make them a part of our history.

Mr. Henry Cabot Lodge, in his biography of Webster, says:

"When the Constitution was adopted, it is safe to say that

there was not a man in the country, from Washington and Hamilton on the one side, to George Clinton and George Mason on the other, who regarded the new system as anything but an experiment entered upon by the States, from which each and every State had the right peaceably to withdraw." (p. 176.)

Prof Woodrow Wilson, writing in 1892, in the "Epochs of American History," on "Division and Re-Union," adopts the compact theory of the Constitution, and elaborates it *in extenso*. He avers that the doctrine that the individual States were at first sovereign, and that they did not lose their individual sovereignty by entering the Union, "was accepted almost without question, even by the courts, for quite thirty years after the formation of the government" (p. 45). He teaches that "even in the North the National idea had been slow to grow," and that "Webster's interpretation of the Constitution, in his reply to Hayne, was only a prophecy" (p. 242).

Prof. Albion W. Small, in his monograph on the "Beginnings of American Nationality," in 1890, teaches in express terms that "the people of the United States simply dodged the responsibility of formulating their will upon the distinct subject of national sovereignty, until the legislation of the sword began in 1861" (p. 12). And he argues that there is no justification to be found in the events prior to 1789, for the success of the northern arms in 1865 (p. 12).

Gen. Francis A. Walker, writing on the "Growth of American Nationality," in 1895, agrees with Prof. Small that our forefathers dodged the question of nationality, and admits that the southerners had the best of the debate on the subject of the compact theory, though he contends that nationality resulted from the first thirty years' ex-

perience of our government under the constitution (Forum, July, 1895, p. 30: Making of the Nation, p. 268).

Ex-Governor Daniel H. Chamberlain, lecturing at the University of Michigan, in April, 1889, on "the State Judiciary," said:

> "Surely, historical evidence could scarcely be clearer than that which points to the fact—recognized, declared, undisputed—of the sovereignty and independence of the individual States prior to the adoption of the Constitution." (Ann Arbor Lectures, p. 246-247.)

This list of champions of secession ought not to omit mention of "the Republic of Republics," by a Boston lawyer, published in 1881, which is a thesis of 600 closely printed pages, in which the theory of a compact between sovereigns is industriously and minutely exploited. The conclusion reached by this writer is, that

> "The confederates observed the obligation of the social compact, and were true to their allegiance, and to the requirements of patriotism, as well as to the instinct of self-preservation; and if, if in the history of the past decade, any rebels or traitors appear, they are those who, being citizens and subjects of states, used federal force in levying war against them." (p. 40.)

When such readings as these are sought to be interpolated into American history, it is not strange that a foreigner, Prof. James Bryce, in his "American Commonwealth," while he approves the declaration of Lincoln in his inaugural that no one of the first thirteen states was ever, for international purposes, a free and independent sovereign state, yet should insist that the Constitution did not "abrogate the supremacy of the States," and that "technically the seceding States had an arguable case," and that if the point could have been sub-

mitted to a court for decision, those states would probably have been entitled to judgment (v. 1, p. 409).

Nor is it strange that Lord Wolselsy, writing in Macmillan's Magazine on the life of General Lee, should believe and aver that "each state was entitled, both historically and legally, to leave the Union at its will"; notwithstanding Lee had in January, 1861, written to his son that the Constitution "is intended for perpetual Union, and for the establishment of a government, not a compact" (Long's Memoirs of Lee, p. 88).

These recent expositions of the secession theory have naturally encouraged the confederate survivors in their arguments.

Mr Davis commended heartily "the Republic of Republics," from which he quoted liberally in his book. Mr. Curry's later work, in like manner, cites frequently and with approval, the pamphlet by Prof. Small, as a sample of historical accuracy.

## Lincoln's View.

It is the fact that books containing these propositions are designed as hand-books for the instruction of American youth, that warrants our attention to their teachings. The doctrine animates them all, that there was in 1861 a real question over which the confederates were justified in fighting. As we of the Federal army viewed the subject then, and as we view it now, there was no such debatable question. The United States was and always had been a Nation, not by a compact between States, but by the authoritative act of the people. The true view was well expressed, before the war began, in that admirable state paper, the Inaugural Address of President Lincoln. The supremacy of the central government was affirmatively established by the Constitution, and its per-

petuity was necessarily implied. Even if the Constitution had been a mere compact between states, it would be absurd to say that any one state could break that compact at will. The Union was even older than the Constitution, that instrument expressly undertaking to make more perfect the previously existing Union, to the perpetuity of which states and people had plighted their faith. It would be absurd, too, to hold that the Constitution, intended to perfect that Union, should contain within itself provisions destructive of the perpetuity of that Union. There was no legal way open by which a state could take itself out of the Union; and ordinances pretending to so operate were utterly void, and were ineffective to justify acts of violence against the United States. All this was publicly and constitutionally declared by the President, and of all this the secessionists were duly advised before they commenced the war.

### Early Opinions Concerning the Constitution.

The premises assumed to support the secession theory are sought to be established by arguments which seem plausible until they are examined. The chief reliance is placed upon expressions of individual opinion by some of those who participated in founding our government. The late Prof. John Randolph Tucker, in his "Commentaries on the Constitution," published within a year, argues laboriously in favor of the State-compact theory, on the ground that (as he says), "The written Constitution of 1789 must be what those who brought it into being and gave it the sanction of their ratification, believed and knew it to be." So he appeals for proof, to what some contemporary observers said. It is true that some of these recent writers, notably Davis and Curry and Wilson, profess to rely on what was done at the time, and

Prof. Wilson undertakes to array some "historian's facts" in support of his thesis. But the facts so appealed to are principally declarations of private opinion. The author of "The Republic of Republics" calls a long category of those whom he styles his witnesses, and often makes garbled citations from their testimony.

But the fact is that the men "who brought the Constitution into being and gave it the sanction of their ratification" did not always agree in their philosophy of the movement. While some of the participants and observers adopted the state-compact theory, there were many other influential men who wholly dissented from it. The questions mooted by the secessionists in 1861 were mooted, though less earnestly, in 1787, and every one of them was then effectually answered. The leading question of all was then discussed quite mildly. The Constitution was both advocated and opposed on the ground, which both sides assumed, that it established a Nation. Wilson and Morris of Pennsylvania, and King and Gerry of Massachusetts, urged this feature in its favor, and Smith and Yates of New York, Martin of Maryland, Taylor of North Carolina, and Henry of Virginia, urged it in opposition. Henry, in the Virginia convention, declared that the result was "a consolidated National government of the people of all the States." Madison, in reply to Henry, said of the constitution, "Should all the States adopt it, it will then be a government established by the thirteen states of America, not through the intervention of the Legislatures, but by the people at large," and described the system as "derived from the superior power of the people." (3 Elliott's Debates (1836) 114, 115.)

Madison had previously said, in the constitutional con-

vention (as reported by Yates): "Some contend that the States are sovereign, when in fact they are only political societies. The states were never possessed of the essential rights of sovereignty. These were always vested in Congress. Their voting as States, in Congress, is no evidence of sovereignty." (1 Elliott's Deb. 461; Jameson on Constitutional Conventions, 52.)

C. C. Pinckney, of South Carolina, said in the House of Representatives, in 1778, of the Declaration of Independence: "This admirable manifesto sufficiently refutes the doctrine of the individual sovereignty and independence of the several states. . . . The separate independence and individual sovereignty of the several states was never thought of by the enlightened band of patriots who framed this declaration." (4 Elliott's Deb. 301.)

And Charles Pinckney of South Carolina also said: "The idea, which has been falsely entertained, of each being a sovereign state, must be given up, for it is absurd to suppose that there can be more than one sovereignty within a government." (2 Hill's S. Caro. Rep. 57.)

James Wilson said, in the Pennsylvania convention, that he saw not the least trace of compact in the Constitution, and that "by adopting this system we become a nation." (2 Elliott's Deb. 526.)

Rufus King, of Massachusetts, in the Federal convention, criticising the inaccurate use of terms by some of the speakers said:

"The states were not sovereigns in the sense contended for by some. They did not posses the peculiar features of sovereignty; they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever; they were deaf, for they could not hear any proposition from such sovereign. * * * A union of the States is a union of the men composing them, from whence a national character results to the whole." (See Foster on the Const., p. 67).

Richard Henry Lee, of Virginia, the "Federal Farmer," discussing the subject in October, 1787, said:

> "It is to be observed that when the people shall adopt the proposed constitution, it will be their last and supreme act; it will be adopted not by the people of New Hampshire, Massachusetts, etc., but by the people of the United States."

So it appears that some of the best contemporary witnesses on the subject were eminent Southerners, whose opinions do not justify Calhounism; and General R. E. Lee in 1861, it will be observed, agreed substantially with Richard H. Lee in 1787.

If there were in 1787 any universal understanding as to the state-compact theory, such as the modern secessionists claim, it is strange that the idea of the possible secession of a State was not broached in the Federal Convention, whose work it was "to form a more perfect Union," and that in all the debates of the time, the intended perpetuity of the new system was assumed. Mr. Lodge thinks all the men of the time entertained a mental reservation in favor of peaceable withdrawal. He calls four witnesses to prove his theory, Washington and Hamilton of the Federalists, and Clinton and Mason of the Anti-Federalists. Let us examine these witnesses.

Washington, on disbanding the army in 1783, wrote to the governors of the several States, that first among the essential requisites of the time was "an indissoluble Union of the States under one federal head." (Elliott's Manual of U. S. History, 266.) In the address of the Convention submitting the Constitution, which he signed, he said that "In all our deliberations . . . we kept steadily in view . . . the consolidation of the Union, in which is involved . . . perhaps our national existence." And in his Farewell Address, he said to his countrymen: "The Unity of Government, which constitutes you one people,

is dear to you; it is justly so, for it is . . . the support of that very liberty which you so highly prize."

Hamilton, in the Federalist, advocating the Constitution, urged that "a Nation without a National government is an awful spectacle" (No. 85); and that "the streams of national power ought to flow immediately from that pure original fountain of all legitimate authority," the people. (No. 22.) Because the idea that a party to a compact has a right to revoke it, had respectable advocates, though he reprobated that idea as a heresy, Hamilton urged that the compact theory be wholly eliminated, and said:

> "The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper, than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis of the consent of the people." (No. 22.)

George Clinton was one of those who waived their objections to the constitution in view of the prospect of sesuring amendments to it. As President of the New York Convention, he signed and sent out its circular letter to the governors of the other states, asking the early consideration of such amendments, in order that the government should not "be rendered perpetual in its present form." (2 Elliot's Deb. 413, 414.) In his pamphlets signed "Cato," he had already stated at length his objections to the Constitution, based on its perpetuating features, which he thought dangerous to personal liberty.

George Mason, who in the beginning had earnestly advocated a strong national government, refused to sign the constitution when completed, because he thought it gave an excess of power to the central government; and in his pamphlet he opposed its ratification on the ground that it needed amendments, a course wholly inconsistent with the secession theory.

A strong national government was not then a new idea. It had previously been advocated by many influential leaders. As early as 1765, Christopher Gadsden of South Carolina, the first to respond to the call of Massachusetts for a congress to consider the Stamp Act, was outspoken in favoring joint action, on a continental basis, "as Americans."

On January 17, 1766, the Sons of Liberty of the city of New York declared that "there was safety for the colonies only in the firm Union of the whole." Similar declarations were made from time to time by various local assemblies. In 1776 appeared Thomas Paine's pamphlet "Common Sense," which received the approval of Washington, and was recognized as exercising a decided influence toward Independence, and the burden of which was a continental basis of government, a National Union, as the only practical road to Independence.

So the conclusions of Lodge are not correct, as to a unanimity of sentiment.

## The Constitution as Interpreted by the National Action.

But expressions of contemporary opinion are not the only evidence of the trend of historic movements. Better evidence is accessible in this instance. Actions spoke louder than words then, as they do now. The truest mode of ascertaining what the people intended, is to observe what was actually done, and to discover the effect. The acts and resolves of authorized conventions and governmental assemblies, the language of constitutions adopted, the manner of conducting the government, and the powers assumed and exercised with the assent of the peo-

ple—these are the authentic facts of our history whose testimony cannot be gainsayed. Let them testify.

The tendency toward National Union, which had so often manifested itself before the Revolution, took shape promptly when hostilities commenced. The war found in session a congress of delegates from the several colonies, already convened for advisory purposes. This body at once put itself at the head of affairs, and began to exercise the powers of a belligerent. On July 6, 1775, in its address to the Inhabitants of Great Britain, it assumed the name of "The United Colonies of North America," a title which was retained until exchanged for that of "the United States of America." The Continental Army had already been established, and a General had been placed at its head. In June, 1775, Rhode Island had recommended that the Congress establish a Continental Navy, which was afterwards done. This Congress assumed and exercised all the external functions of a National government. It carried on the war with its one army and one navy. This war was pushed by the King of Great Britain until it drove the colonies collectively out of their allegiance to him.

On May 4, 1776, the Legislature of Rhode Island passed an Act abjuring allegiance to the British crown, provided for the issuance of commissions to officers in the name of the Colony, and then closed the record with the ejaculation, "God save the United Colonies," instead of the previous form of "God save the King," thus recognizing the United Colonies as having already succeeded to the position of sovereign.

It was this Congress of the United Colonies that made the Declaration of Independence, transforming the Colonies into United States. This was one declaration—the

joint declaration of the people of the thirteen colonies. By it they declared themselves to speak the sentiments and the resolves on one people, explaining to a candid world why they felt impelled to sever the bonds theretofore uniting them to another people. No one colony made any such declaration. No one colony had revolted by itself. No one colony had undertaken independent action on any matter affecting the common defense. No one colony now professed to enter by itself upon the stage of national action. United as one, the thirteen states together saluted the other nations of the world, raised one flag, and as one people entered the arena of nations.

This congress continued to discharge all the functions of external sovereignty, legislative, executive and judicial. It recommended the establishment by the several states of constitutions for their local government, such as should "best conduce to the happiness and safety of (1) their constituents in particular, and (2) America in general." It prepared a plan for a permanent central government, which it sent to the state legislatures, with a letter describing it as a plan "for securing the sovereignty and independence of the United States," designed "to form a permanent Union," and one which "seems essential to our very existence as a free people." It established a Court vested with jurisdiction to hear appeals in Prize causes, the precursor of the present Federal judiciary. It represented the people of America abroad, and sent ambassadors to foreign courts. It made treaties of alliance and commerce with foreign powers. It concluded the war which it had prosecuted, with a treaty of peace.

In all these assumptions of the powers of external national sovereignty, no one state protested against the action of Congress, or sought to share in the exercise of the

powers. These high revolutionary powers were assumed because it was known that such action was in accordance with the desire of the American people. Authority to continue the exercise of some of these powers was granted by the Articles of Confederation. But the powers thus granted were in most instances the same that Congress had for years been exercising with the assent of the people.

The record of the government of the United States by this Congress closes with an Act of high national sovereignty, for which there was no express authority in those Articles; an Ordinance for the government of the Northwestern Territory. This was an authoritative law, evidencing the exercise of the highest national powers. It assumed the supreme control of a vast domain, provided for the entrance of new States into the Federal Union, and bound the existing states to an equality between themselves and such new States. This Ordinance became a part of the fundamental law while the constitution was beginning to take shape in the minds of its framers. The United States had become a nation now, if it had never been before.

The resolution of Congress which recommended the calling of the Philadelphia convention gave as a reason for it: "Such convention appearing to be the most suitable means of establishing in these States a firm national government." (1 Elliot's Deb. 120.) The convention itself understood such to be its object. Its first resolution adopted, voiced the necessity, and the debates continually reasserted it, of establishing such a government.

The work of the convention was consistent with that object. The Constitution professes to be the act of the People of the United States, who ordain and establish it

in order to form a more perfect Union, and secure the blessings of liberty not only to themselves, but to their posterity. It declares the absolute supremacy of itself and the laws made thereunder, it commits all the powers of external sovereignty, and many of the powers of internal sovereignty, to the central government, and it imposes upon the states, limitation after limitation, utterly inconsistent with any pretended sovereignty on their part.

The mode of adoption of this constitution gives further testimony. Avoiding any attempt at or opportunity for State legislative action, the instrument was referred directly to the people, who sent their delegates to state conventions, by whom in every instance the ratification was made, in the name of the people of the State. Thus the authority of the Constitution comes from a source superior to any state.

The language employed by these conventions was consistent. In Massachusetts, the convention acknowledged "the goodness of the Supreme Ruler of the Universe in affording the people of the United States . . . an opportunity . . . of entering into an explicit and solemn compact with each other." In Virginia, the ratification was accompanied with the declaration that "the powers granted under the constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression." In New York, as stated above, the convention sent out a circular letter, signed by George Clinton as President, referring to the perpetuity of the new government.

In this New York Convention, Lansing moved a resolution reserving the right of the State to withdraw from the Union. Hamilton thereupon wrote to Madison for his opinion on the question, who replied that this would be

only a conditional ratification, which would be no ratification; and he stated that the idea of reserving a right to withdraw had been started in the Virginia Convention, but was considered a conditional ratification and was abandoned; and he added, "The Constitution requires an adoption in toto and forever. It has been so adopted by the other States." (2 Hamilton's Works, 467; 6 Bancroft's Hist. (1886) 459). New York then adopted the constitution without condition. It would seem that this State and Virginia were mutually estopped to claim the right to secede.

The historical process thus initiated has continued without interruption. The central government has always exercised the functions of sovereignty, occupying the full extent of the field assigned to it by the people. No state had ever interfered down to 1861. Every state had been required to submit, and had submitted to the national government. By that government their people had been governed. By that government their boundary and other controversies with each other had been authoritatively adjusted. Whenever a state had undertaken to defy the nation, it had been compelled to conform. The Supreme Court of the United States had in 51 cases set aside the judgment of a state court. These cases had come from 23 states, 9 of which were of the original thirteen. In more than one instance the constitution of the State, the immediate act of its people, had been subjected to the correcting power of the central government. In short, that government had been for 72 years in the open, exclusive and adverse possession and exercise of the sovereignty of the people of the United States.

What historical fact, then, had occurred, which could form a precedent for Secession? Not the Kentucky and

Virginia resolutions of 1798, for they averred only the right of private State opinion as to infractions of the constitution, and the right, not of one party, but of all the parties to the supposed State compact, to arrest such infractions; and when the many objections from other states to these resolutions showed that all the parties to the supposed compact did not agree to cancel it, the action taken by the legislatures of Kentucky and Virginia was to protest. Not the Hartford convention, for the remedy it proposed for the evils of which it complained was, to amend the constitution. Nor even the nullification program, for the effect of the attempted nullification by South Carolina of the Federal legislation was like the effect of the Pope's Bull against the Comet; the Federal legislation moved on as before.

There was not a precedent for action upon the theory of secession in the facts of our history. Such action ran counter to the continuous and uniform practice and conduct of the government under the constitution. It was wholly revolutionary, if any course of action could be. If there was any adequate justification for the attempted secession of 1861, then the pretended sovereignty of the United States for a period of 72 years was a mere simulacrum, and the history of its continued assumption of that pretended sovereignty, and of its parading before the governments of the earth as a real nation, was a gilded hypocrisy.

## National Practice Under the Articles of Confederation.

But did not the Articles of Confederation, which were in force when the Federal Convention met in 1787, declare

that each state retained its sovereignty and independence? And was it not then a congress of ambassadors from sovereigns which met to compose that convention?

It is true that that instrument, in this language, has often been supposed to sustain the secession contention. There has been much inaccurate and misleading comment upon the states of the Union as "sovereign states." The word "sovereign" has been put to as many uses as the word "state."

But words cannot control or vary facts. In the actual practice of our government under both the confederation and the constitution, we have seen that the states at all times were by no means sovereign. In what sense, then, has the term been applied to them?

The facts of our history show an intent, from the beginning, on the part of some at least, to construct the American government upon some such dual system as that which now prevails. This object was not originally stated in the terms by which we now describe it; and doubtless it was at first, by many, only vaguely understood. Like many other similar experiments, it grew slowly. So novel was the scheme, that the process of establishing it was necessarily slow, and there was much fear and trembling lest it might not succeed, except at the expense of local self-government. But a distinct movement appears, from the beginning, steadily tending toward the result finally attained.

The Congress and the people of the States co-operated in the movement. Congress at the same time was preparing for the Declaration of Independence, the establishment of a central government by the Articles of Confederation, and the erection of local constitutions by the States. That these various steps were completed at different

dates does not make them any less the parts of one plan. The convention of the people of Maryland, on June 28th, 1776, instructed their delegates to join with the other Colonies or a majority of them, in declaring the United Colonies independent, and in any other measures "necessary for securing the liberties of America," provided the "exclusive right of regulating the internal government and police of the Colony be reserved to the people thereof." At about the same time, Rhode Island, as we have seen, was promoting the "United Colonies" to the sovereignty formerly accorded to the King of Great Britain. All the Colonies had done practically the same.

So when the Articles of Confederation declared that each state "retains its sovereignty and independence," what was meant was, such sovereignty and independence as they then exercised; such as was consistent with the establishment of a central government. These terms implied independence of each other, as to their local affairs, and the exercise by each state of the powers of local self-government. Replying to the criticisms of those who denounced the new system as wiping out the State lines, the Federal advocates outlined the dual system. Madison and Hamilton, in the Federalist, elaborately explained it as partly Federal and partly National. The erection of a strong National government was held to be entirely consistent with the retention of local self-government. The success of the system has demonstrated this consistency. The strength of the Nation has proved the bulwark of the local self-government of the States.

### Judicial Construction of the Constitution.

Not only by the Nation's History, but by its Law also, the secession premises were confuted. Our system

makes the judiciary a part of the government, and gives their decisions authoritative force. When in 1860 the secessionists offered their arguments, the courts had already declared themselves upon every mooted point. Their contest was closed against them before they sought to open it, settled by (1) Constitution, (2) History, and (3) Decisions.

In the first great constitutional case before the Supreme Court of the United States, in 1793, that Court deliberately answered in the affirmative the question, "Do the people of the United States form a Nation," and declared the absolute supremacy of the National government over the States. (Chisholm v. Georgia, 2 Dal. 419).

In 1795, in the next great constitutional case, that Court sustained the action of the Continental Congress creating the "Court of Appeals in cases of Capture," as a proper exercise of National power. The decision was based upon the assumption by that Congress, of National sovereignty, with the approval of the people. The fact was recognized that the states did not profess to be individually sovereign, and that no one state had alone resisted Great Britain; and the position of the central government among the states was compared to that of Jove among his lesser deities. (Penhallow v. Doane, 3 Dal. 54). The Court explained that the phrase "retains its sovereignty," in the Articles, could not be supposed to refer to those powers of sovereignty which the congress was exercising.

In this case and another one in 1796 (Ware v. Hylton, 3 Dal. 199), the court stated and illustrated the distinction between external and internal sovereignty, ascribing to the Congress during the war all the powers of the former.

The decision of 1795 was re-affirmed in 1809 (United States v. Peters, 5 Cranch, 115).

The dual system, by which the Nation and the States co-exist, and co-operate in government, has been more than once expounded by the United States Supreme Court; notably in a case in 1829, in which Judge Washington (pupil of and successor to Wilson) declared:

> "For all national purposes embraced by the federal constitution the States and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects, the States are necessarily foreign to and independent of each other." (Buckner v. Finley, 2 Pet. 590).

So when in 1867, that Court declared that "the Constitution in all its parts looks to an indestructible Union composed of indestructible States" (Texas v. White, 7 Wal. 700), it was merely voicing the ante-bellum declarations of the Court as to our American dual system of government.

In 1816, that Court declared that "the Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble declares, by the people of the United States," and that the people had a right to, and did "make the powers of the State governments, in given cases, subordinate to those of the Nation." (Martin v. Hunter, 1 Wheat. 304).

Other similar decisions followed, in 1819 (McCulloch v. Maryland, 4 Wh. 316); 1821, (Cohens v. Virginia, 6 Wh. 264); and 1824, (Gibbons v. Ogden, 9 Wh. 1).

In 1823, at the inception of the attempt of South Carolina to oppose the Federal power, the United States Circuit Court in that state announced that the advocacy

of the theory that South Carolina was a sovereign state when she adopted the constitution, implied a direct attack upon the sovereignty of the United States. (Elkison v. Deliesseline, 2 Wh. Cr. Cas. 56, 61).

Mr. Davis, in his "Rise and Fall of the Confederate Government," said that "no respectable authority has had the hardihood to deny that, before the adoption of the Federal Constitution, the only sovereign political community was the people of each state." (v. 1, 154).

He must have forgotten the opinion of Chief Justice Jay in Chisholm v. Georgia, in 1793, that during the Revolutionary War, the people considered themselves in a national point of view, as one people, that "from the crown of Great Britain the sovereignty of this country passed to the people of it," and that they, "in their collective and national capacity, established the present constitution." He must have forgotten the declaration of Judge Paterson in Penhallow v. Doane (1795), that during that war, the Congress had exercised its sovereign powers with the assent of the people.

Mr. Davis also says that "No such political community as the people of the United States in the aggregate, exists at this day or ever did exist" (1, 120). To so hold he must run counter to the declarations of eminent jurists.

Judge Marshall decided in 1823, that "The United States is a body-politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people." (U. S. v. Maurice, 2 Brock. 96.)

And Judge Taney said, in 1848: "For all the great purposes for which the Federal government was formed, we are one people, with one common country." (The Passenger Cases, 7 How. 492.)

Again Mr. Davis says, in his article on "The Doctrine of State Rights," in the North American Review (v. 150, p. 218):

> "It had, so far as I know, in all the earlier periods of our history, been uniformly held that allegience was primarily due to the State of which the individual was a citizen."

He should have remembered that, when the attempt was made to put the nullification scheme into operation in South Carolina, in 1834, the Court of Appeals of that state reversed the decision of a lower court, which was to the effect that "by the Declaration of Independence South Carolina became a free, sovereign and independent state," and declared that the allegiance of all the citizens of that State was primarily due, and always had been, to the United States, and said that "Before the Constitution of 1787, it was not then doubted that allegiance was due to the United States." (McCreary v. Hunt, 2 Hill's Law R. 1, 215.)

Not only historically, then, but constitutionally and legally also, the secession dogma was without ethical support.

## The General Ethical Aspect.

There is another ethical aspect of this subject which is entitled to consideration. The American Federal system in 1860 occupied a peculiar position in the world's history. It was then the most conspicuous example of a successful federation. Starting under novel auspices, it had enjoyed the unusual good fortune of success from the beginning. It seemed then to be assured of a like prosperous future. What was the secret of this unexampled success? Federal government was not new. But a new

principle had been introduced into Federation. Interstate quarrels had been the bane of every earlier experiment at Federal association. The reserved sovereignty of the States was not always willing to forego a resort to arms for the settlement of such quarrels, and war between its members sounded the death-knell of the confederacy.

The American Experiment of 1789 obviated this weakness entirely, substituting effectually in place of the arbitrament of arms, the arbitrament of the Federal Courts, for the settlement of all inter-state disputes. During 72 years, this system had preserved internal peace. Harmony at home made the Nation strong abroad; strong enough to protect itself against foreign nations, and to maintain its Washingtonian policy of isolation; strong enough to announce, and to secure respect for the Monroe doctrine; strong enough to bar the designs of the "Holy Alliance," and to guarantee the safety of the infant republic of the west; strong enough to lead in the modern modifications of international law and to promote the use of international arbitration. Thus the United States was in 1860 becoming the peace-maker of the world.

All this success was due to the introduction into Federation of an authoritative central government, the depositary of the functions of external sovereignty, and the arbiter in all interstate collisions and contests. Was there no Providence in all this? Was this new phase of Federation merely a device of man's invention, to be shelved at the will of some of its managers? Was it not rather a part of the great, slowly-working, but world-wide and age-long plan of a Divine artificer, interposed in the fullness of Time, to promote the pacification of the world? History has now answered these questions with exceeding certitude. But History seemed about to answer them

in the same way in 1860. The Federal system of America had been subjected to every test except one. Was it sufficiently founded and buttressed to withstand internal dissension? Could it maintain itself against a strong and broad and skilfully planned revolt?

The heart of this system of government, from which flowed the life-blood that energized it, was the supremacy of the Federal authority. Secession aimed its knife at the heart.

If it be now agreed that it was fortunate for the people of America, and fortunate for the world, that the assault did not succeed, what shall be said of the Ethics of the movement that inspired the blow?

In the view of those who battled to preserve the American Federal system in its integrity, there was one God dominant in the conflict. The God of Battles who set victory upon the Union banners was also the God of Justice and of Peace, promoting the extension of Federation and the progressive pacification of the world. All the world-wide Ethics applicable to the case distinctly condemn the secession dogma and the secession propaganda.

One excuse which is often urged in behalf of the secessionist politicians as their justification, is that of their education; they were educated into a belief in the theories of State-Compact and State-Allegiance. But this must be characterized as a defective education, which might excuse, but cannot justify. They may have been educated in the School of the Resolutions of 1798, the School of Tucker's Blackstone, and the School of Calhoun, whose boast was that he never used the word "Nation." But to adopt such a curriculum was to ignore the School of United States History and the School of the Constitution. The use of the term "sovereignty" in the Articles of Con-

federation should not have misled any one, after its true meaning had been expounded by the Courts.

Locality, even, ought not to have been as influential as it appears to have been in drawing away so many from their rightful allegiance to the Nation. Originally, Nationalism was not sectional. In the early days, as we have seen, men of southern origin were among the foremost and strongest advocates of the National theory of our government. Even in these later days, it is among them that we often find the most ardent and efficient champions of the true Federal principle. John Minor Botts, of Virginia, was such a champion.

A recent episode, which is worthy to be noticed in this connection, illustrates this fact graphically and beautifully.

Sometimes the intuition of the Poet goes straight to the center of a great historic truth, which Statesmen and Historians perceive but dimly until after study and analysis. Such intuition was manifest in that stirring lyric of some ten years since, entitled "The High Tide at Gettysburg," whose author was Colonel C. F. Thompson of Mississippi, a confederate veteran. In two stanzas of his poem, he places in antithesis the loyalist cause and the secessionist cause, seen in their ultimate motives, as disclosed in the crisis of Gettysburg.

"They fell, who sought to raise a hand,
And bid the sun in heaven to stand;
  They smote, and fell, who set the bars
  Against the passage of the stars,
To stay the march of mother-land.

They stood, who saw the future come
On through the fight's delirium;
  They smote and stood, who held the hope
  Of nations on that slippery slope,
Amid the cheers of Christendom."

These stanzas present the culmination of the great conflict in two aspects, one the political and the other the ethical. In the political aspect of the struggle, they fall who seek to place the bars so as to stay the onward march of mother-land; while they stand whose faith gives them, through the smoke of battles, a vision of that mother-land's future. In the ethical aspect, they fall, who in their irreverence and impiety presume to bid the sun stand still, and to attempt to stay the movement of the hands on the dial of Time; but they stand, who are serving posterity and holding fast the hope of nations, while Christendom looks on and cheers.

It is pleasant to know that this optimistic view of the great crisis of the Civil War, and of its grander meanings, emanated from a Mississippian, and that now, as so often in the past, the warmest encomiums upon the great deserts of our system of government, and the most generous appreciation of the achievements which preserved it in its time of peril, come from our southern fellow-citizens.

## IX.

## JAMES WILSON AS A JURIST.*

The work of James Wilson in the development of the jurisprudence of the Republic in its youth deserves a more specific recognition than has been accorded it. In our recent centenary recollections his name has often been remembered and appropriately honored. One of his successors as a justice of the Supreme Court of the United States has, lately, called especial attention to the great abilities and achievements of Judge Wilson as a political thinker and as one of the artificers of the Constitution.† But the versatility of an earnest and profound scholar gave this man pre-eminence in more than one field of research and accomplishment; and as a lawyer no less than as a statesman, both his constructive work and his expository efforts were of the first order. It cannot detract from the honor due to Wilson as a statesman, or lessen our debt to those who have well illustrated his political services, to review and to emphasize that part of his work which may be classed as essentially juristic.

That Wilson was an able and learned lawyer has been abundantly acknowledged in general terms. He is known

*From the American Law Review, Jan.-Feb., 1904.

†Justice Harlan in 34 American Law Review, 481.

as one who explored the depths of both the civil law and the common law, and who utilized in his legal practice the best elements to be drawn from both systems. Mr. Justice Harlan* characterizes him as "the most learned member of that notable body," the Federal Convention of 1787, and as "in the highest and best sense a great lawyer." Others have declared that he was "one of the first jurists in America," and that "he surpassed all others in his exact knowledge of the civil and common law and the law of nations." These lofty attainments won for him a commission from the king of France as advocate of the French nation at Philadelphia, and an appointment by George Washington as the tutor of his nephew in the study of the law. One unfamiliar with the details of Wilson's career as a lawyer may possibly deprecate such generous praises as fulsome adulation; but a cursory examination of that career will serve to establish the worth of his professional labors and the justice of his high reputation.

In the law no less than in statesmanship, his constructive work was notable. His lot was cast in a transitional and revolutionary era. The lawyer is naturally conservative, but he cannot be uniformly so. To Wilson and his coadjutors fell the task of uniting to the old and familiar jurisprudence those new principles introduced by the necessary changes incident to a revolution. The American colonists were holding conservatively to all their established doctrines and practices of local self-government. Their problem was to erect a new national government in place of the kingship which they were eradicating. A similar change of executives was a simple matter for the Netherlanders of 1581, who still adhered to the plan

*American Law Review, Jan.-Feb., 1904., p. 485, 486.

of government by a prince, and who had but to elect a new executive in lieu of the one deposed. But in the eighteenth century the long latent idea of the primary sovereignty of the people had become insistent among statesmen, and was receiving acceptance in America. The logic of the situation of the restless colonists implied an unreserved adoption of the theory, as Wilson early saw and declared. Was it possible to make the change, within the rules of established law, and be at once revolutionary and constitutional?

To substitute a national government based on popular sovereignty, in place of a colonial government based on personal allegiance to a prince, without straining the timbers of the State or the principles of the law, while at the same time preserving local self-government, was a task which might well tax the abilities of any people and appall any group of experienced statesmen. To the mind of a trained lawyer like Wilson, this task was not impossible. His knowledge of first principles was broad. Easily comprehending the operations of the sovereignty of the people, as manifested in the older democracies, and in the compacts frequently made between a people and their elected prince, he had ready at hand the historical precedents in constitution-building, for practical use in the new conditions. His studies in government had shown him the requisites of a State which might ask for an independent position among the world-powers. An ardent love of democracy, and an active participation in the American experiment, familiarized him with the necessities of local self-government. His analytic mind enabled him to arrange harmoniously, in co-operation, each in proper place, the essential principles of each of these departments of political science, and to unite them in one

system. In advance of its consummation in the labors of the Federal Convention, Wilson saw in his mind's eye the possibility of a dual system to be erected by the people, such as is now operative in America, which should preserve the States in their control over local affairs, while above them was established a strong and supreme central power.

To aid in constructing such a governmental machine required one order of ability, and to explain and illustrate it to others required another. Wilson was equipped for both duties. His expositions of the normal and expected operations of the newly devised scheme of government, during the three weeks' discussion in the Pennsylvania Convention, were the luminous arguments of a clear-headed lawyer. What his vision foresaw of the mode of operation of such a political system, he was able to distinctly reproduce before his auditors. Both affirmatively in showing forth its merits and negatively in demolishing the objections urged against it, he was the expositor and the champion of the Constitution; and its ratification by the Convention of his State was another triumph of his advocacy.

Madison has been called the Father of the Constitution; yet his views of his own constructive work are sometimes cloudy, and he has been quoted authoritatively with equal positiveness by the adherents of different schools of constitutional construction. Hamilton's arguments in the *Federalist* are exceptionally luminous; but his distrust of the people and his well-known preference for a strong national government had the effect to minimize the influence of his observations. Wilson's more extended and comprehensive view of the excellencies of the new system, and the unvarying singleness of his expositions of the

office of the people of the United States as the source of all political power, place him foremost among the advocates of the Constitution. The convention of 1787 was an assembly of great lawyers, and among them Wilson was *facile princeps*. As little as now is or can be known of the variations and fluctuations of thought in that convention, it seems only a reasonable speculation that Wilson as a member of the Committee of Detail was often the pilot of the assembly, that he and his colleague Morris, of the Committee on Style, were close co-workers, and that in the fine legal arrangement and the felicity of statement of the Constitution, we see the professional learning of Wilson animated by the happy diction of Morris.

Wilson's pamphlet, published in 1774, on "The Nature and Extent of the Legislative Authority of the British Parliament," is a landmark in our constitutional history. It is conspicuous for both its matter and its style. It is an exhaustive argument, in which the legal characteristics prevail over the political. In calm and dignified language, without passion or rhetoric, the advocate coolly dissects the parliamentary pretensions to legislative power over the colonies. Earlier pamphleteers had earnestly contended against the power when applied to internal taxation, as instanced by the stamp tax and the tea tax, while admitting the parliamentary authority to regulate trade, even to the extent of levying duties in so doing. Wilson took broader ground. As another has said of Jefferson, "he smote the claim of parliamentary supremacy full in the face." Wilson had prepared this argument some time prior to its publication in 1774. Thus he was writing, at the age of less than thirty years, a thesis which became the basis of a revolution. Thenceforth the colonial position shifted, and the colonists' denial of the parliamentary

pretensions was no longer limited to the subject of internal taxation, but occupied the full extent of the ground marked out by Wilson. In this argument, the British constitution is laid bare to its foundations, and its fundamental principles are disclosed. The propositions here advanced are these: (1) that the British islands and the American colonies are separate and integral parts of one empire; (2) that the king of Great Britain is their common prince; (3) that the allegiance of the people of each colony, as well as that of each separate kingdom in the empire, is due to the king in his natural person, and not to his crown or his government; (4) that the king is bound to govern each kingdom and colony according to its own laws; (5) that his right to do so flows from the choice of himself by the people of the kingdom or colony as their prince, and his agreement so to govern them; (6) that allegiance and protection are reciprocal; (7) that a breach by the king of his duty to his people absolves them from their allegiance; (8) that the laws of each separate kingdom or colony have no extra-territorial scope or bearing; (9) that the parliamentary authority is derived solely from the people, and wholly by representation; (10) that the people of the colonies are not bound by the acts of the British parliament because they have no share or representation in that legislature; and (11) that for these reasons, the claim that parliament can acquire jurisdiction over a colony by naming such colony in its acts, is absurd and untenable. All these propositions were sustained by references to English precedents, judicial and legislative, beginning in the time of Richard III., and with a clearness that was lucidity itself. The British constitution was made to stand and deliver its inmost implications, and every step in the advocate's syllogism was

fortified by a British precedent. A new constitutional jurist had arisen; the last of a line of expounders of the old British constitutional system, and the first of a new line of expounders of an American system.

This argument by Wilson covers the whole constitutional ground later covered by the Declaration of Independence, and the whole occupied thereafter by the Americans in their defensive struggle with Great Britain. The "Farmer's Letters" of John Dickinson, confined to an ardent opposition to internal taxation of the colonies by parliament, while admitting the power of external taxation for trade regulation, had previously been the colonial shibboleth. Wilson, once a student under Dickinson, says that he entered upon his investigation of the subject in the "expectation of being able to trace some constitutional line between those cases in which we ought, and those in which we ought not, to acknowledge the power of parliament over us." He failed to find such a line, and in his thesis, the legislative authority of parliament over the colonies is "denied in every instance." He thus became the pioneer in announcing, to their full extent, the principles upon which Independence was declared, constitutionally battled for, and won. His own confidence in the correctness of these views gradually came to animate his coadjutors. The spirit of Wilson breathes throughout the great Declaration, and the revolutionary struggle thereafter is waged in entire consistency with his theories. His denial of any and all parliamentary authority to legislate for the colonies is made the burden of John Adams' "Novanglus," and Adams' citations of English authorities for the contention are largely the same as those of Wilson.

In January, 1775, Wilson delivered in the provincial

convention of Pennsylvania an address, outlining the then existing situation between the colonies and the mother country, and defending the Americans against all the charges urged against them, of disloyalty or revolutionary action. The defense took the form of a free impeachment of the king for his unconstitutional treatment of his colonists. Like the draft made by Jefferson in 1774 of "Proposed Instructions to the Virginia Delegates" to the Continental Congress, this address of Wilson's, as a State paper, prefigures the Declaration of 1776. In these two papers taken together may be found the substance of the calm statements of that great Declaration. How well the more redundant "Instructions" of Jefferson were epitomized in his Declaration of 1776 is well known. In two respects Wilson's address of 1775 seems to have struck the key-note for the great Declaration; the argument, repeated from his address of 1774, that, as allegiance and protection are reciprocal, the king has by his misconduct forfeited the allegiance of his American subjects; and the proposition that, while the king alone could constitutionally do no wrong, he had by combining with others, his subjects and ministers, cut himself off from all benefits of the ancient maxim, and subjected himself to condemnation for the schemes of the combination; neither of which points of the Declaration was drawn from the Jeffersonian "Instructions."

Wilson made his address of January, 1775, practical, by proposing to his fellow-provincials a resolution on the Boston Port-bill, not merely sympathizing with their sister colony, but declaring that that and similar acts of the British parliament "are unconstitutional and void;" that all attempts to alter the charter or constitution of Massachusetts, "unless by the authority of the legis-

lature of that colony, are manifest violations of the rights of that colony, and illegal;" that all force employed in support of such void laws is force without law and may be rightfully resisted; and that "this right is founded both upon the letter and the spirit of the British constitution."

Here was a terse and unequivocal statement of the legal and constitutional grounds upon which the American colonists based their armed resistance to the British aggressions. One can imagine this lawyer's postulate becoming the national rallying cry of the "embattled farmers," at Lexington and Concord and Bunker Hill and Saratoga, and the impetus of "the shot heard round the world."

As a member of the convention which framed the Federal Constitution, Wilson was the constant and consistent advocate of the national idea in Federal government. To every question as to the proper operations of a normal system, he applied his touchstone of Sovereignty of the People, and the result ever was Nationality. Early in the session (June 7th) he declared that "if we are to establish a national government, that government ought to flow from the people at large."* On the following day, he reminded his compatriots that "among the first sentiments expressed in the first Congress, one was, that 'Virginia is no more, Massachusetts is no more, Pennsylvania is no more,' etc.; we are now one nation of brethren; we must bury all local interests and distinctions;"† and he lamented the departure, under the Articles of Confederation, from those early national precedents, under the influence of State jealousy. A few days later (June 19th) he refuted the contention that the States were in the exercise of sovereignty, and that when the colonies became independent of Great Britain, they became also

*5Elliott, p. 167.

†Id. p. 172.

independent of each other, and to illustrate his view, "he read the Declaration of Independence, observing thereon, that the *United Colonies* were declared to be free and independent States, and inferring that they were independent, not *individually*, but unitedly;" and his view of this subject was assented to by Hamilton.*

In November, 1787, the Convention of Pennsylvania met for the consideration of the new Constitution, with Wilson as a member, and here he became the doughty champion of the novel dual system of Federal government. The objections of the conservatives of Pennsylvania were many, and were urged with persistence and bitterness; and Wilson met and demolished them all. During the three weeks' sittings of the convention, he occupied the floor on eight different days. His speeches were masterpieces of forensic argument. His championship of the Constitution was based principally upon three of its essential features, which he never tired of emphasizing: the sovereignty of the people, whose work the entire system was; the erection of a strong national government; and the preservation of the local or State governments, the essential parts of the great whole. Among his declarations are these:

"When the principle is once settled that the people are the source of authority, the consequence is, that they may take from the subordinate governments powers with which they have hitherto trusted them, and place those powers in the general government, if it is thought that there they will be productive of more good."†

"On the principle on which I found my arguments,—and that is the principle of this Constitution,—the supreme

*5 Elliott, p. 213.

†2 Elliott, p. 444.

power resides in the people. If they choose to indulge a part of their sovereign power to be exercised by the State governments, they may. * * * The powers of both the general government and the State governments, under this system, are acknowledged to be so many emanations of power from the people."*

"The government of each State ought to be subordinate to the government of the United States."†

"I consider the people of the United State as forming one great community; and I consider the people of the different States as forming communities, again, on a lesser scale. * * * Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the States as made for the people, as well as by them, and not the people as made for the States; the people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or State governments, in what manner they please, or to accommodate them to one another, and by this means preserve them all."‡

"I cannot discover the least trace of a compact in that system."§

His exposition of the powers committed by the new system to the Federal judiciary was both lucid in present explanation and prophetic of the future work of the courts.

"If a law should be made, inconsistent with those powers vested by this instrument in Congress, the judges as a consequence of their independence, and of the particular powers of government being defined, will declare such law to be null and void, for the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law."**

*2 Elliott, p. 502.

†Id., p. 490.

‡Id., p. 456.

§Id., p. 497.

**Id., p. 488.

And broadening and extending his prophetic gaze, Wilson in conclusion enthusiastically declared to the convention that "by adopting this system, we shall probably lay a foundation for erecting temples of liberty in every part of the earth."*

The value of this forensic victory of Wilson will be more clearly understood and more fully appreciated, when it is remembered that Pennsylvania was the one of the large States whose people in convention first ratified the Constitution. Wilson's task was as arduous as that of Hamilton in New York or that of Madison in Virginia. Though his victory was won by a narrow margin, it was conclusive, and it was the first great triumph for the new system. His arguments in the Pennsylvania convention opened up the general campaign in behalf of the Constitution submitted by the Federal Convention, antedating even those presented in the *Federalist* respecting the details of the scheme.

For his championship of the principle of nationality in Federal government, in both the Federal Convention and that of Pennsylvania, Wilson was already prepared by his previous studies in international law and in the science of government. In his notable argument in 1785, before the legislature of Pennsylvania, on the question of the power of Congress, under the Articles of Confederation, to charter the Bank of the United States, he had said:

"To many purposes, the United States are to be considered as one undivided, independent nation, and as possessed of all the rights, and powers, and properties by the law of nations incident to such. Whenever an object occurs, to the direction of which no particular State is competent, the management of it must, of necessity, belong to the United States in Congress assembled. There are many objects of this ex-

*2 Elliott, p. 529.

tended nature. The purchase, the sale, the defense and the government of lands and countries, not within any State, are all included under the description." *

Here was a jurist who was ready in advance to welcome, in a constitutional sense, not only the Ordinance of 1787 for the government of the northwestern territory, but the acquisition of Louisiana, and the congressional provisions for its government.

Four years later, in his capacity of Lecturer on Jurisprudence at the law school of the University of Pennsylvania, Wilson restated his view of the office of the Federal courts in enforcing the Constitution, in more elaborate but still clear and perspicacious form. His exposition of the constitutional place of the courts in our system might well have been adopted at once as authoritative.

"In the United States, the legislative authority is subjected to another control beside that arising from national and revealed law: it is subjected to the control arising from the Constitution.

"From the Constitution the legislative department, as well as every other part of the government, derives its power; by the Constitution, the legislative as well as every other department must be directed; of the Constitution, no alteration by the legislature can be made or authorized. * * * The Constitution is the supreme law of the land; to that supreme law every other power must be inferior and subordinate.

"Now let us suppose that the legislature should pass an act, manifestly repugnant to some part of the Constitution; and that the operation and validity of both should come regularly in question before a court forming a portion of the judicial department. * * * The business and the design of the judicial power is, to administer justice according to the law of the land. According to two contradictory rules, justice, in the nature of things, cannot possibly be administered. One of them must of necessity give place to the other. * * * It is the right and it is the duty of the court to decide upon them. * * * When the question occurs, What is the law of the land?

* Wilson's Works, p. 558. (Chicago Ed.)

it must also decide this question. In what manner is this question to be decided? The answer seems to be a very easy one. The supreme power of the United States has given one rule; a subordinate power in the United States has given a contradictory rule; the former is the law of the land; as a necessary consequence, the latter is void and has no operation. In this manner it is the right and it is the duty of the court of justice, under the Constitution of the United States, to decide. This is the necessary result of the distribution of power, made by the Constitution, between the legislative and the judicial departments. * * *

"This regulation is far from throwing any disparagement upon the legislative authority of the United States. It does not confer upon the judicial department a power superior, in its general nature, to that of the legislature, but it confers upon it, in particular instances, and for particular purposes, the power of declaring and enforcing the superior power of the Constitution, the supreme law of the land."*

In these words was presented summarily that new doctrine of American constitutional jurisprudence, which has become the corner-stone of our political edifice. Marshall's summary of the same doctrine, advanced as a dictum from the bench in Marbury *v.* Madison, in 1803, has since been universally followed in the decisions of the American courts; and by this doctrine is our constitutional jurisprudence distinguished. But Wilson had in 1791, set forth the constitutional rule as to both the judicial function and the judicial duty in such cases, in language both felicitous and forcible; and Marshall, in Marbury *v.* Madison, had but to paraphrase the words of Wilson uttered twelve years previously.

When the new system of government went into operation, to the original framing and the final adoption of which Wilson had so ably and actively contributed, it was exceedingly appropriate that he should have been by the first President placed upon the Supreme Bench of that judicial department, whose share in the government

*1 Wilson's Works, 415-417 (Chicago Ed.).

and the character of whose operations he had so accurately forecasted. A brilliant judicial career was cut short by his untimely death, after nine years' service. But Wilson lived long enough to deliver one great opinion, and in conjunction with Jay, to put upon the United States, by the impress of judicial determination, the stamp of that supreme nationality by which he had, as an advocate, so long recognized that government. In the case of Chisholm *v.* Georgia,* the important question arose whether, under the Constitution, a State of the Union could be subjected, in the Federal courts, to the suit of a citizen of another State. Wilson stated the question as being, in its last analysis, this: "Do the people of the United States constitute a Nation?"

He addressed himself to the consideration of this grave inquiry from three different points of view: First theoretically, in the light of the principles of general jurisprudence; in the second place, practically, as illustrated by the laws and usages of particular states and kingdoms; and in the third place, categorically, as the question appears to have been treated in the Constitution.

Theoretically, he finds that, as in every State the people are rightfully sovereign, it follows necessarily that the State must occupy a position subordinate to the people. "As to the purposes of the Union, Georgia is not a sovereign State." There is nothing in the relations existing between the State of Georgia and the people who established the Constitution, which, in view of the principles of jurisprudence, evinces any exemption of that State from the jurisdiction of the Supreme Court. Practically, the examples taken from the usages of many states and kingdoms served to show, as a general rule, that the

*2 Dall., p. 419.

ruling power in the State is expected to do justice and to be bound by its promises, and thus disclosed "much in favor of the jurisdiction of the court over the State of Georgia."

A categorical examination of the provisions of the Constitution showed the plain intent of the people who framed it to bind the several States, first, by the legislative power, next, by the executive power, and finally, by the judicial power of the national government. "The judicial power of the United States shall extend to controversies between two States," says Judge Wilson, quoting in a summary way the Constitution, and adds: "Two States are supposed to have a controversy between them; this controversy is supposed to be brought before those vested with the judicial power of the United States; can the most consummate degree of professional ingenuity devise a mode by which this 'controversy between two States' can be brought before a court of law, and yet neither of those States be a defendant?" The judicial power being then further expressly extended to 'controversies between a State and citizens of another State,' it followed that either of these parties might also be a defendant; *ergo*, the State of Georgia might be sued by a citizen of South Carolina.

Justice Iredell's dissenting opinion has been sometimes thought to be of a higher forensic quality than that of Wilson; but the difference between them is patent and fundamental. Wilson and Jay started in their examination of this subject with the basic proposition of the sovereignty of the people of the United States, and from the act of that people in ordaining a Constitution, and from its provisions as so ordained, they deduced the intent of that people respecting the State of Georgia. Ire-

dell started from the wholly contrary assumption that "the United States have no claim to any authority but such as the States surrendered to them." Following only the English precedents which were against the suability of the king, and finding no evidences of an intent to change this English rule, Iredell thought the suit was not maintainable. His narrower point of original view did not permit him to assume the same premises as Wilson, or to take the broad sweep of Wilson's deductions. There is therefore no basis of comparison between the limited views of Iredell and the broad and masterly opinions of his colleagues Wilson and Jay.

The scope and value of this first constitutional decision by the Supreme Court of the United States deserve to be recognized and accentuated. This was a fit beginning of a long line of judicial determinations of the deepest import. In this case was involved the whole future of our Federal judiciary; for that department could not discharge the great duties assigned to it by the scheme of the Constitution, unless it should in fact exercise all the jurisdiction committed to it by that instrument. In Chisholm *v.* Georgia, the court declared itself ready to assume, to its broadest limits, the full extent of that jurisdiction, according to the manifest intent of that Constitution. Thenceforth that instrument was no mere paper declaration. Vivified by the construction of an independent and fearless judiciary, it became, what it has ever since been, a living force. On the foundation of this decision rests our national fabric. All the power which the Supreme Court of the United States has since exercisd over the States of the Union, for the preservation of domestic peace and quiet, was assumed in that case. "The government of each State ought to

be subordinate to the government of the United States," was the postulate of Wilson the advocate, in 1787, when commending the Constitution then under consideration to his fellow-citizens of Pensylvania. Now, in 1793, Wilson the judge was privileged to declare authoritatively that such was the result attained by the adoption of that Constitution by the people.

From this its high-water mark, American jurisprudence has never receded. The adoption of the Eleventh Amendment has been thought to have minimized the effect of the decision. Far from it. That amendment did indeed take from the jurisdiction of the Federal courts the class of cases of which Chisholm *v.* Georgia was a sample. Such was of course the privilege of the sovereign which had established the original Constitution. It is of the essence of that decision that the people had this power. That the power should be exercised again, and to different effect, did not disprove the accuracy of the judicial view; rather did it approve that view and ratify it beyond the possibility of dissent. The court was asked to declare that a State was not suable by a citizen of another State, because, by reason of its inherent sovereignty, it was not suable at all without its own consent. The court found the Constitution conferring jurisdiction over three classes of controversies to which a State might be a party, namely: those with another State or States, those with citizens of another State, and those with foreign States or citizens. It resulted necessarily that a State might be the defendant in a controversy in each of these classes, and therefore Chisholm's suit against the State of Georgia must be sustained. When the people thereafter withdrew a part of the jurisdiction over one of those three classes of con-

troversies, all not thus withdrawn was left by the people in full effect, just as declared by the court in the Georgia case. Thereafter the courts might properly exercise jurisdiction over all such controversies save the class excepted by the amendment; and such jurisdiction the courts have since exercised, constantly and consistently, and without question. There could be no doubt thereafter as to their right to exercise such jurisdiction; for in Chisholm *v.* Georgia the right had been forever settled. That decision had closed the question, and closed it forever as a judicial one, of the jurisdiction over a State as a defendant to the suit of a citizen of another State. Thereafter no power except that of the people of the United States could exempt a State from such a suit; hence the Eleventh Amendment. Prior to that amendment, the Constitution stood as declared by the court in Chisholm *v.* Georgia. Therefore that decision was correct, and still remains so. The Eleventh Amendment was prospective only. The peculiar language of the amendment does not vary this consideration. The words, "The judicial power of the United States shall not be construed to extend, etc.," are purely prospective. The sovereign people refrained from saying that the power had not in fact so extended under the Constitution as they first framed it. Constitutionally and juridically, therefore, Chisholm *v.* Georgia stands as a landmark in our jurisprudence.

All that was said by Mr. Justice Bradley, in Hans *v.* Louisiana,* in criticism of Chisholm *v.* Georgia, was beside the mark. The two cases are so plainly distinguishable, that the *dicta* in the Louisiana case might with great propriety have been omitted. Mr. Justice Harlan,

*134 U. S., p. 1 (1889).

in disapproving of those *dicta*, covered the whole ground as to the present status of the Georgia case, when he said, "I am of opinion that the decision in that case was based upon a sound interpretation of the Constitution *as that instrument then was.*"

Upon still another great constitutional question, which has become settled by the juristic work of Marshall and his coadjutors, Wilson took a decided position in advance of his contemporaries. In his argument of 1785 above mentioned, before the Pennsylvania legislature, he objected, on broad grounds of general constitutional law, to the legislative attempt to repeal an act creating a private corporation after its acceptance by the corporators. Such a charter he claimed to be "a compact, to be interpreted according to the rules and maxims by which compacts are governed."* The reasoning he employed showed that his conclusion was reached irrespective of the introduction into the Constitution of any prohibition in terms. The sense is evident in which the phrase, "law impairing the obligation of contracts," was used in the Federal Constitution by that one of its framers who has been credited with the introduction of that phrase into the instrument.

Among the postulates of our American jurisprudence, of large import and broad application, which have now become fully accepted, we may enumerate the following, viz.: The unity and sovereignty of the American people; that people the artificers of the Constitution; the one dual system of government under that Constitution; the nationality of the Federal government; the subordination of the States to the nation; the judiciary a co-ordinate governing agency of the people; and the contractual force

*1 Wilson's Works, p. 549 (Chicago Ed.).

of legislative grants. In respect to each and all of these now unquestioned propositions, we have seen one man as the pioneer advocate and the earnest and able protagonist. No other jurist appears as having more fully impressed himself upon our jurisprudence, or more clearly anticipated his great successors. When we write our category of the great constitutional lawyers of America, from Adams and Jefferson down to and including Webster, we shall not make our roll complete without placing at the head the name of James Wilson.

## X.

## THE AMERICAN AND FRENCH REVOLUTIONS COMPARED.

The American and the French Revolutions are affiliated chronologically, and there were Frenchmen who participated actively in both movements. But in character, motive, office and results, the two movements differ widely.

These differences are not simply because one was successful, and accomplished results that were permanent, while the other was unsuccessful and its work was ephemeral. Rather is it true that one succeeded and the other failed, because of their inherent and intrinsic dissimilarities.

The great movement by which the American colonies separated from the mother country stands forth in current history as a Revolution, and the War of independence is familiarly called the Revolutionary War. But this movement had scarcely any of the characteristics of the French Revolution. It was not even largely a revolution in the ordinary sense. It was in the main a conservative, rather than a revolutionary movement. The war was a constitutional, defensive war, waged by the

colonists for the maintenance and preservation, against attempted oppression and usurpation, of principles of the British constitution to which the colonists were devotedly attached.

Independence was not aimed at in the beginning. The struggle primarily was for redress of constitutional grievances. The Declaration of Independence was but an incident to the original movement. The colonists at first resisted the attempted usurpations of Parliament, as unconstitutional. Of that Constitution whose protection they invoked, the crown was an integral part, as the lawful executive. They affirmed their devotion to the crown, even when taking up arms. But when the continuance of the war showed the King actively and vigorously supporting the unwarranted pretensions of an usurping Parliament, the colonists declared that the King had by that course absolved them from further allegiance to him. Thereupon they provided themselves with a new executive in the place of the Crown, and in this respect their work was revolutionary. Each colony, however, had its own legislative body, chosen by its own people; and this feature of their government they preserved. Each colony had its system of courts, which it also continued. Each colony was in the actual exercise of local government, administered through the three departments, executive, legislative and judicial; which system, though defective, was retained and perfected.

Thus by far the larger portion of the American movement for independence was conservative, not revolutionary. The colonial judiciary had not been, by any means, independent, the tenure of office derived from the Crown having too often made the judges subservient. But this was felt as a grievance by the colonists,--one of those,

redress of which they demanded; and in severing their connection with the Crown, they accomplished the independence of their judiciary; and this great gain, as a realization of their hopes long entertained, was a conservative change.

The principal revolutionary feature of the movement was the change in the executive department of the government. This was a change forced upon the colonists against their own first choice. It has been noted, too, by recent historians, that the Americans took the English King of the seventeenth century as the type of their executive, and that our President now wields not only more power than the present British crown, but more than George III exercised in his century. But however this may be, the change in the tenure of the executive office was unqualifiedly revolutionary; and this was the principal revolutionary feature of the movement.

The close of the war found the colonies existing as before, with the same system of government, save as to the executive; with the same autonomy of the townships in New England and the same county system in the Middle and Southern colonies. Local self-government remained as before. The political, the social and the economical life of the colonists was practically unchanged. There was a growing disposition toward union and nationalism, which was as yet a tendency rather than a determination; a tendency born of the experience and the necessities of the war. What that war had accomplished was in the main the preservation of the old liberties of the people. "Instead of throwing off the yoke of King George, they had refused to put it on."*

How different in all these characteristics was the

*Landon.

French movement for redress of grievances! It was the movement of a people who had been oppressed for centuries; from whom all capacity for the actual exercise of political rights had been industriously extirpated; who were simply the feeble remnant of a nation; a survival from the kingly oppressions and encroachments of centuries, the *lettres de cachet* and dragonnades of Louis XIV, and the exactions and extravagance of his successors.

One hundred and seventy-five years of utter inactivity had left the Third Estate paralyzed; the people, as keenly as they felt their grievances, did not know the ancient rights which they had lost; nay, to a great extent the disclosure of the fact that they had any rights, startled them. Nor were the other estates better informed. The very idea of a States-General had become a tradition. We in America can scarcely comprehend such an extreme of political degradation. The period of time, from the last meeting of the French States-General in 1614 to the epoch in question, corresponds roughly to that from the colonization of America to the War for Independence. If we can imagine the American colonists, during the whole period of their colonial existence, subjected to the worst tyranny of stamp and tea taxes, to unlimited taxation with no representation, to arbitrary arrest and seizures, transportation for trial, supremacy of the military power, quartering of soldiers and dragonnades, and the forcible suppression of all religious independence,—in a word, to the ruthless, determined and wholesale extirpation, so far as possible, of all those traits of manhood which distinguished our revolutionary fathers,—we may then form a faint conception of the unfitness of the French people in 1789 to take a share in their own gov-

ernment as well as that of the other estates of the realm to assist them in the work. The nobles had no conception of the proper status of the Third Estate, or of their own relation to it. The clergy were divided in opinion, as between the Third Estate and the Court party. The brilliant ancestry of the King and his descent from the great Henry and the grand Louis had wholly failed to endow him with capacity to meet the crisis. Even had the three Estates been competent to govern, and able to agree, the Crown had so degenerated during its centuries of prerogative, that it was wholly incapable of participating, for Louis had not sufficient sense to save his own head by consistently adhering to the constitution which he had sworn to maintain.

So the French revolution could not have proceeded with the conservatism which distinguished the American revolution, because there were no corresponding institutions to be saved, which could be saved.

The French attempt, under the work of the constituent assembly, to preserve the monarchy as a feature of the new constitution, seems at first glance to parallel the American attempt to redress grievances without renouncing allegiance to the king. But the parallel is far from complete. The Americans would have preserved their constitutional kingship, if they could have done so. The French proposed to change an absolute into a constitutional kingship, a movement revolutionary in itself; but Louis was a Bourbon, incapable of acquiring new political knowledge, or adapting himself to constitutionalism of any sort.

As nothing which was worth preserving could be saved, the French Revolution of necessity became wholly destructive. The next necessity was an attempted con-

struction of a new political edifice on the ruins of the old. This was impracticable, by reason of the incorrigible unfitness of the people. They lacked that education into the ways and manners of freemen, the possession of which by the Americans made their revolution a success.

Says Dean Kitchin:

> "The French Declaration (of the Rights of Man) had to begin a fresh epoch; to appeal to a people shaking themselves free from absolutism and feudal oppression; to affirm the first principles of civil life, to give practical expression to opinions floating in every mind. To us the Declaration reads like a string of common-places; we are familiar with the whole row. To the French it was very different, for they were beginning a new life, and they scarcely knew where to tread." *

It requires but a slight study of the startling events and kaleidoscopic changes of the French Revolution, to find in the characteristics of the people themselves the features which differentiate it from its American predecessor. America experienced a wild storm, threatening, electrical, intense, but one which purified the atmosphere and left the sun shining on a refreshed landscape. But France was subjected to a cyclone, which razed to the ground and shattered to fragments everything in its path.

The same distinguishing features are apparent in the respective efforts of the two peoples at constitution making, and the same reasons lie at the bottom of these distinctive differences. The French followed the example of their American brethren, not only in organizing a revolution, but in the matter of framing a written constitution. The American Federal Constitution of 1787 had the happy experience of instantaneous and continuous

*Encyclopedia Britannica.

success; the French constitution of 1791 endured for a brief year. The elements which assured that success in the one case were wanting in the other.

It may be urged that the French attempted their experiment too early, while still in the throes of civil disturbance, and before any of their governmental problems were fully settled, while the American constitution of 1787 was framed in a time of profound peace, and after years of freedom from foreign invasion. But these considerations do not reach the root of the true distinctions.

The American *State* constitutions may be taken as the American type, instead of the United States Constitution; those earliest ones, formed in 1776, as soon as the colonists were confronted with the necessity of substituting a new Executive in place of the King, or that of Massachusetts, adopted in 1780, while the war was flagrant, and which, with a few amendments, is still retained. These, or any or all of the American constitutions, may be taken for the purpose of comparison, for they all embody the distinguishing American principles; while the same vice which destroyed the French constitution of 1791 affected in like manner the later forms of government in the Republic and the Consulate.

The French constitution, however excellent in plan, and however well conceived and fitted together, was a paper constitution, the work of theorists; a new scheme devised for the future political life of the people, and in no sense an out-growth of their past political life. The revolutionists had seen a convention in America succeed in framing an acceptable constitution, and they thought that political constitutions could be constructed. Probably they did not realize that constitutions grow. Probably they did not remember that the great philosopher

Locke had drawn a Fundamental Constitution for the Carolinas, which had been put into operation, but which failed because it did not fit the people for whom it was made.

The early American constitutions of 1776 succeeded for the time, and the Massachusetts constitution of 1780, like the Federal Constitution of 1787, succeeded permanently, because they embodied those principles of political life and habit, which the people who adopted them already recognized as fundamental. In other words, those constitutions had grown; by an orderly process of evolution, the rules and maxims of those constitutions had come to be part and parcel of the political life of the people. This was the secret of their success. Want of this was the vice of the carefully framed French constitution. Upon no other basis than that of embodying what the people already believe in and propose to live by, can any political constitution be successfully framed. The French people did not know what they believed in or what principles they proposed to live by, nor did their constitution-makers.

The American Constitution is often spoken and thought of as a new creation, the work of marvelous political constructiveness. A glance at some of its fundamental principles will show them to be old, familiar, and the results of growth.

The colonies had always elected their own representative assemblies, by whose votes all revenue had been raised, so that taxation and representation had gone hand in hand.

Two of the colonies had from the beginning elected their own Governors. Connecticut and Rhode Island had thus always been full republics grown up under

charters granted by the crown at the very time it was seeking to extend its prerogatives at home. All the colonies thus learned the practicability of an elective executive as a feature of constitutional government.

Having raised and paid armies on their own account, and having always found it possible to keep the military subordinate to the civil power, the colonies had come to regard the power to do this as a constitutional right.

They had been in advance of the European nations in the practice of religious toleration, and they had been educated thereby into the higher stage of full religious liberty, so that it became natural to express in their constitutions of 1776 the principle of freedom of conscience.

The New England township had always been a pure democracy, and the counties in the Middle and Southern colonies had always exercised a measure of local self-government.

The division of state powers into three departments was in practical operation, and the colonial statesmen had long been familiar with the theory of Locke that sovereignty resides in the people, and the theory of Montesquieu of a possible balance of powers between the three departments of the government.

Into all these principles now regarded as fundamental, the colonists had thus been educated. They had also favored in theory the principle of the independence of the judiciary, and they had had some experience in the matter of a system of Federal courts for admiralty cases.

But there were principles of fundamental law, namely, many of those incorporated into the American Bills of Rights, which were for centuries familiar to and cherished by Englishmen as a part of the warp and

woof of their political life, nay, as a part of their very political manhood. Some of these were the same that were incorporated into the French Declaration of the Rights of Man, and which were, as we have seen, so novel to French thought. Among Englishmen they were as old as Magna Carta, and grew naturally into their constitutional position. As Mr. W. T. Brantly has tersely said: "Magna Carta, the Acts of the Long Parliament, the Declaration of Right, the Declaration of Independence, and the Constitution of 1787, constitute the record of an evolution."*

Thus in many respects did the American constitutional system find a place prepared for it in the affections of the people. Only in a similar way could a constitution be expected to suceed in France. All these conditions were wanting in the era of her Revolution.

Carlyle has well said:

> "A Constitution can be built—constitutions enough a la Sieyes; but the frightful difficulty is that of getting men to come and live under them. Is it not still true that without some celestial sanction, given visibly in thunder or invisibly otherwise, no Constitution can in the long run be worth much more than the waste paper it is written on? The Constitution, the set of Laws, or prescribed Habits of Acting, that men will live under, is the one which images their convictions, their Faith as to this wondrous Universe, and what rights, duties, capabilities, they have therein."
>
> "Who is it that especially for rebellers and abolishers can make a constitution? He that can image forth the general belief, when there is one; that can impart one when, as here, there is none."†

It may be said, as to the French Revolution, no less than the American, that it came in the fullness of time. But its mission, its office and its opportunity were unique.

*6 Southern Law Review, 352.

†French Revolution I, p. 209.

In America, it was the fullness of time for the constructive work of erecting a political fabric for a people already well educated politically. In France, it was the fullness of time for the destruction of anachronisms, the annihilation of political shams, the emancipation of a people who had been so long oppressed that, in spite of their natural intelligence and vivacity, they were politically in dense ignorance. For such a people, the fullness of time for the constructive work of erecting a political fabric must come later.

## XI.

## CONSTITUTIONAL PHASES OF ENGLISH HISTORY IN THE SEVENTEENTH CENTURY.*

Viewed at a glance by an ordinary observer, the political history of England during the seventeenth century appears much like a kaleidoscope.

The successive events are varied and sometimes incongruous, and the governmental changes are so decided, and often so startling, that they seem far outside the scope of the ordinary evolution of historical events. We pass rapidly from the England under James I., who feels the hostility of a Parliament which he fears to antagonize, to the England under a Charles I., who endeavors without success to overrule the parliaments which he hates, and succumbs to them; thence to a nation which takes the unprecedented step of bringing its king to trial and execution; thence through stages of chaos to a Commonwealth which exhibits great apparent strength, but is overthrown by a despotic protectorate, which commands admiration by the benignity of its exercise of

*From the American Law Review, Jan.-Feb., 1903.

vast power, but which in its turn grows effete and gives way to a restored kingship. The shifting scenes now exhibit a once vigorous and aggressive Protestantism, wasting away before the rising power of a Roman Catholicism which soon becomes dominant,—next an abdicating and flying king, abandoning the prerogative for which his family had staked their all;—and then an elective Kingship, which at last becomes the distinguishing feature of the century's closing history.

So sudden are many of these mutations, and so bewildering are they all, as to lead one to think that sedate history has in this instance put on the dress of Harlequin and has taken to turning somersaults.

Viewed, however, with closer scrutiny, by a careful inquirer into the meaning of these dissolving views, they appear as the successive acts of a great historical drama. One consistent purpose asserts itself throughout the whole discordant era. One dominant theme recurs again and again. One end, though often obscured, is once more aimed at, and is finally accomplished.

The hearty welcome of the English people to their first Scottish ruler was their tribute of loyalty to the kingship as an essential feature of their constitutional polity. But the English view of the place and office of the king was something of which the Stuarts, first and last, were invincibly ignorant. The past of the English people gave them a parliament, as well as a king, an institution making equal demands upon their loyal devotion. The writers of our histories continue to style the parliaments of the time of any king, that king's parliaments. The truth is, that they were the people's parliaments, not the king's. Though the institution in its then existing form dated from the time only of Edward I.,

yet it was in principle an even older Anglo-Saxon institution than the kingship.

The fatal Stuart error was the attempt to make this parliament subordinate. The genius of the English people insisted on retaining both king and parliament, assigning to each its appropriate sphere. This insistent idea of the nation, though often overpowered, now by the encroachments of the kingly prerogative, now by the ascendency of republicanism, finally triumphed. Thenceforth it was settled that king and parliament must co-exist, as the governmental agents of the sovereign people. Elizabeth had recognized this peculiar feeling among her subjects, had realized its vitality, and had skillfuliy managed to conform to and live with it. In the seventeenth century, this feeling, now become a theory, must struggle for respect, for recognition, for existence. The history of the century chronicles its struggles and its triumph. The Stuarts attacked it with their claim of divine right to rule, the army and the Republicans undertook to abolish the kingship, and the heavy foot of Cromwell crushed for a time the power of both king and parliament. Other causes and forces were at work, too, in shaping the political movements of the time, and bringing in various complications, so as sometimes to obscure the great constitutional issues of the period. Among these influences were the religious dissensions then rife, the profligacy and weakness of Charles II., the perversity and incapacity of James II., the scheming interventions of foreign powers, and the partisanship of Whigs and Tories. But through all the mazes of bigotry, chicanery, bribery and intrigue, the grand movement of the century is still discernible, that which culminated in the settlement of the Constitution under the Declaration of Right and the Bill of Rights.

The Restoration is sometimes erroneously looked upon as a reactionary step. Reactionary it was from the extreme measures of the Commonwealth. But the English nation had never really given up its king. When animated anew by the old devotion to the throne, and determined to reinstate the kingship, it could find no other so fit candidate as the expelled Stuart, whose father's martyrdom gave him a sort of consecration, and whose own misfortunes had aroused for him an undeserved sympathy. Thus the Restoration became a logical necessity. It was not, however, merely the necessary swing of the pendulum away from the democratic extreme. The Protectorate had brought in a despotism to displace a democracy,—but that despotism was only an episode. Neither the Commonwealth nor the Protectorate was essentially English, though each was the work of patriotic Englishmen. The English ideal of *a truly limited monarchy* was the great end of the century's grand drama. To attain this ideal, monarchy must first be restored. It was the accident of the times that a Stuart monarchy was the only one practicable, so the Stuart dynasty was recalled, with all its faults, its crimes, its profligacy, its weakness, its un-English assertions of extreme prerogative, its truckling to foreign powers. Well might that England blush for itself and its kingship, which had voluntarily called Charles II and James II to wear its crown.

That the Commonwealth was by no means an English institution, is proven by the whole subsequent history of Great Britain. Americans find much to admire in the tendencies toward a constitutional government which then found expression. The constitutionalists of the day were of a new sort; they were the advance guard of an

army of political theorists who favored written constitutions, and they put into brief practice the system which America has since made successful and prosperous. Vane, in his "Healing Question," distinctly presented the idea of a representative convention or "constituent assembly," for the settlement of a new constitution for the realm; and one passage in his tract is thought to be an advance suggestion of that judicial power to declare statutes void for unconstitutionality, which has now become the distinguishing ornament of our American jurisprudence.

But England was far from ready for the adoption of any such political principles; indeed, the world was not prepared for them until a century later, and England is not even now ready to put them into practice. The England of the sixteenth century was not republican in any sense; the Commonwealth trampled upon political precepts which the mass of the Englishmen cherished; the Protectorate was but a form of monarchy; and the revolt against the Protectorate was the natural and necessary assertion of the dominant idea of parliamentary government. The Stuarts misinterpreted the scope and effect of this revolt; it did not imply the divine right to rule, the enlarged prerogative, the dispensing power, the kingly right to establish a religion for the realm. Blind and besotted, the Stuarts drove themselves, by their fatuity, away from that measure of royal authority which they might by prudence have preserved.

Macaulay has characterized the capital error of Charles I. and Wentworth,—in undertaking to force the English liturgy upon the Scottish churches, and thus precipitating the conflict which secured the political and religious freedom of the people,—as a blessing in disguise.

A deeper study of the era will show us the tendency toward a final settlement of Britain's constitutional system, as the supreme movement of the century, of which the stubbornness of Charles, the "Thorough" of Strafford, the Civil War itself, and the Commonwealth and the Protectorate, as well as the Restoration, were merely incidents.

To use the language of Prof. Dicey:—

> "The existence of a difference between the permanent wishes of the king who then constituted a predominant part of the sovereign power, and the permanent wishes of the nation, is traceable in England throughout the whole period beginning with the accession of James the First and ending with the Revolution of 1688."*

A coalition of Whigs and Tories, says Macaulay, restored the hereditary monarch; and another coalition of Whigs and Tories rescued constitutional freedom. But in truth, a more potent force than coalition was operative in both these events. The national idea of a limited monarchy was the active and influential motive, which dominated the more discreet and patriotic men of both parties, and not only made coalitions possible but gave them the power to prevail. Thus the Revolution was the logical culmination of the century's political operations.

Of all the startling events of this wonderful era in English history, the most remarkable in many respects was the Revolution of 1688. The struggle at arms between the forces of the king and those of the parliament had exhibited the anomaly of a war without an enemy. The two armies had been largely recruited among neighbors and friends, whose friendship survived the victory

*Dicey, Law of the Constitution, p. 79.

The successful army spilled no unnecessary blood, gave over no towns or districts to sack or ruin, and followed their triumph with no reprisals. The forfeit of the king's life was exacted, not as a military requirement, but as the penalty of offended civil justice. No less unique in itself was the Commonwealth, a representative body perpetuating itself indefinitely as the ruler of England, until one man blew it out with one breath as he would a candle. The one-man power of the Protectorate was quite consistent with the precedents of despotism, provided it had continued in the hands of a despot. When it was devolved upon a weak man who lacked all the elements of a despot, it fell of its own weight.

But the anomalies of the Revolution surpassed all those that had so curiously preceded them. It was a revolution without a battle, without an army, almost without a mob. True, William entered England at the head of an army; but he came by invitation, and for anything but war. The presence of William at the head of an army did not constitute the Revolution. It co-operated with other forces to inspire the flight of James II., which was in itself an anomaly; but the Revolution was not consummated by the abdication of James.

The Revolution was the work of a representative body of men, who were so sensitively jealous of constitutional formalities that they styled themselves a convention, and not a parliament; a work which was begun and ended in debate and conference, after the ancient plan of an Anglo-Saxon folk-moot. The crown was given freely, by a Parliamentary body in session, to a conqueror who demanded nothing for himself, who had without a battle secured the object of his campaign, namely, the right of

the nation to limit its monarchy, and who cheerfully accepted the crown with conditions which had made it intolerable to his predecessor.

The whole scope of the Revolution may be summed up in this, that the limitations upon the kingly power, so long insisted upon by the people, were now freely acknowledged by the crown. The great charters of the Revolution, namely, the Declaration of Rights and the Bill of Rights, were not new; they were but a new assertion of venerable principles. These principles had blossomed out in the Petition of Right and in the Grand Remonstrance. Their germs were older than Magna Charta, for that instrument was but a recognition by the crown of the old demands of the barons. What was new in the Revolution, in like manner, was merely the final acknowledgement by the crown of the inherent popular prerogative.

One feature of the Constitution as settled by the Revolution is sometimes thought to be new, namely, the establishment of the succession to the crown, after Anne, in the Protestant heirs of James I.; the law under which the House of Hanover still reigns over Great Britain. But this, though so offensive to the Stuart pretensions, was not new in principle. It was merely a fresh assertion of an ancient right, with an application of it, fitted to the exigencies of the epoch. The Anglo-Saxon crown had been elective, and William the Conqueror and his successors had admitted the principle, and had with better or worse grace conformed to the practice. The Plantagenets had endeavored to dispense with it, but a Richard II had been deposed to make place for a Henry IV. The principle always had its supporters in England, and it was claimed with much plausibility that the last Plan-

tagenet, the first Tudor and the first Stuart had each been called to the throne by the voice of the people. The same principle was at the basis of the deposition of Charles I., an act which is in these days condemned, not as illegal but as impolitic. Now, at last, with the Revolution, this often asserted right of the people had come to stay.

In their effervescent enthusiasm over the Restoration, the loyalists declared that "The king had come to his own again." But the revolution revolutionized forever the Stuart claim of a divine right to rule, and now it might in truth be said that the nation had come to its own again.

Henceforth, the history of England was destined to be one of a government by Parliament, gradually changing to a government by the House of Commons. The old fiction of three estates yet survives, and the enacting clause of the public laws of Great Britain continues to read: "Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same."* But the stately phrase is seen to be only a venerable sham, when we look at the succession act in the Bill of Rights, and observe that the people through their representatives have chosen their own king,—and then observe further, that the people through those representatives are the actual governing class in Great Britain.

*36 American Law Review, 890, 891.

## XII.

## THE BENEFICIARIES OF THE FEDERAL CONSTITUTION.*

In the public discussions concerning the recent congressional legislation respecting the newly acquired insular possessions of the United States, many doubts have been expressed as to the extent of the constitutional power of the national legislature to govern the peoples of those islands. It has been urged that the acknowledged principles of our free institutions, the broad language of the Declaration of Independence, and the limitations of the Federal Constitution, combine to restrict the character of the proper legislation of Congress over such ceded or conquered territories, and that the inhabitants thereof are constitutionally entitled to the benefit of all the guarantees expressed or implied in that Constitution. Those who embrace this view strenuously insist that our recent legislation marks a departure from the previously well established principles and practices of the Republic, and that the inherent character of our popular government thereby undergoes a radical and unfortunate change. Thus the question has been fairly raised, and is entitled to consideration,—What was the original purpose of the

*Lecture before the Law School of the University of Minnesota, April, 1901.

Constitution, both present and prospective, as to the persons and classes then and thereafter to be affected by it, and as to the extent to which they should be respectively entitled to claim its privileges and benefits?

In endeavoring to ascertain the intent of a written instrument whose language is open to more than one construction, it is permissible for those who seek to construe it accurately, to consider the occasion when and the circumstances under which it was written or delivered, the objects to be accomplished by it, the mischief, if any, to be corrected or avoided by it, and the relation of the author toward the parties to be affected by it, and to observe carefully any differences, as well as resemblances, in the language employed as to those parties respectively. The first step in the construction of an instrument is to "hold it up by its four corners"; but if it does not readily give up its secrets, all the surrounding circumstances attending its execution may be minutely and critically looked to, and this in case not only of a will or a deed but also of other documents. The American Constitution is often spoken of as the "political testament" of the Fathers of the Republic; a metaphor not without justification. If this instrument be inspected and examined with reference to the environment of its origin, it may be made to reveal to our understanding not only its general but its specific intent, and its particular objects, and the persons or classes for whose benefit it was enacted.

The Constitution of the United States was established by the people of thirteen states, for the government, as one state, of their external and general or national concerns. These people had already organized their thirteen several state governments, for local affairs. They

had long been accustomed to administer, each its own local affairs, in their previous condition as colonies of Great Britain. Their privileges of local self-government had been threatened, and to preserve these, they had united as one people, and declared their independence as a Nation, and proceeded to secure and preserve that independence.

"In order to form a more perfect union," this people, "the people of the United States," ordained and established the constitution of 1787. By it, they perfected a new system of government, a dual one, composed of two elements, the National element and the element of State governments, the two together forming one composite system, of which each of these two distinct features was an essential part. The system of government thus created was a strong one; strong externally in all national affairs, and strong internally, as to all local or domestic concerns. Thus was realized an ideal which had been before the minds of the founders of the system from the inception of their action as a distinct people. At the moment of announcing their independence, it was a part of the object of the leaders of the people to form a strong nation, as the means and for the purpose of assuring efficient local self-government, which should be as slightly fettered as possible. The assemblies or congresses of nearly all of these colonies sent explicit instructions to their representatives in the continental congress, authorizing them to join in measures for the common or general welfare, including the assumption of independence and the making of foreign alliances, and at the same time reserving to the people of the colony the exclusive right of regulating its internal government and police. Following the giving of these instructions, came

the Declaration of Independence, and the establishment of a government which professed to undertake to attain the objects referred to. This government proved unequal to the task. It was not strong enough externally, either to protect the whole people as a nation among nations, or to secure to any one state the full measure of the desired privileges of local self-government. Therefore the people erected in its stead the Constitution of 1787.

One chief object of the people in ordaining this instrument as the basis of their government was to secure and preserve for themselves the blessings of liberty. But their plan was broader than the extent of the thirteen states, and included another incidental feature as a part of their original purpose. The boundaries of some of the states were already contracted, and the natural increase of the population was already demanding room for expansion. The contiguous territory, claimed as a national domain, was needed for the erection of new states. Contemporaneously with the framing of the constitution, an Ordinance of Congress, for the government of the northwest territory, had made express provision for the ultimate division of that area into new states; to be admit ted into the Union, "on an equal footing with the original States in all respects whatever." This provision had been formally suggested as one feature of the government of that territory, by one of the states, as early as October 30, 1776, within four months after independence was declared; and it was always under consideration thereafter, as a part of every plan of legislation for that teritory.

Thus the theory of the new government included the enlargement of the galaxy of states from time to time. This was affirmatively announced in the new constitution,

and was extended beyond the limits of the then existing northwestern territory, in the provision that "new states may be admitted by the Congress into this Union," the boundaries of existing states not to be disturbed without their consent.

The essential features of the new adventure in government are thus seen to be three, namely: First, a strong central government; second, thirteen vigorous and free local or state governments; and third, additional similar local governments or commonwealths in prospect, unlimited in number, and of equal grade, rank and privilege with the original thirteen. The great value of this last named privilege to the people to whom it should be accorded was felt to be, the opportunity to experience for themselves the vast advantages of free local self-government, for which the first thirteen states had been obliged to fight. All this was expressed by the people of the thirteen, when they stated that it was one of their objects to "secure the blessings of Liberty to ourselves and our Posterity."

Such were the essentials which were intended to distinguish the constitutional government of America, and in them were disclosed the intended beneficiaries of its future operations. It will not be accurate to read this clause as if it stated the object of the constitution to be to "secure the blessings of Liberty to ourselves and to all people." No such generosity, nor any limited instalment thereof, was intended by the Fathers. Those whom they aimed to serve they described as "ourselves and our posterity." That this last named term was used by them to include the future citizens of states to be newly admitted, is evidenced by the provisions so carefully made for such admissions. Beyond that, their altruism did not then extend.

The specific provisions of the constitution illustrate this general intent, and are well calculated to accomplish it. These provisions, outside of those which create the central government and endow it with the usual attributes of a nation commensurate with the national quality industriously conferred upon it, may be arranged in two classes: first, limitations upon the powers of Congress, and second, limitations upon the powers of the States. In the first class, the limitations imposed upon the operations of the Congress are for the purpose of protecting and fostering individual rights, and ensuring the exercise of the proper powers of the local or state governments, against possible aggressions by the central government; and in the second class, the limitations imposed upon the exercise of powers by the States are for the purpose of obviating any interference with the exercise by the central government of the powers and duties assigned to it. The objects of the care of the framers of the constitution in imposing these limitations are the two elements of the dual system. To protect each of these separate departments of the system against interference from the other, and to ensure a fair equipoise in their combined operations, is the solicitude of those who framed this instrument, and of those who established it. The beneficiaries of this solicitude are the people of those States who are living together in Union, under the ægis of this constitution, and, categorically speaking, as *the United States.* A careful examination of this entire scheme discloses no other class of intended beneficiaries.

It is to be observed that foreign nations and peoples are neither feared nor favored in this instrument. It sufficed to create a national government capable of exercis-

ing all the attributes of external sovereignty. No purpose appears to restrict that government in the exercise of any of the powers properly pertaining to its position as a Nation among other Nations. The rights and privileges of foreigners, as such, either in war or in peace, do not seem to have been under consideration. War may be declared by the legislative branch, and carried on by the executive of the government, with no limit imposed by the people who ordained the constitution. Equally silent were they in regard to the character of treaties that might be made with other nations. Neither in war nor in peace, was the United States government enjoined to be just, or humane, or merciful, or even liberal, much less altruistic, toward the people of other lands. No evidence appears of any design to hamper that government in its exercise of external sovereignty. This silence of the constitution, coupled with its careful guarding of the rights of the people of "the United States" against aggression, shows that the peoples and classes of the outside world were in no sense the intended beneficiaries of its limitations. As to them, the new nation might, in the language of the Declaration of Independence, "do all the acts and things which independent states may of right do."

It is incident to every national government that it may acquire, retain and govern territorial possessions. This is in the constitution recognized as incidental to our powers as a Nation. But the territory so possessed by our general government is nowhere classed in the same category with the States. It is referred to in the same section which provides for the admission of *new States*, but in language so different as unequivocally to imply a distinct classification. "The Congress shall have power to

*dispose of* and make all needful rules and regulations respecting the Territory *or other property* belonging to the United States." Such possessions stand at the political antipodes of the States. They are merely a kind of property of the United States, subject to untrammeled disposal as such, at the will of the Congress.

Nor are the inhabitants of such territory, or those of the District of Columbia, even, indicated as among the beneficiaries of the special limitations of the constitution. The full measure of what the people of the United States will do, in ensuring to themselves the blessings of free local self-government, is expressed in the declaration, "The United States shall guarantee *to every State in this Union* a Republican form of Government, and shall protect each of them against invasion." This immediately follows the section which commits the territory of the United States to the absolute disposition of the Congress. No guarantee in terms is vouchsafed to the inhabitants of the territories. So far as these, or the denizens of the District of Columbia, shall share in the liberties which are the birth-right of the people of the States, they must rely, not on the specific provisions of the constitution, but on the inbred disposition of Congress to give free government to all people as far as practicable.

Other provisions of the constitution are found, which corroborate this view of its original scope and intent, but none which contradict it. The members composing the federal congress, to which is assigned such extensive legislative power, are all to be inhabitants of some one or other of the States which compose the United States. The President must now be a natural-born citizen of the United States, and he is elected solely by electors chosen in the States. The privileges and immunities of citizen-

ship were guaranteed to those who were citizens of the several states. The qualifications of citizenship of the United States were not defined in terms, in the original instrument; but by the fourteenth Amendment a certain class have been declared to be citizens both of the United States and of the States in which they may reside; and the general judicial construction of the constitution before that amendment was to the same effect. Two modes of amending the instrument are provided, in both of which, the power of amendment is to be exercised only by the people of the States. Among the amendments which were made so early as to be practically contemporaneous with the original, one which secures the right of the people to keep and bear arms, assigns as its reason, "the security of a free state;" and another preserves the right, to a party accused of crime, of a "speedy and public trial, by an impartial jury of the state wherein the crime shall have been committed." Finally, the powers not specifically delegated to the Union nor prohibited to the States, "are reserved to the states respectively or to the people." "What people?" Certainly the *governing* people; not all people, or any general class, but those only in whose behalf the constitution has been created and its limitations have been imposed.

The action of the National Government, in all its departments, has proceeded along lines herein indicated. Congress has continuously legislated, without reserve, for the government in all respects of all the territory belonging to the United States, and for all its inhabitants of whatever class, except the domain occupied by the States which together compose the Union. The most stringent and despotic rules of government have been

at times applied; as, for instance, in the statutes passed for the first territorial government of Louisiana, which clothed the President of the United States with many of the powers usually exercised by an emperor, and which powers Mr. Jefferson proceeded to exercise. With the single exception of the period during which the Dred Scott decision was received as law, the United States Supreme Court has always sustained the legislation of Congress over the territories, in whatever form it has been cast.

That court has said:

"All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of congress. The territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. * * * In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people under the Constitution of the United States may do for the States."

(National Bank v. Yankton County, 101 U. S. 129).

Again it has said:

"The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire teritory, and no power to govern it when acquired. The power to acquire territory other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution) is derived from the treaty-making power and the power to declare and carry on the war. The incidents of

these powers are those of national sovereignty and belong to all independent governments."

(Mormon Church v.United States, 136 U. S. 1.)

In another case, the Supreme Court has outlined the views presented in this article, in the following words:

"The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."

(Murphy v. Ramsey, 114 U. S. 15.)

No case has yet been decided by the Supreme Court of the United States, in which the guarantees or limitations of the Constitution have been applied for the benefit of any individual, to render void any of the legislation of Congress respecting the territories. The Court was invited, in the Utah case of Murphy v. Ramsey, above referred to, to deny to Congress the right to change the qualifications of voters in that territory; but the constitutional power of Congress over such voters was affirmed, to "take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient."

These decisions of our highest court may seem to affirm and establish a despotic power in Congress, over the territories; yet such has not been the judicial purpose. The context of the language quoted contains a reservation of the power and authority of the Court, to

restrain the legislation of Congress in respect to the territories, within bounds to be declared by the court, as fixed by the constitution or necessarily implied in the frame of our institutions. In Murphy v. Ramsey, it was said:

> "The people of the United States as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress."

And in National Bank v. Yankton County, it was said:

> "Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution."

These judicial declarations were intentionally left general in their terms. The implication is that no attempt will be made toward a more specific statement. But the Court does not wish to be understood as being indifferent to Congressional action which may exceed "the discretion which belongs to legislative power." For such action, if no corrective could be found in the letter of the Constitution, the Court would find one in that unwritten portion of the Constitution which provides that it is only "legislative power" which has been committed by the

people to the legislature. This was in fact done by the Supreme Court in the case of Loan Association v. Topeka, in 1874 (20 Wall. 655), where it was declared:

> "The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments."

In that case it was held, as a matter of constitutional law, and without citation of or reference to the text of any written constitution, that a state legislature had no power, under the guise of taxation, to take from one person his property and confer it upon another. Doubtless the Supreme Court will apply a like corrective to the legislation of Congress, should a proper case arise.

The Constitution has reserved to the people of the United States, says the Supreme Court, all the powers not conferred upon the government of the United States or reserved to the States. Such powers as do not pertain to the States and are denied to the general government, are in the reserved list, and are not to be exercised at all, until the people of the United States shall so authorize. According to the decisions above mentioned, the congressional power of plenary legislation for the territories has been expressly granted in the Constitution. It may be inferred from these decisions that a like extent of power over the newly acquired possessions of the United States was, by clear implication, vested in Congress. But all those powers, national in their character, which exceed "the discretion which belongs to legislative power," as well as all such powers as are expressly denied to Congress by the Constitution, have been by the people of the United States reserved to themselves.

A familiar instance of such a power, reserved by the people to themselves, is found in the subject of religious freedom. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," say the people in the Constitution. The denial of this power to Congress is categorical and imperative. If to be exercised at all, it can be only by the people themselves.

Some patriotic spirits may be found, who will lament the presentation of a theory which recognizes such an extent of legislative power in Congress, and who will fear that the exercise of so great power by either the executive or the legislature may breed a domestic disposition toward the exercise of despotic power which shall endanger our liberties at home. Such apprehensions may be quieted by the remembrance of three salient features of our constitutional history. First: the action of both the legislative and executive branches of the government in the past, as to our territorial possessions, has been toward the promotion and extension of local self-government. Second: Our highest court declares that the theory of our government is opposed to the deposit of unlimited power anywhere. Third: The officials who administer each and all of these departments of our government are of the people and have been educated in the school of the people.

---

NOTE.

The opinions of the Supreme Court of the United States in what are styled "The Insular Cases," which were under consideration when the foregoing was written, were awaited with an expectant interest, many persons looking for some variation from the former rulings

of that tribunal. But no variation appeared. In the case of De Lima v. Bidwell (182 U. S. 1, May 27, 1901), relating to duties on imports from Porto Rico to New York after the cession of that island, the opinion of the majority of the court, after quoting with approval the declaration above cited from National Bank v. Yankton County, adds:

"It is scarcely too much to say that there has not been a session of Congress since the territory of Louisiana was purchased, that that body has not enacted legislation based upon the assumed authority to govern and control the territories. It is an authority which arises, not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the State to act upon the subject. Under this power Congress may deal with territory acquired by treaty; may administer its government as it does that of the District of Columbia; it may organize a local territorial government; it may admit it as a State on an equality with other States; it may sell its public lands to individual citizens, or may donate them as homesteads to actual settlers. In short, when once acquired by treaty, it belongs to the United States, and is subject to the disposition of Congress."

The opinion of the minority of the court, exhibiting marked divergencies from that of the majority on the subject of the proper construction of a phrase in the Act providing a government for Porto Rico, contains no note of dissent from the language last above cited; but employs new phrases and presents additional reasons in support of the control by congress over the insular possessions. This opinion

"exhibits the Constitution as a Charter of great and vital authorities, with limitations indeed, but with such limitations as serve and assist government, not destroy it; which, though fully enforced, yet enable the United States to have, what it was intended to have, 'an equal station among all the powers of the earth,' and to do all 'acts and things which independent states may of right do.'"

In the case of Dooley v. United States (182 U. S. 222), relating to goods sent from New York to Porto Rico subsequent to the cession, the court again divided on a question somewhat resembling that involved in the De Lima case, but both sections of the court treated as firmly established, the power of congress to fix the revenue laws applicable to Porto Rico. The majority opinion sustained the free entry of goods into the island from ports of the United States, after the ratification of the treaty of peace, "until Congress should constitutionally legislate upon the subject." The minority opinion insisted that no condition of things, not even the most extreme one imaginable, could arise by reason of the cession of the island, "without affording to the Congress the opportunity to adjust the revenue laws of the United States to meet the new situation."

The case of Downes v. Bidwell (182 U. S. 244) involved the constitutionality of the Act of Congress providing a government for Porto Rico, and imposing duty on goods brought into New York from the island, and the court again divided in opinion as to the proper construction of certain clauses of the constitution governing the revenue laws of Congress. But none of the judges intimated any doubts as to the question of the general power of Congress to legislate for the island. The first opinion of the majority of the Court notes the fact that "the Constitution was created by the people of the *United States,* as a union of *States,* to be governed solely by representatives of the States," and cites the long line of legislative and judicial precedents, including those above noted in this article, in support of the doctrine

"that the power over the territories is vested in Congress without limitation, and that this power has been considered the foundation upon which the territorial governments rest."

The second majority opinion declares in terms that

> "the constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants, as respects the local governments, such degree of representation as may be conducive to the public well-being, to deprive such territory of representative government if it is considered just to do so, and to change such local governments at discretion."

The third majority opinion sums up the doctrines advanced in the other two, by saying that civil government proper over territories acquired by the United States as a result of war

> "can only be put in operation by the action of the appropriate political department of the government, at such time and in such degree as that department may determine."

The dissenting opinions of the minority in this case do not in terms declare against this general doctrine announced by the majority, nor suggest any contrary ruling. They dissent from the conclusion reached as to the proper construction of the clause "throughout the United States" in the section of the Constitution applying to the revenue laws, and urge that this and other clauses impose some limitations upon the character of the laws which Congress may establish for our insular possessions. Much of these dissenting opinions are devoted to criticisms upon the language used in the majority opinions, from the fear that they may be construed as favoring what have been called "state rights," and thus detract from the plenitude of the control of the United States government over external and national affairs. The differences of opinion disclosed in the opinions in this case relate more to the *modus operandi* adopt-

ed by congress in its legislation over territories, than to its exercise of general legislative power over them. No purpose appears to change in any way the doctrines announced in the cases decided before the acquisition of the islands. Those doctrines still stand as the evidence of the judicial opinion on the subject; and the majority opinion applies them to the case of the congressional legislation for Porto Rico on the subject of the tariff duties, holding that the clauses of the constitution which were appealed to in the litigation are not applicable to the legislation in question.

That such is the proper interpretation of the decisions in "The Insular Cases" is evident from the second decision entitled Dooley vs. United States, made in another insular case at the succeeding term of the Supreme Court (183 U. S. 151). This case and that of Fourteen Diamond Rings (183 U. S. 176) expressly approve and sustain De Lima v. Bidwell. One of the majority opinions in the second Dooley case refers to the fact that there had been dissenting opinions in the earlier insular cases, and adds:

> "None of the dissents rested, however, upon the theory that Porto Rico or the Philippine Islands had not come under the sovereignty and become subject to the legislative authority of the United States, but were based on the ground that legislation by Congress was necessary to bring the territory within the line of the tariff laws in force at the time of the acquisition." (p. 163.)

## XIII.

## AMERICAN SLAVERY IN ITS CONSTITUTIONAL RELATIONS.

The expansion which the United States of America has experienced since her birth as a Nation has been an expansion, not alone geographically, nor in the number of the commonwealths composing the Union; nor yet merely in her credit, or her commerce, or her influence, nor in all these combined. In these and in other respects, there have been extended growth and development in perhaps a greater than a geometrical ratio. But more marvelous than all has been the expansion in moral strength and integrity, and in the national ideal concerning freedom. From the beginning, the United States has been professedly a free country. We entered upon our career as a nation with the declaration that all men are created equal and possess an inalienable right to liberty. But what a travesty now appears this florid declaration, in view of the conduct of the nation in respect to the black population. Theory and practice were as far apart as the poles. "A glittering generality," said Choate of the Declaration of Independence. "A glittering falsehood," responded Garrison. The national

ideal of Freedom today is so far superior to that of 1789 that comparisons are practically impossible. Then, Freedom professedly pertained, not to manhood, but to only one race of mankind. As to those Americans who were of African descent, they seemed to have inherited the ban which Judge Taney said had attended their ancestors when they were transported from the Eastern world to the Western,—they had no rights whatever which white men were bound to respect. Now, Freedom and Manhood are held to be synonymous. Now, the white race has adopted as its ideal for its dealings with the blacks, *"Noblesse oblige."* Not only have the Africans been freed, but the constitution itself has been emancipated from the low role of slave-keeper. That the new ideal has not been attained in fact, and that there still remains a race question to be settled, is no longer the fault of the fundamental law. So great a change could have been caused by only a revolution or an evolution. Apparently, the abstract truth inherent in the glittering generality of the Declaration of Independence has been the little germ from which has been evolved, in due course, the high ideal of Freedom which distinguishes the Constitution of the present,—an ideal toward the attainment of which the American people may now set themselves in earnest.

## The National Power of Slavery.

Passing strange now to look back upon, and extremely difficult to understand, was the extent of the grasp which the institution of African Slavery had upon the Great Republic. When the civil war commenced, there were but a minority of the states, and a minority of the pop-

ulation, that were personally interested in the preservation of that institution. Yet so great was the second-hand interest of politicians and their followers from the non-slave-holding states, in the welfare of slavery, that in the election of 1860, it was only the divisions among friends of the institution which permitted the election of a President opposed to its extension. Had the advocates of slavery extension been able to agree among themselves upon a line of policy to be pursued, they might have carried out such a policy triumphantly, and there would have been no Civil War. Of the four great parties into which the voters were then divided, the Republican party was the only one actively opposing slavery. The Bell-Everett party had no aggressive policy, and desired only that the well-enough of a past political situation should be left alone. The Douglas party confined themselves to exploiting the policy of leaving all the national territory outside the organized states open to occupation by slave property. The Breckenridge party, the exponent of the wishes of the slavery propagandists, demanded from the nation new guarantees for the right which they claimed, of not alone preserving but extending their cherished institution. What the Republican party stood for—the only organized antagonist which the slave power then had,—was not the abolition of slavery, nor even a campaign of gradual manumission of the slaves, but merely the restriction of the institution to its then existing limits in the organized states. There was no alignment of organized parties into friends and foes of slavery. The abolitionists were its earnest and radical enemies, but they were not organized into a political party. On the very eve of a civil war which was to sound the death-knell of the peculiar institution,

there were no two parties confronting each other on any issue involving its life, because there was no such political issue. The moral sense of every political party was asphyxiated by the poison which exuded from the upas-tree of slavery. The Republican party was later to become the agency for the destruction of the institution; but that party was not yet ready for its work. The extent of its subserviency to the institution,—or in other words, the extent to which that party held the institution sacred under the sanctions of the constitution,—is evidenced by the character of the concessions which that party was willing to make, in 1860. Its leaders were ready, in order to avoid the war which was looming before the country, to support an irrepealable amendment to the constitution, forever protecting, against hostile legislation, the institution of slavery in the states where it then existed. If the slavery propagandists had accepted that proposition, it would have become a part of the constitution, and African slavery would be in existence today in fifteen states, save as it might have been modified or abolished by voluntary state action. And this was practically the ultimatum of the party which elected Abraham Lincoln President. Surely, nothing more need be stated to show the degree of the supremacy of the slave power over the Great Republic, or to illustrate the lamentable fact that Slavery was a national sin, militant and defiant, entrenched within the walls of the Constitution.

It was the civil war which purged the nation of this sin. Yet the war was not commenced with that end, for the express declarations of the President at its inception, and the early conduct of the war in both its civil and its military aspect, evince that the first object of the

loyal people was to preserve the Union, and this without injuring the peculiar institution if possible. Why, then, must there be a war? Simply because the champions of slavery extension would not accept the irrepealable Corwin amendment, and allow slavery to be confined. What, then, was the actual grievance, to redress which they waged war? Simply that, after March 4, 1861, the legally elected and installed government of the United States was to pass under the control of the Republican party, which was expected to and doubtless would legislate in opposition to slavery extension in the territories, a subject unquestionably within the legislative power of Congress. To determine, *pro* or *con*, this question of the sacred character of the rights and privileges of manhood slavery under the national constitution, the country must be plunged into the most sanguinary and distressful war of modern times. Yet this was the constitution which had been the choice of all the people of the land; yea, the constitution which the majority of the people had united to establish, and which in their blindness they had worshiped as immaculate. That constitution is now purged from that stain, and the blood of the nation's citizens of all sections has been shed on the altar of the national sacrifice. Again, at the close of the war, as at its inception, we are admonished that it was indeed a national sin which had to be thus expiated.

## The Compromises of the Constitution.

The evidence that this sin was originally a national one is found in the constitution itself. Although slavery was recognized as a local institution, with which each state was allowed to deal as it pleased, and although when the great contest over the slavery question had culminated in

civil war, only a minority of the states allowed slavery, yet it was impossible under such a system of government as ours, that the people of the free states could escape responsibility for the existence or for the evils of slavery. The constitution was the work of the people of the entire United States. It had been established by the people of the old thirteen states, and ratified and kept in its position of supremacy by the aid of the people of every successive new state. The three compromises of the constitution on the subject of slavery were, each and all, concessions to the peculiar institution, which, when embodied in the constitution, conferred rights upon the slave-owners which there was much ground for esteeming sacred. Yet nowhere in the instrument was either the word "slave" or "slavery" used. The clause for apportioning representatives in Congress and direct taxes, added to the whole number of free persons . . . "three-fifths of *all other persons.*" The people forbade their congress to prohibit, prior to the year 1808, "the migration or importation of *such persons* as any of the states now existing shall think proper to admit." The clause for rendition of fugitives provided that "*no person* held to service or labor in one state" could be freed therefrom by escaping into another state. Thus, without naming slavery, that institution was very abundantly protected, and its continuance was guaranteed, by the solemn provisions of the fundamental law. Well might that instrument be denounced by the modern abolitionists which thus built human bondage into the national edifice as a corner-stone.

The circumlocution thus employed in reference to slavery is curiously expressive, even eloquent. A certain degree of antipathy to the institution is disclosed by the

failure to call it by its distinctive name. The inhibition for twenty-one years of congressional legislation against either the migration or importation of persons whom *the existing states* should choose to admit, evinced a strong feeling against the slave trade generally, on its merits; and it amounted to a positive denial of power to any of the new states to legalize the traffic. The whole scheme, as set forth in these three provisions of the constitution, left it open to each state to become a free state at will; and it was only requisite that all the states should so choose, and slavery in the United States would end forever, without any congressional statute or constitutional amendment, to testify by its language that slavery had ever disgraced the nation; for thereafter there would be no "other persons" to be counted in taxation, or to be considered in any of the respects suggested in the provisions above noted. This result was no doubt expected, and even ardently hoped for, by many of "the Fathers." No other theory will adequately account for the pains taken to give the institution constitutional guarantees, without ever naming it.

With a sentiment existing, thus decidedly hostile to this institution, why was it dealt with so considerately? Why was not the slave trade immediately abolished, and why was not the existence of slavery at least discriminated against? These have been among the standing puzzles of our political history. A fair and candid study of the debates of the day, and the contemporary expressions of opinion, discloses that there was at that time a very general feeling and understanding, north and south, that the institution was not destined to a long life, and that in fact its race was even then well nigh run. It had once been sanctioned in each of the original thirteen

states, and yet it had already vanished from some of them and was fast disappearing from others. Practically, but six of the thirteen had any interest in its existence, and even they were not anxious to perpetuate it. This state of the public mind must be held in view, if we would do justice to the revolutionary Fathers, or fairly consider their temporizing conduct. There was scarcely any division of opinion on the subject of the probably short life of the institution. When likely so soon to give up the ghost, the system of manhood slavery might with some propriety be allowed to die in quiet. This was doubtless the explanation of the willingness of "the Fathers" to adopt the compromises named. It was a difficult, a trying task, to secure any constitution at all, and some compromises were necessary. Slavery being considered moribund, an undue zeal to hasten its demise might endanger the country by deferring to some uncertain date the adoption of any new constitution. This view clears the memory of the patriot fathers of the imputation of designedly temporizing with the subject for the purpose of attaining small and unworthy advantages. Had slavery died as early as expected, its death-throes would not have convulsed the nation nor have threatened general ruin. The error in the calculation is now seen, when the fact is noted that economical changes awoke the dying giant of slavery to a new lease of life and to a giant's efforts at self-preservation.

## The Introduction of Slavery.

The mutations in the prevailing public opinion on the subject, in America, add to the intricacies of the puzzle. The colonists should not be held responsible for the

original introduction of slavery. The institution was imposed upon them by the mother-country, and partly at least, against their will. At the stage of observation which we now occupy, this foul curse bears the aspect of a hereditary disease. England was a slave-holding and slave-trading mother. She commenced her patronage of the traffic in 1562. The Stuart kings encouraged it, and granted charters to companies to pursue it. In 1689, England made a treaty with Spain for furnishing to the Spanish West Indies, negro slaves from Jamaica. In 1713, the treaty of Utrecht secured to English subjects the exclusive right to introduce negroes into the Spanish dominions in America, at the rate of 4800 negroes yearly for thirty years. This pact was called *"El pacto de el assiento de negros,"* and is commonly referred to in English history as "the Assiento contract." The British trade to the American colonies and the West Indies, from 1680 to 1786, has been computed to have aggregated 2,130,000 negroes, an average of 20,000 annually. In 1753, 101 vessels sailing from the one port of Liverpool imported into America 30,000 negroes; and the ports of London and Bristol also had ships in the trade. At the time of the American Revolution, the annual British traffic in slaves was estimated at 100,000 negroes, and the annual mortality among them at 20,000. Yet there was then no organized protest in Great Britain. In 1776, when the estimable David Hartley moved in Parliament, and was seconded by the eminent Sir George Saville, that "the slave-trade is contrary to the laws of God and the rights of man," the motion failed utterly. Small wonder that, while the great campaign was in progress which the devoted Wilberforce initiated in 1787, the indignant Pitt should declare to

Parliament, in 1792, that "they ought to consider themselves the authors of the slave-trade."

## Colonial Opposition.

While Britain was industriously preparing this record for herself, the American colonies were trying to aid her to escape from it. They were protesting against their unwilling participation in the traffic, endeavoring to free themselves from it, and complaining of British refusal to permit them to do so. As early as 1645, the colony of Massachusetts enacted a law prohibiting the buying and selling of slaves, except such as were taken in lawful warfare, or were reduced to servitude by a judicial sentence for crime. In 1703, she imposed a heavy duty on negroes imported. In 1774, her legislature passed a bill to prevent entirely the importation of slaves. The Governor refused to approve it, and prorogued the legislature, saying that his instructions forbade his assent to such a law. Written instructions to Governor Benning Wentworth of New Hampshire, in 1761, to the same effect, are of record.

The colony of Virginia passed a number of laws imposing duties on the importation of negroes. One such law, which laid a heavy and almost prohibitory duty, and which had in some way received the royal assent, was, for temporary purposes, repealed by the colonial assembly. Thereafter, several attempts were made to re-establish such a duty, but without success. The crown would never consent and it required the royal approval to make any colonial enactment complete.

In 1772, the assembly of Virginia passed another

similar act, and sent with it to the throne a petition in these words:

"The importation of slaves into the colonies from the coast of Africa hath long been considered a trade of great inhumanity, and under its present encouragement, we have too much reason to fear, will endanger the very existence of your Majesty's American dominions. * * * Deeply impressed with these sentiments, we most humbly beseech your majesty to remove all these restraints on your majesty's governors of this colony, which inhibit their assenting to such laws as might check so very pernicious a commerce."

But neither the humanity nor the patriotism of this plea could prevail. The British Secretary of State was asked by a colonial messenger (Mr. Granville Sharp) to give an answer to this unusual petition from Virginia, and he responded that no answer would be given.

In 1744, the colony of Jamaica had laid duties almost prohibitory upon this traffic. In 1774, she renewed the legislation, but the English merchants engaged in the trade now secured a royal order to the governor of the colony to discontinue the levy.

This course of conduct by the British government illustrates Jefferson's arraignment of the king, in his proposed "Instructions to the Virginia Delegates," in 1774, which said:

"The abolition of domestic slavery is the great object of desire in these colonies, where it was unhappily introduced in their infant state. But previous to the enfranchisement of the slaves we have, it is necessary to exclude all further importations from Africa; yet our repeated attempts to effect this by prohibitions, and by imposing duties which might amount to a prohibition, have been hitherto defeated by his majesty's negative."

And now we can see a justification of Jefferson's fierce denunciation of George III, as an active promoter of that "piratical warfare," the slave trade, which he inserted in his first draft of the Declaration of Inde-

pendence. This was omitted from the final draft, but the Congress doubtless had the King's cruel conduct in mind, when retaining in the Declaration the charge made against him first of all:

"He has refused his assent to laws the most wholesome and necessary for the public good."

The American position in reference to domestic slavery was well summed up by Judge St. George Tucker of Virginia, the first American editor of Blackstone's Commentaries, in 1803, in these words:

"It is unjust to censure the present generation for the existence of slavery in this country, for I think it unquestionably true, that a very large proportion of our fellow-citizens lament that as misfortune, which is imputed to them as a reproach; it being evident that, antecedent to the Revolution, no exertion to abolish or even to check the progress of slavery, could have received the smallest countenance from the crown, without whose assent the united wishes and exertions of every individual would have been wholly fruitless and ineffectual."

## Revolutionary Sentiment.

When freed from the hostile control of the royal negative, the American states acted promptly. Great Britain claims much credit for abolishing the slave trade in 1807, after 20 years of the Wilberforce agitation. But America had already pointed the way. In 1778, Virginia enacted a law prohibiting the further importation of slaves, and declaring the immediate freedom of every one thereafter imported, and another law authorizing manumission by owners. The Continental Congress published an exhortation to the states to abandon the trade altogether. Pennsylvania abolished the traffic in 1780, Massachusetts in 1787, and Connecticut and Rhode Island in 1788. Even Denmark anticipated Great Britain, by a law passed in 1792, closing the traffic in 1803. The United States

began, in 1794, a course of national legislation limiting the extent of the trade. In 1794 and 1800, laws were enacted prohibiting citizens of the United States from engaging in such trade between foreign countries. One was passed in 1798, forbidding the importation of slaves into Mississippi territory from foreign parts; and in 1803, one punishing the importation of slaves into any state whose local laws already forbade it. The year 1807 arrived, and on March 2nd, the United States Congress forbade the importation of slaves after January 1st, 1808; while on March 25th, Great Britain forbade their importation, to take effect *March 1st*, 1808. The British colonies were not allowed the benefit of absolute emancipation until 1833. Long before that date, the majority of the American states had by individual action freed themselves forever from local slavery.

So the United States, whose Constitution was in part based upon tolerance of slavery, entered upon her national life with a well defined and general feeling against its continuance. This feeling was entertained, candidly and earnestly, by a large proportion of the leading public men. The views of Washington, Jefferson, Madison, Randolph, Henry, St. George Tucker and other eminent men of the slave-holding states are well known. Jefferson "trembled for his country" in view of the prevalence of human bondage. Washington manumitted his slaves in his will, to take effect on the death of his widow, and she completed the work in her own lifetime. The feelings of the leading southerners of his age are doubtless well voiced in the sentiments expressed by Washington respecting the compromises of the Constitution:

"There are some things in this form, I will readily acknowledge, which never did, and I am persuaded never will

obtain my cordial approbation. But I did then conceive, and I do now firmly believe, that, in the aggregate, it is the best constitution that can be obtained in this epoch, and that this or a dissolution awaits our choice. It is the only alternative."

The first Continental Congress declared (Oct. 20, 1774) that

"We will neither import, nor purchase any slave imported, after the first day of December next, nor will we hire our vessels nor sell our commodities or manufactures, to those who are concerned in the slave trade."

## Early Anti-Slavery Societies.

It was but natural that this revolutionary antipathy to negro slavery should find its first flowering in the Anti-Slavery or abolition societies which distinguished the closing quarter of the eighteenth century. These societies were not sectional; among the most active were those in the southern states. They were not identical in purpose with the abolition societies of the nineteenth century, for they had no political aim. Their programme was to teach the hatefulness of slavery and promote gradual manumission. The early ones took the name of Societies for the Relief of Negroes unlawfully held in bondage. The earliest in time was organized in Philadelphia, in 1775. It held regular meetings until 1787, when it was broadened to aim at the abolition of Slavery, and Benjamin Franklin became President and Benjamin Rush Secretary, both Signers of the Declaration. The "New York Society for Promoting Manumission" began its work in 1785; John Jay was its first President, and was succeeded by Alexander Hamilton. London had a similar society in 1787, and Paris one in 1788 with LaFayette as one of the founders. The American states

followed with similar societies; Delaware in 1788, Maryland and Rhode Island in 1789, Connecticut in 1790, Virginia in 1791 and New Jersey in 1792. In addition to these state organizations, there were a number of local societies. They all promoted with unanimity a common cause. Memorials were formulated and presented to Congress, asking that some action be taken toward circumscribing slavery. The last public act of Dr. Franklin was his signing as President, on February 3, 1790, the memorial of the Pennsylvania Society to Congress, asking that body to go to the verge of its constitutional power in discouraging the slave-trade. He died in April following. In 1794, a joint convention of these societies was held at Philadelphia, which memorialized Congress to legislate against the slave-trade; and in response to their memorial, the Act of 1794 was passed. The same convention issued an address to the People of the United States, drawn up by Benjamin Rush, urging early action to promote the freedom of the negroes, and saying, in anticipation of Lincoln, "Freedom and slavery cannot long exist together."

Mr. William F. Poole, late Public Librarian at Cincinnati, has performed a public service in compiling, under the title of "Anti-Slavery Opinions before the year 1800," (published in 1873), the statistics of these early societies, with copies of their memorials and resolutions. With them he has printed, in *fac simile*, the Oration delivered by Dr. George Buchanan, of Baltimore, on July 4, 1791, before the Maryland Abolition Society. The original pamphlet edition of this Oration, bearing the autograph of George Washington, forms a part of the library of that distinguished opponent of slavery, now preserved in the Boston Atheneum. A more scath-

ing and unreserved indictment of the peculiar institution, in all its depravity, it would be difficult to find in the Garrisonian literature. And in Baltimore, in the eighteenth century, the orator was complimented by a unanimous request for a copy for publication.

## The New Era.

From the Southern opinion of 1800 against slavery, to the Southern frenzy of 1860 in its favor, was a far cry. The transformation was doubtless due to the two causes of the introduction of the cotton gin, making the production of cotton more easy and stimulating a demand for slave labor, and the acquisition, through the Louisiana Purchase, of a large extent of alluvial territory especially suitable for cotton-growing. These economical suggestions seem to have eliminated from the minds of the friends of slavery all humanitarian and sentimental considerations, to have their places supplied by the sophistries of utilitarian arguments. Certain it was, that when Lundy and Rankin and other abolition leaders of Southern birth, renewed in 1820 the agitation of the same ideas advocated by Franklin and Rush and Washington and Jefferson and Madison a few decades earlier, they met with an intensity of resistance that at this day seems almost appalling. The once proscribed institution had now come to believe itself sacred.

Now came on the death struggle of the institution, a struggle lasting over forty years. One of its anomalies seems the fact that the fiercest opposition to the abolitionist operations in the early "30's" arose in non-slaveholding communities. It was in Massachusetts that Garrison was mobbed, and in Illinois that Lovejoy was martyred.

The most plain and patent conclusion to be drawn from this intensity of northern sympathy for the slaveholder is, that the sin of slavery was national. Though this northern sympathy was almost wholly political rather than economical, yet it was sincere, for it was based upon a belief in the legal rights of slaveholders under the constitution, and an abhorrence of any such illegal interference with those rights as might give the slaveocracy just grounds of complaint.

So proceeded the great struggle through its successive phases of Missouri Compromise, Anti-Slavery Agitation, Fugitive Slave Bills, Underground Railroads, Wilmot Proviso controversy, Admission of Texas, Squatter Sovereignty Debates, Kansas-Nebraska Legislation, Corwin Amendments, and attempted State Secession, to the grand crisis of the Civil War. It was a titanic struggle on both sides. At first in the arena of debate, and afterwards on the field of battle, the greatest men of the age put forth their most intense efforts. It was a final and crucial convulsion of the body politic, endeavoring to extirpate the poison of slavery from a state created to be free.

Happily, the opposing forces took on new proportions and presented new alignments as the fever of the struggle ran its course. The armies that confronted one another on the field were not identical with those that had faced each other in debate. The slaveocracy had lost those allies who had stood by them when their constitutional rights in the existing states had seemed to be endangered, but who could not sustain them in demanding new constitutional guarantees. When the slavery party refused

to accept the future exemption of the institution as it stood, and announced unimpeded slavery extension as their ultimatum, then the sincere devotion of all the loyalty of the country rallied around the flag; and the flag was to be cleansed of its one stain, but not lowered.

It has been said that in its last extremity, the scorpion prefers to die of its own sting, inflicted by itself. Thus was it that slavery, by bringing on the civil war, sounded its own doom. Even after hostilities had commenced, the sanctity of the old constitutional guarantees of slavery survived. Lincoln, as a man, had promised his God and his country to strike the institution a death-blow if ever permitted. He was now the Commander-in-Chief of the Armies and Navies of the United States. But Lincoln was a lawyer and a constitutionalist, and he felt that he could honestly use his military power only in a constitutional way. Had the slaveholders refrained from war, they had in the lawyer-President a constitutional champion, disposed as a lawyer, and pledged by his oath of office as President, to preserve their constitutional rights. But by waging war, they called into activity the President's war powers; and in strict observance of the constitutional rules governing his discharge of the Executive duties, Lincoln had in due time the opportunity of declaring emancipation to be the law in all of the south where war was then flagrant. So, at last, by its own egregious self-exaltation, did Negro Slavery invoke the power that destroyed it. For though the Proclamation took effect only during the war, yet the strength of the army and the power of the nation were back of the President, and the institution had become effete before Lee and Johnston had surrendered. The will of the Nation had been spoken un-

equivocally and was thoroughly understood. The adoption of the Thirteenth Amendment was simply the formal registration of that will.

## XIV.

### Theories of the National Constitution.*

The Commentaries on the Constitution of the United States, prepared by the late Professor John Randolph Tucker, of Washington and Lee University, are now published under the editorship of his son and successor, Professor Henry St. George Tucker. They treat *seriatim* the several provisions of that instrument, in a form somewhat similar to the commentaries of Judge Story. Agreeing in some respects with that eminent constitutionalist, Professor Tucker differs from him *toto coelo* in others, notably in his theories concerning the process by which the nation grew, and the office of the Constitution in that process. One of the objects of this treatise is not only to renew the discussion upon that general subject, but to furnish a categorical reply to Judge Story's criticisms upon the constitutional views advanced by the elder St. George Tucker as the editor of Blackstone. Thus a portion of this work wears the aspect of a family controversy. Professor Tucker's style, while often con-

*From The Dial, Oct. 1, 1899. The Constitution of the United States: A Critical Discussion of its Genesis, Development, and Interpretation. By John Randolph Tucker, L.L.D. Edited by Henry St. George Tucker. In two volumes. Chicago: Callaghan & Co.

troversial, is always so calm and dignified as to appeal strongly to the sober thought of his readers. He bestows his most elaborate exposition and argumentation upon these questions as to the "Genesis" of the Constitution; and to this branch of inquiry, as distinguished from the Development and the Interpretation of that instrument, he appropriates more than one-third of his entire space.

Professor Pomeroy, in his "Introduction to American Constitutional Law," enumerates three schools of thought concerning the genesis of the United States Constitution, namely, the National school, the Secession school, and the intermediate school which bases the supremacy of the Federal government on inter-state compact. Professor Tucker ignores entirely the Secessionist theory, apparently as not entitled to consideration in a legal treatise, and schedules "two leading schools of thought" on the subject. The first is the intermediate school of Pomeroy's classification, which holds, as stated by this devotee of that school, that "the unit of sovereignty is the State, which is a Body Politic; that the Constitution of the United States is a compact between these sovereign units and Bodies-politic, making a Federal Union between the States" (v. 1, p. 178). The second school, as he well and tersely says, "holds that the Union itself is the unit of sovereignty, of which the States are subordinate parts, to which certain powers belong under the Constitution of the United States, while the main powers belong to the National Government" (p. 179).

Professor Tucker has marshalled very cleverly and forcibly all the arguments which can be brought to the support of his theory that "the Union is a multiple of units." If that theory can be sustained by argument

and logic, it would seem that he might do it. His elaborate efforts in that behalf, extending to 140 pages, will be interesting reading to all students of the constitution-making period in our national history. The fatal flaw in the logic employed to support the compact theory is apparent upon Professor Tucker's pages.

In his introductory chapters, treating generally of Sovereignty and the Body-politic, our author industriously exposes the fallacy of the Social-Compact theory of the basis of government, and adopts the modern American view of the rightful sovereignty of the People as a Body-politic, distinguished from the governmental agencies which it employs. In this Body-politic is vested "all rightful political power over its members for the common good of all" (p. 2). It is "the source of all authority; the government is the agent or trustee it creates and to which it delegates powers" (p. 351). This is the constitution-making power. A constitution is "the act by which the Body-politic constitutes the government and delegates and limits its powers" (p. 60). "The Body-politic utters its sovereign will through the constitution, which calls government into being, organizes its functions, defines and limits its powers, and declares to this, its creature, by its creative fiat, 'thus far shalt thou go but no farther.'" (p. 63). And "this principle, the supremacy of the Body-politic as constitution-maker, and the subordination of the government as the delegated agent of the Body-politic, is therefore *the foundation of American Constitutional Law*" (p. 66). These extracts are fair samples of the happy manner in which our commentator states propositions which most of his readers will recognize as admirably descriptive of that Body-politic, the People of the United States, which,

by its creative fiat, established the dual system of Federal and State governments under the Constitution of the United States. The larger part of his first three chapters might be incorporated bodily into a treatise like Story's Commentaries, in support of the National view of our Constitution from which Professor Tucker so earnestly dissents.

Of the supremacy of the government created by that Constitution, our author entertains no doubt. It is "supreme, within the limits of the delegated powers, over all the constitutions and laws of the several States, and binding and operating upon the citizens of all the States, and by its terms, certain rights and privileges of the citizens of each are intercommunicated to those of every other" (p. 256). And "this supremacy is to be maintained through the judicial department of the States and of the United States, because it is declared that the judges in every State shall be bound thereby, that is, in their judicial action they must recognize the supremacy of the constitution" (p. 376).

From these premises, the logic is not obvious by which Professor Tucker reaches his conclusion that the United States is a "multiple of units" (p. 179); "a confederacy by State peoples" (p. 287); "the multiple of Bodies-politic" (p. 302); and "a confederation of States, but not a new composite, or one new civil Body-politic" (p. 318); and that the Constitution is "a federal compact between Bodies-politic" (p. 256).

What authority could erect, by means of the United States Constitution, a frame of government which should be supreme over all the constitutions and laws of the several States, short of a Body-politic, answering Professor Tucker's requirements, and composed of the Peo-

ple of the United States? In what smaller or more limited Body-politic would it be possible for us to see vested "all rightful political power over its members for the common good of all" the people of the entire United States? The Constitution speaks in the language of self-conscious Sovereignty; why shall we deny that in so speaking, "the Body-politic utters its sovereign will"? By what process could the thirteen States create a new State, or a new governmental agency, greater, for any purposes, or to any extent, than themselves? By what process could they authorize the creation of a fourteenth State, or any other additional number of States, conferring upon those creatures equal power, dignity, and sovereignty with themselves? How can we attribute to the United States of America a sovereignty superior to that of any or all of the States, which was created by the act of those States? This is impossible, as a result of inter-state compact, because it involves the idea of a granting or transferring of sovereignty; and Professor Tucker well says that "Sovereignty, as essence, is one, *indivisible, ungrantable,* undistributable, and always reserved" (p. 60). Then no one of the thirteen Bodies-politic of 1789, if it had so desired, could possibly have granted or transferred to any new power or State any portion of its inherent sovereignty. If, then, there were thirteen distinct peoples in 1789, which desired to accomplish "a more perfect Union" than a League, there was no process which they could employ, save for each several people to relinquish all its sovereignty, and join all the others in forming a new Body-politic, the "People of the United States." This is the only logical theory deducible from Professor Tucker's premises. It was this Body-politic which "uttered its sovereign will through

the Constitution, called government into being, organized its functions, defined and limited its powers," and declared to each of its creatures, Federal and State, "thus far shalt thou go, but no farther." On the logic which leads to this conclusion, the human mind can rest; and in these principles, "the supremacy of the Body-politic as constitution-maker, and the subordination of the created governments (Federal and State) as the delegated agents of the Body-politic," can be seen "the foundations of American Constitutional Law." Doubtless these considerations, though not expressed by him, were in the mind of Chief Justice Marshall, when he said, in 1823, in the case of the United States *vs.* Maurice:

> "The United States is a government, and consequently a Body-politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people."

The basis upon which Professor Tucker rests his support of his compact theory is stated categorically by himself. "The written constitution of 1789 must be what those who brought it into being and gave it the sanction of their ratification believed and knew it to be, and cannot be changed by what men a century thereafter choose to think it ought to have been" (p. 180). But, suppose the men "who brought it into being and gave it the sanction of their ratification" did not agree as to just what the Constitution was? Professor Tucker accepts the verbal explanation of a portion of those men, and rejects the view of others. If there were men who then sincerely believed the Constitution was merely creating another league, there were others, equally sincere, whose verbal explanations of its dominant national features are

convincing even now to "men a century thereafter." Our commentator pays no regard to the contemporary views, as to the nationality embodied in the Constitution, of Wilson and Morris and Findlay of Pennsylvania, and King and Gerry of Massachusetts, nor to the opposition raised on this ground by Smith of New York and Martin of Maryland. He does cite the view of Patrick Henry, that the result was "a consolidated National government of the people of all the States," only to report the contrary ideas of several who, in replying to Henry, seem to have had an understanding of what our dual system in fact is. Among these is Madison, whose view our author does not seem to succeed in apprehending, for he quotes from that statesman the argument in the "Federalist" (No. 39), that the new Constitution would be in certain respects federal and not national, without giving the connoted view that in other respects it would be national and not federal, nor the conclusion there reached that the new government would combine both these features and be of a mixed character. It must be a similar misapprehension which seeks to draw comfort for the State-compact theory, from the writings of Hamilton, who said in the "Federalist," that "a Nation without a National Government is an awful spectacle" (No. 85); and that "the streams of national power ought to flow immediately from that pure original fountain of all legitimate authority," the people (No. 22). This is a fair expression of one phase of a Body-politic, such as Professor Tucker describes, but composed of the entire people of the United States. Both Hamilton and Madison seemed to clearly understand that a new type of popular government had been created, a dual system, possessing both National and Federal

features. Jefferson, too, as quoted by our author, declared to Madison in 1786: "With respect to everything external, we be one nation only, firmly hooked together. Internal government is what each State should keep to itself." In a labored argument, the commentator seeks to show that the phrase, "We, the people of the United States," might perhaps have been employed by the constitution-makers in the sense of "We, the people of the confederated States of New Hampshire, etc., not as one civil Body-politic, but as a league" (p. 296). But Richard Henry Lee, the "Federal Farmer," gave the phrase its simple and natural construction when he said, in October, 1787, "It is to be observed that when the people shall adopt the proposed constitution, it will be their last and supreme act; it will be adopted, not by the people of New Hampshire, Massachusetts, etc., but by the people of the United States."

The difficulty with the arguments advanced in support of the State-compact theory has always been, that they wrest terms from their true meaning, and juggle with definitions. The system of our Constitution under which the Federal government exercises the Supremacy, within its appropriate sphere, so distinctly stated by Professor Tucker, does not allow to the States the enjoyment of "sovereignty" within the usual meaning of that term. To attempt to assign to the States their true position by any ordinary use of that term, is necessarily misleading. So, as we have seen above, the idea of a supreme Body-politic, such as our commentator describes, can be applied only to the nation; and the attempt to place the States in the like category can result only in confusion of thought. Professor Tucker seems to take umbrage at the presumption of Mr. von Holst, a

foreigner born, in writing upon our constitutional history and criticising our statesmen. But his own pages furnish justification of Mr. von Holst's complaint that American statesmen have "*bona fide*, used the same word in most opposite senses, and employed words as synonymous which denoted ideas absolutely irreconcilable."

Bent on subjecting every circumstance to the support of his chosen thesis, Professor Tucker finds in the declaration of the convention of Virginia, on May 15, 1776, in favor "of a total separation from the crown and government of Great Britain," some evidence of individual action as a sovereign State. But Virginia at the same time declared for united action of the colonies toward independence, reserving to each colony the regulation of local and internal concerns; and thus, like Maryland, Virginia was at the outset of the movement for independence, prefiguring the dual system. Again, respecting the deed of cession to Congress of the Northwestern lands, made by Virginia in 1784, Professor Tucker argues that Congress was, by its acceptance of the deed, estopped to deny that Virginia, and not Congress, had theretofore "exclusive right of soil and jurisdiction to the territory thus ceded"; not considering the fact that, in yielding as she did, after a hot discussion for several years, to the claim of the smaller States that only the whole nation had a valid title in law to that "right of soil and jurisdiction," and thereupon joining in the national legislation for the government of that territory on a national basis, Virginia acquiesced in the national theory and became in honor estopped to deny it thereafter.

The correct method of formulating a satisfactory theory of the genesis of our Constitution will not permit

a reliance upon contemporaneous declarations on either side of the disputed question. The results accomplished in fact must be allowed their proper weight, and often these will outweigh contemporary theories. So it is true that the lapse of years, furnishing a historical perspective, should enable "men a century thereafter" to better understand the constitutional process and its results. Professor Tucker demurs to this method of determining whether the Federal Constitution was an inter-State compact or an authoritative law. But he has employed the same process, with signal success, in his discussion of abstract Sovereignty and the abstract Body-politic. On these subjects he reasons *a priori*, and in disregard of contemporary theory. The Bodies-politic he discovers in the original thirteen States took form at the instance of men, many of whom firmly believed in the Social-compact theory of government, and helped to embody that theory in laws and constitutions and judicial decisions. And here comes Professor Tucker, "a century thereafter," and says of it: "This theory is fiction, and as an hypothesis is unsound, and must lead to error" (p. 3). So he employs more modern canons of study, and tests the processes of the formation of governments, in part by principles now considered as established, and in part by the results attained. A like independence of original investigation, employing the same *a priori* processes of reasoning, leads us to reject on similar grounds the inter-state-compact theory of the Constitution, and to attribute its creation to the People of the United States as a Body-Politic.

Outside of the controversial portions of his treatise, in respect to which he seems to hold a brief, Professor Tucker's commentaries on the Constitution are judicious

and well-considered. He seems to favor, with Chief Justice Marshall, and as lawyers usually do, a fair and reasonable construction of that great instrument, rather than either extreme of a strict construction which would fetter its necessary operations, or a broad and latitudinarian construction which would render its limitations meaningless.

## XV.

## THE GENESIS OF CONSTITUTIONS.*

Judge Jameson's well-known treatise has grown in value and importance during the quarter-century since its first appearance. It is that American institution, the written constitution, which calls for the friendly offices of the Constitutional Convention; and the presentation of the fourth edition of this treatise brings with it a fresh suggestion of the peculiarly American flavor of the book. The making and amending of constitutions is one of our industries; and the author's statistical table chronicles 192 conventions, held for these purposes, since "the embattled farmer stood and fired the shot heard round the world." Evidently the American mind is losing none of its old-time preference for written over unwritten constitutions. This great development of constitution-making naturally stimulates inquiry concerning the agency by which the work is done.

An understanding of the process of construction will be a pertinent introduction to a critical examination

*From The Dial, December, 1887. A Treatise on Constitutional Conventions; Their History, Powers, and Modes of Proceeding. By John Alexander Jameson, L.L.D. Fourth Edition. Chicago: Callaghan & Co.

of the constitution itself, and a treatise on the subject might appropriately be made a preliminary study to a course of lectures on Constitutional Law. It is but a fair estimate of the high merits of Judge Jameson's work, to anticipate that it will be accorded such a place in every American school of law or of history, and that it will in time be recognized as an American classic. In this author's work, the powers of a mind trained in law and logic are combined with a lofty patriotism and a common-sense competent to test specious theories. These characteristics find apt play in his discussion of the question of Sovereignty, a discussion preparatory to a consideration of the powers of a constitution-making convention. He treats Sovereignty as essentially a political and legal fact; a fact which is no less credible because we have not first accounted philosophically for its existence. Hence the various theories as to its origin, while succinctly stated in a note, are dismissed as theories merely. "With the abstract question of the ground upon which the right of sovereignty rests," says he, "I shall not concern myself." The existence of Sovereignty as a fact it would be absurd to doubt. Government implies Sovereignty; its entire absence would be Anarchy. Government in the United States, republican and constitutional in form, has existed for a century as a fact, and is to-day potent to throttle and subdue Anarchy. It is not material to the rightful exercise of such Sovereignty that we should clearly diagnose either its legal or its metaphysical origin.

The practical questions which address themselves to Judge Jameson are: Where in the American state does Sovereignty reside? And how does it there exist? These lead up to and involve other questions which have been

largely treated as fundamental to our national politics. Are the states of the American Union sovereign? Was the Federal Constitution formed by a compact between thirteen sovereign states? Does the Union exercise a partial Sovereignty delegated by those states? Did that compact open at the organization of each new state, admitting it thereto as a grantor *ab initio*, equally with the original thirteen, of a portion of the delegated Sovereignty? But questions like these, in the light of Judge Jameson's comments, are seen to be speculative rather than practical. Sovereignty is political supremacy. It implies, in the felicitous language of Austin, habitual obedience to the sovereign as a political superior, such superior not being in a like habit of obedience to any superior. The United States government exacts and receives, but does not give, habitual obedience. The United States thus exercises Sovereignty, and is therefore a Nation. Its power thereunto is conferred upon it by the body of the American people. The whole people is therefore the body in which Sovereignty in this Nation primarily resides. The Federal government and the State governments are agencies, or, in the language of Austin, "subject-ministers" of that Sovereign; the first named for general and national, the last named for local purposes. The phrase "sovereign state" is an unfortunate misnomer; unfortunate, because it has proved misleading. Each state is, for local purposes, and within definite limitations, vested with supreme power; but this vestiture is a grant from the Sovereign, not an exercise by the State as a Sovereign, of its own Sovereignty.

Aside from the demonstration of the correctness of this theory, afforded by the results of the civil war, it is evidently growing into universal acceptance among

publicists. Many essayists besides Jameson have recently adopted it after careful study and research, and now sustain it stoutly upon logical and legal grounds. A valuable contribution to the literature of the subject is found in a recent article in the American Law Review (Vol. 21, p. 399), by Robert Ludlow Fowler. Inquiry is there made into the historical source of the governmental powers exercised under our constitution by the Federal government and the states respectively. It is clearly shown that the powers of government, formerly exercised by the several states in their colonial capacities, and retained by them as states, correspond closely to those exercised, under the British constitution of two or three centuries since, by the parliament in England; while those powers which the colonies never attempted to exercise, but which were assumed successively by the Continental Congress and the Congress of the federation, and which devolve upon the Federal government under the constitution, are those which under the same British constitution, were the acknowledged prerogatives of the sovereign, the Crown.

Jameson's discussion of these questions leads up to the conclusion that Sovereignty is not inherent in the Constitutional Convention, nor is it vested therein by transfer from the sovereign. The Convention is neither the people nor a substitute for the people; it is merely a convenient agent, appointed by the people, and charged with certain duties. As such agent, it must act within the limits of its delegated authority. This axiomatic proposition is used by our author to illustrate the powers which it may properly exercise, in each of the following respects; (1) in the relations of the convention to the sovereign; (2) in its relations to the State as a whole;

(3) in its relations to the electors; (4) in its relations to each of the three great co-ordinate departments of the government; (5) in its internal relations, its powers to control its own members, fill vacancies, punish offenses, and order its business, and its attempts to prolong its own existence. To all these subjects, which have at various times occupied the attention of Constitutional Conventions, Judge Jameson gives the light of his close and logical reasoning, from the premises of the fundamental principle above stated. He recognizes many of the questions discussed by him as to some extent still open, and it is his aim to give material aid in their settlement, not by attempting to decide them, but by participating in their argument. Readiness to argue legal and political questions so vital, in a manner so thorough, dispassionate and exhaustive, and to wait patiently for the calm decision of the people's tribunal, is a rare trait in our professional writers; and the nation is fortunate in the citizenship of one so willing as Judge Jameson to discharge this duty to his country.

## XVI.

## A CENTURY OF THE AMERICAN CONSTITUTION.*

Appropriate to this period of centennial celebrations is a historical retrospect, in which a careful account may be taken of the progress of the American experiment in constitutional government. Such a retrospect, in excellent form for general use, is presented by Professor Landon's exposition, which is based upon a series of lectures given by him as President of Union College. That our constitutional system has not only survived all the vicissitudes of its first century, but has measurably strengthened with its growth, may be taken as one of the standing wonders of history, which will lose no interest as future ages shall progress. At its inception, it was recognized as an experiment. Its success is even now recognized as phenomenal. The secret of this success is already engaging the attention of historical students. Prof. Landon's lectures are an opportune contribution to the inquiry.

*From The Dial, June 1889. The Constitutional History and Government of the United States. By Judson S. Landon. Boston: Houghton, Mifflin & Co.

Foreign observers are gracious of their tributes of admiration at the wisdom of our plan of constitutional government, as well as at its success. But American students will not be content with mere admiration. For us, the vital question is, what outlook for the future does our past success afford? Admirers like Gladstone wonder at the genius which struck off such a constitutional system at a single blow. But Americans have discovered that our system was a growth and a development, and that the Providence which favored us was manifested in a succession of events which were in themselves comparatively unnoticeable, if not relatively unimportant. It would seem probable, therefore, that an American student of our institutions would be the one most likely to find by search the secret of our successs. A comparison between Professor Landon's exposition of less than four hundred pages, and the verbose and ponderous volumes of Dr. Von Holst, will illustrate the difference between the equipment of the domestic and that of the foreign observer. Von Holst "felt" with us and tried to see and understand with us; but Landon is an American by birth, heredity, education, and mental equipment. Von Holst will still be looked to as a magazine of political gossip and personal characterization; while Professor Landon's book will become the initial of a series of constitutional disquisitions from the point of view of the new century.

Those who have read McMaster's entertaining and discriminating magazine article upon "A Century of Constitutional Interpretation" will appreciate the tumult of political storm to which our constitution has been exposed during its first century, and will perhaps wonder wherein lay the strength which maintained it through-

out all the political turbulence so clearly portrayed in that article. To turn from McMaster's sentences to the pages of Landon is like passing from the roar and the riot of the outward tempest into the interior of the foundations of the edifice, there to observe how firmly they are planted upon the solid rock. It is the merit of Professor Landon's lectures that he has so clearly shown wherein lies the strength of our constitutional system.

As may be inferred from what has already been said, Professor Landon does not treat of the United States constitution as to be considered by itself, or as presenting in itself the whole or the essential part of the American system. That system can be understood only by considering the Federal constitution as but one portion, while the various State constitutions are another portion of no less importance in the completed whole. This dual form of our government is emphasized in these lectures. The State constitutions stand as an essential part of the Federal system. The correlative proposition has never been more forcibly presented than now by Professor Landon, that the United States constitution is necessary to the proper scope and development of that part of the system which finds its expression in the State constitutions. It was this dual constitutional system which was the natural growth. If criticism upon so excellent a work would not be considered ungracious, one might suggest a fuller elaboration by Professor Landon of the details of the gradual and natural growth, during the American colonial period, of each of these principles of national sovereignty and local independence.

It is, however, elucidated in this treatise, and with a clearness most excellent, how the central powers of the National government have been exercised with

the result of strengthening the State governments. During the period prior to the Civil War, the hostility of the States toward supposed encroachments of the Federal governments is stated succinctly but clearly. The author is not, however, a harsh critic of the States-Rights politicians, altho himself a firm and uncompromising Unionist. With impartial candor, he shows how natural was the political feeling, at one time so prevalent, of jealousy of the central power. With like judicial calmness, he shows in what an orderly way the central power has, in the new era since the Civil War, become the firm bulwark of the reserved rights of the States.

This, which may be considered the final summary of the author's views of our constitutional development, is presented in the three lectures which are appropriately devoted to an illustration of the influence of the Supreme Court of the United States upon our constitutional development and growth. This court occupied, at the beginning of our first century, a position in our political system which may be best described by the term sufferance. Recognized in the constitution, it was allowed to exist and operate; but its decisions were often treated with disrespect and sometimes with contumely and open disregard. It worked its way gradually into partial and then more complete favor; then into a position of influence, and finally into one of calm and quiet, yet supreme and unquestioned power. Its first great work was to determine the proper powers of the nation in our system, and to secure for those powers just recognition, respect, and obedience. It was through the labors of this court that the people were educated into the faith and the strength sufficient to carry the Union through the crisis of the Civil War; that work done, and the nation

finally planted with firmness upon the constitutional foundation, it then became the task of the Supreme Court to enforce and maintain in like manner the powers conferred by our system upon the State governments. The consummation of the work of our statesmen, as described by the court, is an indissoluble Union, composed of indestructible States. Landon appropriately reminds us that that august court has itself done no small portion of the work of erecting and perfecting such a Union.

> "Not immediately, but gradually, ultimately, and surely, the court by its decisions separated the National and State powers from their confusing mixture, and gave to each clearness of outline and distinctness of place. It gave to the abstract words of the constitution an active and commanding significance. It disclosed the instrumentalities by which rights conferred could be enjoyed, and wrongs forbidden could be averted or redressed. It composed conflicts, promoted harmony, and soothed passions. It defined the just limits of contending powers, separated encroaching jurisdictions, and restored each to its proper place. It lifted a dissolving and moribund nation to great strength and vitality. It gave to the States clear and accurate conceptions of their wide field of domestic government. It instructed coördinate departments. It vested the nation with its own, and did not impair the just powers of the States. The peaceful manner in which all this was accomplished made the accomplishment more remarkable. Revolutionary results without revolutionary means are rarely witnessed in the history of mankind." (p. 274.)

It is a familiar thought that our political system is one of "checks and balances." Probably few persons who are in the habit of using this phrase have ever attempted to fully state or closely define these checks and balances. That one power checks another, is easily seen; but that the checks and balances should in themselves contain the germs of much of the inherent strength of our system, is not so evident. To this feature of our system Landon devotes several pages. Among those

provisions which assist in insuring its perpetuity, he calls attention to the following: The division of the great powers of government among three departments prevents the lodging in any one man or body of men of so much power as to allow him or them to oppress the people. These separate powers, so committed to separate officers, are so co-ordinated, that the proper action of each is usually necessary to the successful working of the whole; so that officers in each are watchful of defects or abuses in the other departments. The powers most liable to abuse are committed to officers with short terms of service, so that the public interest in their proper discharge of duty is well-nigh continuous. The constant participation of the people in the government is a force continually tending not only to strengthen and perpetuate it, but to keep up its standard of excellence. The division of the Legislative department into two chambers makes each one constantly watchful against encroachments by the other, precisely according to the prescient suggestion of Madison. The provisions of the constitution for its own amendment are a safeguard against revolution and discontent. Finally, the separation between the National and State powers of government furnishes a constant and always active influence against any attempt on the part of either State or Federal authorities to encroach upon the powers or privileges pertaining to the other. These careful selections by our constitution-makers from the precedents furnished by the best experience of earlier governments and political ventures, have proved to be, in our system, the sufficient means of its continuance, and preservation.

From what has been here said, it will be plain that the pessimist will derive but little comfort from the pe-

rusal of Professor Landon's pages. They will, however, reward every patriot, whether optimist or not, who may give the necessary time to their careful reading.

## XVII.

## OUR UNWRITTEN CONSTITUTION.*

It is a much-mooted question, among jurists and constitutional students, whether we have, in this land of written constitutions, any additions thereto in the character of unwritten constitution. Professor C. G. Tiedeman has taken the affirmative of this question, and his latest treatise, "The Unwritten Constitution of the United States," is a thesis in support of his position.

There is a fundamental difference between the British and the American types of constitution, outside of the feature that one is unwritten and the other written. The unwritten constitution of Great Britain is a flexible aggregation of rules and principles, changeable by Parliament from time to time, according to the popular will as contemporaneously ascertained. These rules and principles are said to be fundamental in the American sense. As Professor Tiedeman states,—

"There is no binding force in the prohibitions of Magna Carta, except so far as they are now voiced by public sen-

*The Unwritten Constitution of the United States: A Philosophical Inquiry into the Fundamentals of American Constitutional Law. By Christopher G. Tiedeman, A. M., New York, G. P. Putnam's Sons.
From the Dial, May, 1892.

**timent; if an act of Parliament should be passed in accordance with some great public demand, the fact that it violated these principles would not prevent its enforcement by the courts."**

These remarks will apply to all the principles of the English Constitution. Many of them are administered by the courts while they remain in force. They have not, however, the characteristics of fundamental law in the American sense. The principles of the American Constitution may be built upon to a larger extent. The term "fundamental" must be differently understood in examining the two systems; and hence the idea of a "constitution" is not the same in both. It is for this reason that Great Britain has no such body of constitutional law as that which forms so important a part of American jurisprudence.

Professor Tiedeman's thesis seems to have been written to illustrate an American "unwritten constitution" in the British sense of the term,—that "unwritten constitution whose flexible rules reflect all the changes in public opinion." It is true, he expects to find that "unwritten constitution" in "the decisions of the courts and acts of the legislature which are published and enacted in the enforcement of the written constitution,"—a development, as it were, out of the latter. But what he there finds he characterizes as "constantly changing with the demands of the popular will," and thus he imputes to it the same characteristics as those of the unwritten constitution of Great Britain. It is a question worthy of serious consideration, whether any rules or principles, however well established to present appearance, can be considered a part of our constitution, unless they have been so adopted and made fundamental as to be enforce-

able in the courts. The constitution in the American sense is fundamental in this respect; its every rule and principle is so enforceable, because our system makes it a legal rule. Can any practice or usage, not so enforceable, be regarded as any part of an American constitution, written or unwritten?

The illustrative instances of supposed unwritten constitution collected by Professor Tiedeman are presented without reference to this distinction. Among them are the change in the practical working of the electoral college, and the general public sentiment against a third presidential term. These, however, are usages, not laws. They correspond to what Professor Dicey calls, under the English system, "the conventionalities of the constitution," as distinguished from the law of the constitution. The test-question is: Does either of these usages establish or confer a right which the judicial department of the government will undertake to protect? The essayist argues that the practice of selecting presidential electors by a strict party vote is "the real, living, constitutional rule," and that "the popular limitation upon the re-eligibility of the president can be taken as a constitutional limitation" found in the "unwritten constitution." So to argue is to lose sight of the basic rule that every constitutional right in America is under the protection of the judiciary. In the chapter on Natural Rights, there is a hint at the disposition of the courts to condemn legislation which interferes with the natural rights of individuals, even when such rights are not within the specific protection of the written constitution; but no instances of such condemnation are noted. In respect to citizenship, sovereignty, and secession, certain variations in the judicial decisions are pointed out, which

seem to be attributable to a diversity of views on unsettled questions of interpretation and construction, rather than to any changes in the national will. What the essayist supposes to be "a decided shifting of the position" of the Supreme Court in reference to the constitutional inhibition of legislation impairing the obligation of contracts, is presented by him as a "change in the constitutional rule"; but this supposed change of judicial view many constitutional lawyers declare to be wholly imaginary.

Two rules of American fundamental law are cited in this essay, which are enforced by the courts upon the basis of constitutional rules, and are thus entitled to be considered as constitutional in the strict American sense, but which are not established in terms in the written constitution. These are, the rule that the courts have jurisdiction to declare a law constitutional which is in conflict with the written constitution, and the rule that in time of war the military power of the government becomes supreme of necessity. Beyond these, the "unwritten constitution" elucidated in this work is of the British rather than the American type.

## XVIII.

## BURGESS ON THE CIVIL WAR AND RECONSTRUCTION.*

The three most recent volumes in Scribner's "American History Series" are by Professor John W. Burgess. Two of these are devoted to the period from 1859 to 1865, under the title "The Civil War and the Constitution." This period is illustrated in two distinct aspects: one, its military history, giving a condensed and succinct account of the campaigns and engagements of the war; and the other, its constitutional history, with discussions of the questions then or since mooted, concerning the constitutional phases of the movements of the period. These two lines of study are here presented together, in chapters arranged chronologically. Some readers would doubtless prefer a division of these subjects which would give each a volume by itself. The author's pages do not seem to exhibit any common *vinculum* uniting the two.

*The Civil War and the Constitution, 1859-1865. By John W. Burgess, Ph. D,. LL. D. In two volumes, New York: Charles Scribner's Sons.

Reconstruction and the Constitution, 1866-1876. By John W. Burgess, Ph. D., LL. D.. In one volume, New York: Charles Scribner's Sons.

From The Dial, September 16, 1902.

A final chapter of the second volume is devoted to a terse but clear and instructive *résumé* of the international complications growing out of the war. The third volume closes with a chapter treating in a similar manner of the international relations of the United States between 1867 and 1877.

The eminently valuable portion of this work is its constitutional history. The presentation of the important subjects of Secession, Emancipation, the National Powers of the Government, and the War Powers of the Executive in their constitutional relations, is profound and scholarly, and is seasoned with the author's well-known fearlessness and impartiality. The cause of Secession is shown to have been constitutionally and morally groundless; constitutionally because the only real grievance of the secessionists was, that after March 4, 1861, the legally elected and installed government of the United States would be in the control of a party which would probably legislate contrary to the wishes of the secessionists, on subjects admittedly within the legislative power; and morally, because the secessionists had been offered compromises, liberal beyond reason, to induce them to abandon their attempted secession. Our author places fitting emphasis upon the willingness of the Republican leaders in Congress to avoid war by supporting an irrepealable amendment to the Constitution, forever protecting slavery in the States. This was the supreme test of their desire for peace. They are to be "considered as having offered everything that could have been expected from wise, honest, and sincere men, for the pacification of the country, and, from the point of view of a sound political science, more than they ought to have done." Our author here makes clear his settled opinion that every normal

constitution essentially requires provisions for its own amendment; so the Republicans of 1861 were conceding unwisely in favoring the Corwin amendment.

"An irrepealable, unamendable provision in a Constitution in regard to anything is a rotten spot, which threatens decay to the whole Constitution. It is a standing menace to the peaceable development of any political system. It is the most direct contradiction possible of one of the most fundamental principles of political science, the principle that the amending power in a constitution, the legally organized sovereign power in the political system of a country, must be able to deal with any and every subject. . . . The proposition to withdraw from its operation the most serious and burning question of our political ethics was a proposition to set the clock of ages back a century and more, so far as concerned the advancement of liberty and of the science of government. . . . It meant the reversal, in principle, of the chief advance which we had made in the development of our constitutional law from the system of 1781 to that of 1787."

These vigorous views relate to an episode that is past. But they are timely; for they illustrate principles of constitutional jurisprudence which are permanent and of perennial interest.

Professor Burgess states fully, though briefly, the facts which put to rest the silly story that President Lincoln acted unfairly toward the secessionists in the matter of provisioning Fort Sumter. He defends not only the constitutionality, but the morality also, of the Emancipation Proclamation. The inherent Nationality of the Federal government, as an essential of political and constitutional science, is very clearly expounded; and the entire regularity and necessity of the exercise by the President of plenary powers in time of war are demonstrated as vigorously as they were by Solicitor Whiting himself during the war time.

"It is altogether gratuitous to concede that the Government of the United States overstepped its constitutional

powers, and acted on the principle that necessity knows no law, in preserving the Union by force against dissolution. It overstepped its ordinary limitation, but it had, and has, the constitutional right to do that, in periods of extraordinary danger. The root of the error in denying this right lies in the claim that the Constitution made the Union. The truth is that the Union made the Constitution, and that the physical and ethical conditions of our territory and population made the Union."

It is unpleasant to observe any defects, however slight, in so fair a composition. But our author is an overearnest controversialist; and while uniformly measuring his expressions on all subjects of prime importance, he sometimes lapses into mere rhetoric when discussing minor topics. His very just animadversions upon the gross errors involved in John Brown's raid on Harper's Ferry derive no greater force from the abundant epithets which are here heaped upon the unfortunate Brown and his ill-fated cause. So, again, with reference to Lincoln's ancestry. It must have been some unfair prejudice which described his father as "a dull, lazy, shiftless, poor white, of Kentucky backwoods life, the son of a man of the same sort;" and his mother, who is incorrectly said to have been "the daughter of one Lucy Hanks," as one of another family which "belonged likewise to the class of poor white trash." If it were desirable to refer at all to Lincoln's ancestry, in such a history, the simple facts might have been given, instead of exploded myths. The American people will forgive the poverty of Lincoln's parents, in view of the sturdy yeomanry which made their fathers successful pioneers in the new West of the eighteenth century, and in view of the intense antipathy to human slavery which governed their lives and descended to animate and distinguish the life and career of their great son.

It is not quite clear why our author should admit, while he justifies the act, that Lincoln, on his accession to the Presidency, "shifted the whole issue" from the restriction of slavery to the maintenance of the Union. The President in fact shifted no issue. The explanation of his emphasizing the preservation of the unbroken Union is so simple that no apology would be pertinent. The issue on which Lincoln was elected was at once forced to the background. Secession in arms brought forward a new and paramount issue: the Union must be fought for and preserved. It would have been idle to discuss any lesser issue, in the face of this greatest one of all. So thought the loyal millions who rushed to the defence of the Union, at the call of the President. So will thousands of them testify to-day.

The third volume in our list, entitled "Reconstruction and the Constitution," is a detailed thesis on the processes employed for the rehabilitation of the insurrectionary States, from 1865 to 1872. The discussion refers, almost continuously, to the questions arising, as related to or affected by the Constitution, so that the narrative deals with constitutional history in the proper sense. The treatment of these questions by Professor Burgess is minute, discriminating, and often masterly. He is impartial, both in praising and in blaming the leading actors of the Reconstruction period; and his fearlessness in criticism, and his sincere desire to find and declare the true constitutional ground which should have been occupied at every step of the momentous proceedings, will challenge the commendation of unbiased readers. The executive and the legislative branches of the government are by turns censured and applauded, as they have seen or failed to see the step proper to be taken at the moment. The Presi-

dential policy is shown to have been erroneous in treating the statehood of the insurrectionary States as in no way vitiated by their attempts at secession, and in seeking to rehabilitate them by the employment of less than a full majority of the qualified electorate. The legislative policy was based upon the correct theory that the impaired functions of the insurrectionary States could be restored only by Congressional action; but the mistakes made by Congress in working out this theory were glaringly worse than those of the Executive department in seeking to reconstruct without the agency of Congress.

According to Professor Burgess, the States of the Union derived from the Constitution all their powers of local autonomy, and the logical consequence of an attempt to secede from the Union was to deprive the State so attempting of such autonomy, and reduce it to a Territorial condition; for it could not abridge the sovereignty of the Union over the land within its limits, and the act of rebellion against that sovereignty could have no other effect than the abjuration of Statehood by the offender. This being accepted as true, it is the author's view that but two modes of reconstruction were logically feasible.

> "The one was, to establish territorial civil governments in the late rebellious region, and maintain them there until the civil relations between the two races became settled and fixed. The other was, to so amend the Constitution of the United States, before the readmission of the 'States' which had renounced the 'State' form of local government under the Union, as to give Congress and the national judiciary the power to define and defend the fundamental principles of civil liberty. Neither of these methods would have demanded martial law or universal negro suffrage."

Professor Burgess has a good word for the last named project, which he tersely denominates "the nationalization of civil liberty." But his preference seems to have been

for the plan first mentioned, of placing the insurrectionary states under Territorial civil government, "and keeping them there until the spirit of loyalty to the Nation was established, and the practice of civil equality among all citizens was made thoroughly secure." Our author does not refer to the great and undue anxiety which President Johnson was exhibiting at that time, to hasten his own scheme of Reconstruction by the appointment of "Provisional Governors." It was this precipitate action of the President which first invited the counteracting policy of Congress. Several of the Southern Governors had summoned their legislatures, as our author states, to meet for the purpose of Reconstruction; and they were in some instances, dissuaded from so meeting by officers of the Union Army. Johnson's hurried appointment of "Provisional Governors" was a higher bid for Southern favor, and he was hoping to be thereby made the leading politician of the South. Lincoln, if living, would have had no such motive for haste in making such appointments; and if there had been disagreement between him and Congress, he would doubtless have been able to compose the difficulty. The delicate tact of Lincoln was wanting in Johnson's composition.

Professor Burgess is astute to expose each error which Congress made, either in departing from the logic of its own correct theory of the mode of Reconstruction, or in going counter to the Constitution. Of its errors of the first class, he says that "they intensified partisanship at the expense of statesmanship." It was a departure from the principles of the Constitution, when Congress arranged to have States not yet rehabilitated,—or still "out of their practical relations," as Lincoln phrased it,—to vote upon amendments to the fundamental law; as also

when a Freedmen's Bureau, upon the basis of a war measure, was created in time of peace; and again when, by the Tenure-of-office act, it was attempted to deprive the President of his normal functions under the Constitution. These purely constitutional questions are discussed with a considerate calmness of expression that gives to the author's conclusions the weight and emphasis of a judicial deliverance. But when he intermits his examination of these general phases of Congressional power and function, to discuss the measures resorted to by the majority in Congress, then the jurist descends to the plane of the partisan, and calm exposition gives place to heated denunciation and the use of epithets. Several of the measures adopted by Congress are declared to have been "monstrous," although one of them is admitted to have been within its Constitutional powers. Constitutions were framed for some of the seceding States by "carpet-bag, scalawag, negro conventions." The reconstructed legislatures were "hideous" bodies of men, and the result of their work came near being "ghastly." This intensity of indignation felt by the historian will appeal strongly to all who, with him, disapprove the employment of temporary devices to maintain party control, which are in contravention of fundamental principles; but it must be confessed that such a profusion of epithets is out of place in dispassionate history. Our author deals gently with the foibles of Secretary Stanton, and none of the many excesses of President Johnson provoke his resentment, save those attending his famous "swinging around the circle." How unwise and how uncalled for were the impeachment of President Johnson and his trial upon the impeachment, and how fortunate was his acquittal, are clearly demonstrated in a chapter which, by some over-

sight, has been entitled "The Attempt to Impeach the President." This chapter will be read with interest by the many, now living, who deprecated at the time the extent to which partisanship had carried the majority in the lower house of Congress.

## XIX.

## AMERICA'S LEADERSHIP.*

Two notable books, recently issued, serve to illustrate, from different points of view, that advance of America to prominence among nations, which, if incorrectly spoken of as her supremacy, is certainly entitled to the appellation of leadership. Mr. John W. Foster, diplomatist and statesman, writes historically of the work accomplished by the young republic during her first century, in the field of international relations. Mr. Brooks Adams, essayist, economist, and historian, gives a series of broad generalizations, with the statistics on which they are based, which attribute to the United States a controlling influence in the present trade conditions of the world. Ordinarily, there would seem to be but little in common between diplomacy and commerce. But when a study in each separate subject leads to the same conclusion as to the superior influence of a young nation, the link is supplied which makes it convenient to bind these subjects together. In an industrial age, the

*A Century of American Diplomacy. By John W. Foster, Houghton, Mifflin and Company. 1900.

America's Economic Supremacy. By Brooks Adams. The Macmillan Company. 1900.

merchant and the diplomat may together advance the pretensions of the State to leadership; and the warrior may stand aside, holding himself in reserve, to contribute his aid in maintaining that position, when circumstances may call for him.

Mr. Foster, in his "Century of American Diplomacy," shows that our diplomatic efforts have been exceptionally successful, and remarkably influential. Our recent achievements, notable as they have been, are but the natural culmination of a series of international successes, upon a gradually enlarging scale. America entered into the field of diplomacy immediately after the declaration of her independence, and from the first she assumed a high position among the nations, and was taken by them at her own valuation. Perhaps her daring seemed perilous; but the frankness of her assumption of the highest privileges of external sovereignty won her the respectful attention of other nations. Bold and intrepid, but at the same time courteous and considerate, the young republic "from the nettle danger plucked the flower safety." She challenged the respect of the world in her earliest ventures in diplomacy. In her first treaty of commerce with France in 1778, new principles were embodied, prohibiting privateering, and aiming to enlarge the field of the rights of neutrals in time of war. Similar advances were made in the treaties with Prussia in 1785 and with Great Britain in 1795. So to America has been accorded by foreign jurists the honor of having been a pioneer in the modern program of ameliorating the conditions attending war; and though some of her early ideals have not been fully or generally adopted, others have become the accepted standards of international action.

To call the roll of our presidents is to read the catalogue of our triumphs in diplomacy. Washington's administration placed America in a position of advanced and practical neutrality toward the warring European States, which has commanded general admiration; so that Canning thirty years later recommended as "a guide in a system of neutrality, that laid down by America in the days of the presidency of Washington"; and a late English writer on international law says that "it represented by far the most advanced existing opinions as to what the obligations of neutrality were." The Jay treaty of 1795 provided for extradition of criminals, and arbitration of national disputes, and sought to mitigate the severities of war. Under the elder Adams, a treaty was negotiated with France, by which differences of long standing with that nation were amicably settled, and a war, which at the time seemed inevitable, was avoided. Jefferson's administration gave us the acquisition of the Louisiana territory from France, and the diplomacy which abolished the time-honored (?) custom under which the European states had for years paid tribute to the Barbary pirates. That of Madison was distinguished by a war, fought honorably in defence of a principle which was destined in later years to win general support; and while the war was closed without attaining the object fought for, it was acknowledged in Great Britain that the terms of the peace were a triumph for the American commissioners, and that the war "made them (the United States) formidable." How formidable was indeed manifest in the succeeding administration, when the announcement of the Monroe doctrine startled an allied array of autocrats, and without a clash of arms, released one continent from the

political control of another. The elevated position to which this declaration raised the United States among the nations has never been lost. Our success in avoiding war and preserving peace with our neighbors; in securing the continued neutrality of the great powers during our civil war, and retaining their friendship; in relieving our neighbor Mexico of the temporary incubus of imperialism; in settling international disputes by arbitration; in opening Oriental markets to western trade; and finally in becoming prepared to be the champion of oppressed Cuba against Spanish misrule; all these accomplishments of our diplomacy are familiar incidents of our national history. Mr. Foster tells the story of the first century in an easy, conversational style, which at times becomes anecdotal, and which is always entertaining. No reader will find the recital dry or tiresome; both the subject of his work and the manner in which he treats it are fascinating; indeed, Mr. Foster seems to have imbibed the attractiveness of the study of our diplomacy, and to enjoy the sharing of its pleasures with his readers. Doubtless this subject is often avoided by the public, under the impression that it is, like another, only "a dismal science." Mr. Foster's history will help to make popular the study of our diplomatic relations to and with the powers of the world. From the shrewdness with which the feeble America of 1783 played off the jealousies of one power against another, so as to secure at one stroke an independence of them all, to the success with which the Great Republic held her own against internal rebellion, and maintained international relations with States whose interest it was to see the Great Republic divided, there is a gradation of achievements which is clearly outlined in Mr. Foster's pages.

The ability of the United States to become a world-power, at a bound, when the time was ripe, is accounted for. It was the natural culmination of a distinguished career.

Mr. Brooks Adams, in the essays which he has collected under the title of "America's Economic Supremacy," writes a thesis to expound a belief which may be briefly stated as follows. The leading nations of the earth, Great Britain, Germany, Russia, and America, are now engaged in a life and death struggle for trade superiority. Spain, once the mistress of the seas, has fallen into senility, and the "Spanish Main," having been for some time an English gulf, is now about to become an American harbor. France, until recently the chief competitor of Great Britain, has dropped the reins of her former commercial power into the hands of Germany. "From the dawn of time, commerce has flowed from east to west in the track of the migrations of the races." The history of the world exhibits a periodical recurrence of trade conditions; after an industrial revolution which has changed the customary route of commerce, and developed new mercantile interests, there has ensued a period of comparative quiescence, during which some one commercial centre dominates all industrial activity and controls all trade movements, and thus constitutes for the time "the vortex of civilization." This vortex, so long on the banks of the Thames, "reached London from the banks of the Tigris, by way of Constantinople, Venice, Antwerp and Amsterdam. Amsterdam and Antwerp are calm, Venice and Constantinople are torpid, while Ctesiphon, on the Tigris, is a ruin in a desert."

The signs of the times show the sceptre of commerce departing from England. The English are losing their

initiative. Great Britain is no longer in receipt of great riches from her colonies. Her recent experience in South Africa is a desperate attempt to secure new colonial wealth. She has been distanced by America in the iron and steel industry, and by Germany in sugar production. "The course of civilization promises to hinge on the ability of Great Britain to maintain the economic ascendency she won at Trafalgar and Waterloo." She secured that ascendency through her admirable maritime facilities, her great rival, France, having relied of necessity on land transportation for extensions of her commerce. The present rivalry among the nations is to reach China, and secure the opportunity to develop her wonderful material resources of iron and coal, as yet all undeveloped. Russia is, to this end, pushing forward her transcontinental railway system. The contest is again likely to be one between land and maritime systems of transportation, and if Germany enters it, she seems destined to join Russia. America and Great Britain, the leading maritime states, must hasten to the far east, to secure the mercantile connections which the sea makes possible, or lose their present commercial advantages. America stands to-day the leader in all the iron and steel industries. She must have early access to the Chinese resources, or transfer her present ascendency in these industries to some rival. The recent decadence of English initiative, enterprise and leadership seems to call on America to assume the chief burden of the contest between the two mercantile systems. "Cost what it may, sooner or later the mineral deposits of Shansi and Honan will be seized by Europeans," and then America must be on the ground with her great facilities for development of manufactures. Mr. Adams does not

in all these disquisitions, assume the air of a promoter, who urges national action for national glory, or from any excess of patriotic fever. Rather is he the seer, or the prophet, who has studied the lessons of history, and who from what he reads in the past, foretells the future. From these lessons, he reasons, "it is evident that the expansion of the United States is automatic and inevitable, and that, in expanding, she only obeys the impulse of nature, like any other substance."

To thus state the character of Mr. Adams' argument is to show its inherently interesting features. But, of course, generalizations so vast and comprehensive as his must make their way slowly, and to many readers their principal interest will be that of curious inquiry. He furnishes statistics in abundance, in support of his deductions; and his conclusions as to the present decadence of Great Britain in the commercial world are in many instances fortified by expressions of opinion from current British economists and observers. An under current of confidence in the career and the destiny of the American republic pervades the book. One lays down this work, as he does that of Mr. Foster on our diplomacy, impressed with the feeling that America has been providentially called to great achievements, and the hope, if not the trust, that wisdom will be vouchsafed to her people, commensurate with the duty laid upon them.

## XX.

### The American Empire.*

Given a people organized into a Federal Union of commonwealths, with a central government exercising efficiently all the powers and functions of external sovereignty, and there is exhibited a Nation, standing on an equality with other States, and endowed with all the attributes recognized by international usage as pertaining to organized States, including among these the power and privilege of acquiring, holding, and governing outlying territories and dependencies. This is, in brief, the view which modern international jurists take of the present relations between the United States of America and her recently acquired insular possessions. Such a relationship is entirely normal. "A Nation," it has been said, "is an organized community within a certain territory." Later writers name this conception a State. But every Nation may possess territory, as well as other property, external to the boundaries within which it is itself organized. This right is implied in the term "external sovereignty." As the author of the work before us states the theory:

"The lands and populations which constitute the body and personality of the State are not the only lands and populations

*From The Dial, Jan. 16, 1903.

over which it may exercise power. It is a fact that the State may and does exercise power over lands and poulations which are not, and cannot in the nature of things be, a part of the body and personality of the State, and that it may be in a permanent relationship to these lands and populations of such a kind that it must exercise power over them permanently."

To the United States pertain the same rights and privileges, in this respect, as are exercised by her fellow nations. What attitude she should maintain toward distant dependencies is a question that is new to her officials as a practical problem; but the career upon which she has entered with the close of the nineteenth century has made this question imperative. Patrick Henry's "one lamp" must again become our resource. Other nations have had experience in administering government in extraneous territories. To illustrate historically our present situation in this respect by examples drawn from the annals of our fellows, as well as by our own past usages, is the aim of an elaborate treatise by Mr. Alpheus H. Snow, entitled "The Administration of Dependencies." This writer has made an exhaustive study of the precedents found in French and English history, and has ably marshalled those which are of present value to us. The administration of her dependencies by France from 1600 to 1787, and the English administration prior to the charter of Virginia, are treated in separate chapters, following which the usages of England prior to her breach with her American colonies are copiously illustrated. The American Revolution originated in a controversy over the question of the normal relations between the King of Great Britain and his American dependencies, and this controversy is set forth *in extenso*. The trend of colonial opinion at that time followed the lines marked out for 1750 by the political thought of Europe. It was a transitional

period, and the progress of change in the British constitution led to diverse views as to the nature of the British state and the constitution of her trans-Atlantic colonies. How the administration party and the colonial statesmen parted company after 1750, at which time the characteristic of the American constitution seemed to be clearly understood on both sides, is succinctly stated by Mr. Snow. The phases of the quarrel, and the demands and deliverances of both parties, from 1761 down to the final breach in 1776, are fully detailed, as are also the successive steps taken by America thereafter, both in continuing her controversy with the mother-country, after ceasing to be a dependency herself, and in proceeding toward the administration on her own part of the territories that became her dependencies. Herein we are furnished a brief history of the Revolutionary War from a new point of view,—namely, that of a contention over the relations between a dominant state and its dependencies, leading up to the assumption by the late dependencies of nationality for themselves, including incidentally the exercise of their own government over their dependencies. After showing how the American system of such government grew to align itself with the European precedents, the author illustrates the styles of such government, followed, since the consummation of the American Revolution, by European states, including Great Britain, as well as the course pursued by our own country, in all of which examples there is seen to be a practical similarity in principle. The chapter on American administration from 1787 to 1900 includes citations from some of the decisions of the Supreme Court on questions that have arisen under the Federal constitution,—enough in number to illustrate the position taken by that tribunal,—and sufficient to show

abundant precedents, both legislative and judicial, in our own experience, to guide to the solution of all the problems which have recently confronted the nation.

"Colonial" and "Imperial" are among the terms extensively used, in recent years, in referring to the relations newly assumed by the United States. The first of these adjectives is wrongly applied to the dependencies of our republic; and the second is largely used in that connection in a mistaken sense. This nation has no "colonies" in the proper meaning of that word, and never has had any. Colonies are one class of dependencies; but all dependencies are not colonies. Mr. Snow is careful to adhere scrupulously to his chosen subject, and to write of "dependencies" in the proper sense,—though one *lapsus* is perceptible in the sub-title which he chooses for his volume, "A Study of the Evolution of the Federal Empire, with Special Reference to American *colonial* problems."

His frank adoption of the phrase, "Federal Empire" shows that the bogey of "imperialism" does not affright this author. Disregarding the old political sense of that term as indicating the despotic rule of an emperor, he freely uses it in its geographical sense. The extent of territory possessed by a nation which holds outlying lands in addition to its home domain is often well named an "Empire." Geographically, the United States may be aptly styled an "Imperial Domain," and this without any necessary implication of the other sense, in which the term describes a form of government. Modern developments in popular government have often given to a republic, whose political system is either representative or democratic, the possession of territories so extended and scattered that no terms so well describe the result as those

which imply an empire in the geographical sense. "The British Empire" is a familiar example of such a domain, from whose home government political imperialism is absent. Even a pure democracy may, as a dominant state, lord it over dependencies as an imperial domain, without debasing its democracy. As the modern view is well summed up by Mr. Snow:

> "The old conception of an Empire as a Kingdom composed of Kingdoms, and of an Emperor as a King who rules over other Kings, is passing away, and in its stead has come the conception of the Empire as a State composed of distinct and often widely separated populations or States, of which a State is the Central Government or Emperor."

Vattel, in his time, had come so far as to see much new meaning in the term "empire," and to attribute to every nation, in addition to its own domain, the right of "the empire, or supreme command over persons, by virtue of which it orders and disposes, according to its will, of the whole intercourse and commerce of the country." But it was only a few years later that Burke, when discussing the relations between Great Britain and her American Colonies, said: "My idea of it is this: That an Empire is the aggregate of many States, under one common Head, whether this Head be a monarch, or a presiding republic."

The idea that the United States should in time become the "presiding republic" of such an Empire is by no means a new thought of the nineteenth century. Such a state as Great Britain was recognized to be in the eighteenth century, the early American statesmen often assumed to be the destiny of America. It was in this geographical sense that Madison, Hamilton, Jefferson, Ellsworth, Dickinson, Marshall, and others,—men whose partisan views

were far from concurrent,—agreed in using the expressive phrase "American Empire." The precedents cited by Mr. Snow show how amply and continuously the actual practice of America in holding and governing her dependencies has justified this prophetic expression of the faith of the Fathers.

The conclusion reached by Mr. Snow, as a result of these novel historical investigations, is that "the people of the American Union, by their written constitution, consented to by all the people of the Empire, have divided the governmental power under an unwritten Constitution, so that the Union is the Imperial State as respects the dependencies." Thus has been established a "Federal Empire," composed of "the people and lands of the American Union and the people and lands of its dependencies." The final chapter of the work is an exposition of the "Imperial Obligations" which are, by the establishment of this Federal Empire, "imposed upon the American Union and its people." This imperial state "has arisen out of the need for social and economic peace and for equalization of economic conditions, exactly as Confederations and Federal States arose; it is the only form of organism by which the federative principle can be extended beyond the limits of lands occupied by a homogeneous population capable of self-government."

The excerpts here given from this searching study into our colonial and national history will perhaps give some idea of its ambitious purpose. It is not merely a valuable contribution to the popular knowledge of our own institutions,—it is an epoch-making book, as a profound exposition of the inmost characteristics of the unwritten constitution of the Republic.

The work exhibits defects which are largely in mat-

ters of detail, and which detract somewhat from its high character, but which are apparently due to the author's excess of enthusiasm for his thesis. There is an unnecessary refinement of analysis, which furnishes no strength to his exposition or his argument, in the attempt to array the Revolutionary statesmen against each other as *Anti-Imperialists* and *Federal-Imperialists;* a distinction which the author does not suggest to have been understood by themselves, and which even he does not make clear. The same undue zeal has pressed too far some of his deductions respecting the positions occupied by the antagonistic parties prior to the Revolution. He regards it as established "as a fundamental principle of the Constitution of the British Empire for the American Colonies," that "the King was the representative of Great Britain as the Imperial State, and that Parliament was also its representative, superior to the King;" and he insists that "nothing was better settled than that there were no constitutional conditions or limitations upon the power of Parliament when exercised within the realm of Great Britain." But the colonial statesmen disputed both of these claims as to the supremacy of Parliament, and supported their contention by English precedents, legislative and judicial; and the arguments of James Wilson and John Adams came near to demonstrating that once there had existed limitations upon the power of Parliament, the benefit of which the colonists had not surrendered, and back to which they went in deraigning their political rights. Omission of these superfluous statements would not have made any less effective or valuable the author's general conclusions, which his numerous quotations from historical sources abundantly sustain.

## XXI.

## RIGHTEOUSNESS EXALTETH A NATION.

### A Forefathers' Day Address.*

The wise proverb of Scripture, which assures us that "Righteousness exalteth a Nation," brings before our minds two distinct ideas which ordinarily address themselves to us separately. One is the conception of a habitual course of right conduct, which we usually associate with the individual human being; the other, that of the State or Nation, as an organized governmental entity. Righteousness, in the sense of the Scriptures, means right acting and living, from the proper motive; that is, doing the right for the sake of the right. The term implies a recognition and understanding of the difference between right conduct and wrong conduct, based upon an adoption by the will of the highest possible motive, namely, to do the right because it is right.

A common interpretation of this passage of Scripture is, that the aggregate of the righteousness of all the individuals in a Nation enhances the honor and the merit of that Nation, and thereby tends to exalt it. Whatever may

*Address delivered at First Congregational Church, Minneapolis, Minn., Dec. 23, 1900.

be said in favor of such an interpretation, the sentence is susceptible of another, much broader and deeper, and more comprehensive. To make a Nation, a mere aggregation of people does not suffice. It is an *organized* aggregation,—organized upon a definite plan, for certain definite purposes of government,—which alone constitutes a Nation. So the conception differs essentially from that of a mere mass of people No matter what may be the ties which hold those people together, if they be not governmental ties, there is no Nation. The conduct of the Nation, and the conduct of its people, may proceed along different lines. It is possible to conceive of a people of whom all, or the great majority, may be persons of righteous conduct individually, and yet their aggregate righteousness may not make the Nation righteous; indeed, it may have no necessary effect upon the national conduct. The people may be religious, kindly disposed, and associated in churches; there may be even an established state-church; and we may call the people righteous; and yet the government may be conducted for purposes, and from motives, that are the reverse of righteous. As history has often shown, a people who are generally righteous as individuals may be ruled by a government that is selfish, or cruel, or revengeful, or everything that is unrighteous. If there be a state-church, some prelate may be the prime minister, one of irreproachable private life, but who in all dealings with other governments is selfish, untrue, hypocritical and despicable. It was among people professedly righteous as individuals, that the debasing maxim of diplomacy arose, that language is given to a diplomat in order that he may conceal his ideas. Louis XIV, though pretending to piety as a man, selfishly and arbitrarily absorbed

into himself all the functions of the three estates of the French government. The massacre of St. Bartholomew was planned and executed by the officials of an administration whose people as individuals were devoted to the church and professed to live rightly. The national conduct in these instances was the antithesis of the personal conduct of the majority of the people.

We must, then, look to the course of conduct of the Nation, *as such*,—to its official and governmental acts,—in order to learn whether *the Nation* is righteous or unrighteous. The same test must be applied to the organized government that would be applied to an individual. What has been the character of the life of the Nation, as such? What have been its objects, and by what motives has it been animated? How far has it, as a government, done the right thing because it was right, and from a desire to honor and promote the right? These are the questions whose answers will disclose the Nation as either righteous or unrighteous.

The recurring anniversary of Forefathers' Day makes this catechism pertinent, as to that Nation which has grown from the seeds the Forefathers planted on the sacred soil around Plymouth Rock. Though not the earliest, this was the most conspicuous lodgment of new principles of government made on our Atlantic coast. It has come to be generally acknowledged that our present federated nation owes more of its controlling principles and political customs to the legacies of the Pilgrims of Plymouth, than to those of any other of the early plantations. We count the Forefathers as righteous men. Was their personal spirit imbibed by the government they founded, and does it survive in the Nation to-day? Or are we, as a State, self-seeking, and

indifferent to and regardless of the right, when dealing with others?

To Plymouth Rock, then, let our gaze be directed, while we inquire: What were the principles involved in the Pilgrim experiment of government? How far did that experiment contemplate, or imply, a Righteous Nation? How far has national Righteousness been developed by reason of what the Forefathers did, not as individuals but as a government? Does the event really justify what we fondly regard as a momentous experiment? Can we now answer the query propounded by James Russell Lowell in his inspired and inspiring lyric of half a century ago,

> "Turn those tracks toward Past, or Future, that make Plymouth Rock sublime?"

The compact made in the cabin of the Mayflower evidences, affirmatively and impliedly, certain principles of state action and conduct which were esteemed fundamental. It agreed expressly upon, (first) the establishment of a separate civil body politic, which should be (secondly) for the advancement of the Christian faith, (thirdly) for the honor of the king of Great Britain, (fourthly) by the establishment of just and equal laws, which should be (fifthly) most for the general good, and (sixthly) by which all agreed to be governed. Impliedly, as we may read between the lines, the civil government was to be separate from the church, freedom of conscience was guaranteed, the rights of all neighboring peoples and colonies should be respected, peace abroad was to be promoted, and domestic quiet was to be assured. These seminal principles were faithfully sustained, and they grew stronger and stronger,

during the ensuing struggles of this colony and its neighbors, until the critical time arrived of a breach with the mother country, when from necessity the allegiance to the king of Great Britain was repudiated. Every other of the principles of the Mayflower compact was upheld and perpetuated, and in due time was extended over greater domain, and thus became a part of the constitution of a Nation, which, as it emerged from a crucial contest for existence, was admitted into the group of the world's civilized States. With what measure of fidelity has the great Nation kept the assurances of its early beginnings?

This Nation has been called upon to act along two distinct lines, one, as to its own people at home, the other as to other peoples outside. In both these respects it has always, with substantial uniformity, stood for Peace. Of the one hundred and twelve years of its mature life under the present constitution, one hundred and two have been years of peace. Four years were spent in domestic strife, the Nation constantly endeavoring to suppress that strife and to restore peace. During the other one hundred and eight years, the Nation has preserved domestic peace. It has repressed all those bitter strifes and armed collisions between its federated states, which every earlier federation had been obliged to experience acutely. Our present system was devised in order to secure this precise result. Such was a part of the constitutional plan. For armed contest in such cases, we substitute a peaceful appeal to the courts. Eleven of the original thirteen states bequeathed to the Union their boundary disputes, the other two states having then just settled another similar quarrel. All of these, as also several other inter-state disputes that have since arisen,

have been disposed of by the quiet and pacific action of the national tribunals. How admirably has the event justified the wisdom of the plan!

Our foreign wars generally have not been of our seeking. Like the Revolutionary War, out of which the nation grew, they have been defensive, not aggressive. War for the sake of peace, has been the rule. The war with Mexico has been pointed to as an exception. If the administration did covertly act so as to induce that war, this must be confessed an unrighteous act, calling for repentance and expiation. Outwardly the offending officials in that case admitted self-defense to be our standard in war, by ostensibly putting Mexico in the wrong as the aggressor. The war with Spain was indeed declared by Congress, but under such conditions and from such motives as to illustrate powerfully our national preference for peace.

Since the entry of the United States into the arena of nations, the most conspicuous change in the relations existing between the states of the world has been the amelioration of the rules governing warfare and the treatment by states of each other. The leading factor in this amelioration has been the persuasive power of the United States. No other nation has exercised an equal influence. The latest historian of our diplomacy well says:

> "A new nation in a new world, from the beginning of its existence it made itself the champion of a freer commerce, of a sincere and genuine neutrality, of respect for private property in war, of the most advanced ideas of natural rights and justice."*

Almost Quixotic was the zeal with which the young and weak government commenced this campaign. Be-

*Foster, A Century of American Diplomacy, p. 3.

fore we had become known as a nation, the world was advised of some of the principles for which we should stand, if allowed to stand at all. In our first treaty of commerce with France, in 1778, and our treaty with Prussia in 1785, provisions new to international law were introduced, defining neutrality more clearly, giving new guarantees to commerce, forbidding privateering, and exempting neutral property on the sea from confiscation. European diplomats then sneered at this program as "a beautiful abstraction." This was but the beginning of efforts to alleviate the horrors and minimize the destructiveness of war.

The Jay treaty of 1795 with Great Britain was far from being generally popular in this country, and was grudgingly adopted by a narrow margin; yet it had the merit of treating the British claims justly, while seeking to soften the harshness of war and to protect neutrals, and it was our first treaty for the extradition of criminals.

The early practice of the government during the many quarrels between European nations harmonized with its professions. Canning, in 1823, approved the new ideas we had advanced, and recommended that his government follow as a guide the system of neutrality "laid down by America in the days of the presidency of Washington."

A late British authority on International Law (Hall) says:

> "The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. * * * It represented by far the most advanced existing opinions as to what the obligations of neutrality were. * * * In the main it is identical with the standard of conduct which is now adopted by the community of Nations."*

*Hall's International Law, 3d Ed., p. 594.

It was the United States which at the beginning of the century demanded that the piratical Barbary states stop their outrageous levy of tribute on peaceful commercial vessels of other countries,—and they stopped it,—to the shame of European states which had for years submitted to the wrong.

In no one respect has the Nineteenth century surpassed its predecessors, more than in the advances made toward universal peace by the practice of international arbitration. Here, again, the United States has been the leading advocate and the leading participant. She has been engaged, in some capacity, in fifty-five conventions for arbitration,—acting as an arbiter eight times, and forty-seven times as one of the parties to the agreement. This record of peace-making is its own encomium. In many instances, as in the recent arbitration between Great Britain and Venezuela, the difficulty settled had become chronic. The whole subject of War is put in a new light by this promotion of arbitration. The greatest military general of the century, speaking upon this subject when President of the United States, said: "I look forward to an epoch, when a court, recognized by all nations, will settle international differences, instead of keeping large standing armies as they do in Europe." The recent Peace Conference at the Hague indicates that we are approaching the general's ideal. Although our government there declined to join in the agreement to abandon privateering, it should be remembered that this was on the ground that the agreement did not go far enough, and that the true ideal is, that all nations shall agree that private property shall have full immunity from capture at sea, so as to dispense with extensive maritime armaments in case of war.

To our record in international arbitration, let it be added that we have instituted thirteen domestic arbitration courts for the distribution to our own citizens of the indemnity paid us by other nations. By these tribunals, the claims of our own citizens have been closely scrutinized as to their inherent justice. In one such case, where China under the treaty of 1858 had settled the claims allowed against her by the International court, our domestic tribunal adjudicated that more than one-half of the amount had been unjustly claimed; and this sum was by act of Congress returned to China. To this extent at least, the nation has inculcated personal righteousness.

Of larger moment have been certain of our national acts, which were essentially altruistic. The enunciation of the Monroe Doctrine was of this class. The oppressed colonies of Spain had revolted, and had set up independent forms of republican government. The allied autocrats of Europe, alarmed at the spread of free institutions, declared against all constitutionalism on their own continent, and were about to lay violent hands on freedom in America. The United States gave bold and prompt notice that such interference would not be permitted. This deliverance struck a blow full in the face of that unholy conspiracy which hypocritically called itself the "Holy Alliance," and disabled it. Freedom on the western continent was thereby given opportunity for development. It is true that the declaration of this government professedly based our action upon the necessity of protecting our own national interests. But this was simply adopting the universal language of diplomacy seventy-five years ago. The real motive was the protection of constitutional government, wherever introduced upon this continent, from autocratic interference. Such was its office at its inception, and in later instances, as

in case of the French attempt to introduce imperialism into Mexico. As advanced originally, and since reiterated, the Monroe Doctrine was intrinsically just and right, and this is its real and sufficient justification.

But our Nation was not yet fitted to become the great champion of Liberty and Justice abroad, because we were untrue to these ideals at home. Let not this recital of right governmental conduct palliate or conceal any national sin. Righteousness exalteth a Nation, but sin is a reproach to any people. Our treatment of the American Indians has often been severely condemned; but this condemnation should fall chiefly on the acts of individuals, or groups of citizens. The government ought doubtless to have anticipated wrong-doing and made efforts at prevention. Still, the general national policy toward the Indians has not in its spirit been unjust or harsh.

But the flag of the Union bore one dark, foul stain. While she tolerated human slavery, and allowed that worst of wrongs to remain entrenched in the compromises of the constitution, the United States could not become the spotless champion for which free democratic government was waiting. How bitterly but how completely that national sin was expiated and atoned for, let the history of the civil war testify. An awakened public conscience reviewed with horror the past record of compromise with and tolerance of the debasing practice of manhood slavery. Timely was the awakening, timely the national resolve to rise upon the stepping-stones of past misdeeds, to higher planes of just and honest action and of service to humanity. In the fullness of time came the fullness of opportunity.

For nearly a century, our nearest island neighbor had been an ever-present problem in our diplomacy. Our

statesmen since Jefferson's time had been interested in the destiny of Cuba. Time and again had the kindly sympathies of our people gone out to these near neighbors, in their sufferings from Spanish oppression, and scheme followed scheme for their relief. But against all this personal sympathy was set our National duty toward Spain, and as a Nation we could offer such service only as International Law would recognize. Finally, Spanish oppression reached a startling stage. The unhappy island lay prostrate, her people doomed to slavery, to famine, to slow but sure destruction. Humanity was shocked, and shrieked for relief. Then the humane impulses of our people grew contagious, and the Nation itself became infected. International duty toward Spain was overbalanced by the demands of a new duty. In a spirit of devoted chivalry, the Nation at a bound leaped to an unprecedented height of altruism. Congress announced her intervention in the affairs of Cuba, in the interest of humanity and fair dealing, disclaiming all selfish motives, and proclaiming the welfare of the Cuban people as the supreme object; and her demands were enforced by the full power of the Nation. What a startling innovation in International practice! Intervention for selfish purposes had been legalized, and had become fashionable. The allied powers of Europe intervened in the affairs of France to protect the Balance of Power. When the sturdy Norwegians framed their constitution of republican government, those Allied Powers intervened, and forced protesting Norway to engraft a Kingship upon her republicanism. Even more selfish was the intervention when the king of Wurtemberg had offered to his people a constitution, and the Holy Alliance stepped in and forced the king to recall his offer, lest constitutionalism should

spread and promote republican government. All these interventions were based on the plea of protection of the existing systems of government. Such was the general rule of International Law. The language of a leading English authority, which appeared only five years ago, is:

"The requirements of self-defense furnish the only legally sufficient ground for foreign intervention."*

So sat crowned Selfishness, her throne resting on the foundations of International necessity. This maxim was the consummation of nineteenth century enlightenment on the Eastern continent. Three years after that publication, a great nation on the Western continent intervened in the affairs of a weak people, on the altruistic ground of Humanity. The United States arose in her dignity, and when confronted by that respectable maxim, exclaimed, "Get thee behind me, Satan!"

This brief retrospect, necessarily incomplete, but intended to be fair and impartial, illustrates the habitual conduct of the Republic. Generally speaking, she has done the right thing in the right way, and from the right motive. Exceptions to this practice might naturally be expected, but the Republic seems ready to correct her mistakes.

This habitual conduct has raised Columbia high in the estimation of both the peoples and the powers of the world. The success of our domestic system has made it a model for the use of other free peoples. The Spanish-American states have followed our example, though at some distance. Switzerland has imitated us in part. In Canada and Australia, our form of federation has been engrafted upon the living tree of the British Empire, and

*Walker on International Law, p. 23.

an even closer imitation of our system has been by some Britons proposed for South Africa. These are movements commencing with the people, who turn their gaze toward our wonderful national career, and hope that our history may repeat itself with them. Our Federal Republic becomes the cynosure of constitutionalists, and the fear of monarchists and imperialists, the world over. In Diplomacy, we have opened a school, in which we have announced a Golden Text for every day in the year, and that text is the Golden Rule. The powers of the world take counsel with us in their diplomatic schemes. Affairs in the Celestial Empire reach a crisis; the long expected partition seems now, at last, imminent; the carvers assemble with their knives; but Columbia, not of her own will, is there; and she firmly declares that justice to China, to all the other powers, and to herself, shall be her only aim in the settlement of the Chinese troubles; that she will not seize any Chinese territory, and that she will use all her influence to prevent such seizures; and the concert of the Powers at once attunes itself to the key-note struck by Columbia.

Is not this exaltation of the Republic indeed due to her righteousness? Then has the wise proverb of Scripture proved to be a prophecy as well, and it is this day being fulfilled before our eyes.

So at the close of the century, we are vouchsafed an answer to Lowell's doubtful query of the middle of the century. The tracks that made Plymouth Rock sublime were turned not toward the Past, but toward the Future. Pointing in the same direction we see a succession of later foot-prints, which lead us toward the threshold of a new era, wherein opens a vision of unlimited peace. The selfishness of the old diplomacy has vanished, and the

principles of American governmental action have encircled the globe. Federation after the American type has promoted everywhere, peace at home and peace abroad. The federations are all united into one general, world-wide, federal alliance: and between the pacific sessions of that "Parliament of Man," we hear the strains of the Christmas Anthem, ascribing all the glories of the new era to God in the Highest, who, at his own time and in his own way, has sent upon earth Peace to Men of Good will.

## XXII.

## AMERICA'S PLACE IN HISTORY.*

### WHAT IS HISTORY?

An attempt to elucidate the part taken by the United States of America in the great drama of the progress of the world may well include an explanation of the sense in which the essayist understands and employs the term "History."

It is often said with reference to the study of certain sciences, that "definitions are perilous." But whether or not any peril arises to confront the student, and whether or not a common ground may be found which all investigators can occupy, it is surely desirable that any formal exposition upon a given theory shall make plain the meaning in which an important technical term is employed.

Definition upon this subject may well start with the declaration of the encyclopedist, that History means "the prose narrative of past events, as probably true as the fallibility of human testimony will allow." This version of the term limits our consideration to the purely literary phase of history; and this limitation ceases to satisfy the mind, so soon as the anthropological or psychological elements which distinguish history begin to be

*Address before the Memorial University, Mason City, Ia., Sept. 24, 1902.

appreciated. The same encyclopedist himself feels the insufficiency of his first definition, for he almost immediately reminds us that "History is of two kinds, the old or artistic type and the new or sociological type." Then the commentators begin to vie with each other in their efforts toward a lexicography which shall recognize the human elements latent in history. The maxim that "History is Philosophy teaching by example" is made more specific by the philosopher who urges that "the true object of study in History is the Human Soul." Then more advanced philosophers present variations upon the same theme, and the maxims, "History is the Philosophy of Humanity,"—"The History of a Nation is the Biography of its great men,"—and "History is past Politics and Politics is present History," in succession demand our approval. These gropings after an acceptable definition are well summed up in the suggestion of the German historian Droysen, who introduces the subjective side of History to our attention, by the saying that "History is Humanity's Knowledge of, its certainty about itself."

But Droysen's version does not meet all the requirements of the American student as to American history. This is the history of a Democracy, and the "great men" of America, whose biography in compacted form may be styled the "History of America," have been the popular leaders of thought, action, achievement and progress in America. The "ancient" or "artistic history" of the Greek type was wont to devote itself to expounding in narrative form the achievements of the leaders or governors of the peoples concerned; but now it is the people themselves who are the governing class and furnish the leaders. Humanity, in America, objectively glances

at the things done by its leaders, and classes those achievements as History, while subjectively it becomes conscious of its own participation in those achievements,—"conscious concerning itself," as Droysen has it. We must round out the German suggestion by adding to it the element of the actual dominance of Humanity as a governing class, in order to formulate a conception of American history which may be correlated with the World's history in general. It is not material that general history in earlier ages was not always or principally concerned with a democracy; perhaps that was the misfortune of "earlier ages;" perhaps those ages saw in merely a formative stage that type of Humanity which has since been not only advancing but progressing. Nor is it material that it is only American History which now finds Humanity governing itself with great success, on a large scale, wholly on a representative plan; perhaps there was in this respect also a misfortune in the experiences of "earlier ages."

Let us then postulate the "World's History," with reference to which it is desirable to illustrate the present position of America, as "Humanity's recital concerning its own career as a governing class."

## Leadership of the United States.

From the point of view of an American observer, there are evidences, in more than one field of national achievement, that this country has attracted an unusual share of the attention of other peoples.

Our peculiar type of religious freedom has been and is now stirring to a noble unrest the once torpid millions of older civilizations. Federation, on two continents, is

copying some of the features of our governmental system; and even that most sedate of federal systems, Switzerland, has in the past century added to her older type of federal government, features borrowed from our successful type. Mr. Brooks Adams, under the title, "America's Economic Supremacy," marshals cogent reasons for claiming the mercantile and industrial crown for the western republic. Mr. John W. Foster and other students of modern diplomacy place this country in the very van of all international progress, and justify its leadership by the merits of its diplomatic efforts. The statistics of the operations of our navy are cited by our own partisans with just pride, as entitling us to one of the foremost places in naval accomplishment. America is recognized abroad, as having at the outset of the Spanish-American war, introduced into international law the novel principle of national altruism, and as having attained at one bound the honorable position of "Knight Errant of Christendom."

### True Value of the American System.

But not all these outward glories should blind the student to the real object of his quest, the actual contribution made by the western republic to the science of democratic government. What is the true value of the American system of political operations? For a long time, it has been a partisan shibboleth, that "the best government is that which governs least"; and even now, partisans are pointing to the failure of all our external glories to conform to this assumed maxim, as proof of their worthlessness. But while it is true that mere glory may be so cheaply won that it proves nothing as to merit, it is also true that no false standard

should be set up for the guidance of the student. The alluring theory that there is merit in a minimum of government should not be allowed to have weight against the true test which should be applied to all governments, namely, how far does the government furnish to its people a fair opportunity to develop the best that is in them? The government which does this most effectually is the best government, whether or not it governs least, and without reference to whether it governs less or more. It is a common saying that in some respects the people of England are more free, and in other respects the people of France have broader liberties, than those of the United States. But neither of these facts, if true, furnishes proof as to the comparative value of the system of either nation as against the actual worth of the American system. What has our type of democracy accomplished as a contribution to the governing capacity of the people? Which system has advanced farthest the governmental possibilities of Democracy, and contributed most to the fundamental interests of the population of the world? Which system promises most for the future ventures in government of the people by the people? These are the questions, the answers to which will illustrate the object of our search, namely, the relation which the history of America occupies toward the history of the world. To understand this relation requires an examination of the governmental features which America has introduced into and added to the political science of the eighteenth century. This is to take our system at its actual normal weight in the scale proposed by Lowell when he said: "Democracy is nothing more than an experiment in government, more likely to succeed in a new soil, but likely to

be tried in all soils, which must stand or fall on its own merits, as others have done before it."*

Did America, when she arrayed herself as a nation, have any other claim to success, than the fact that she had found a new soil on which to try an age-old experiment in government?

## Its Distinctive Principles.

The American political system adopted and applied several old and familiar principles and practices in government. The basic principle of all was that of the Sovereignty of the People; a governmental conception often expounded in earlier ages, and susceptible of much argumentation in its favor, and sometimes applied in practice,—now for the first time accepted as the basis of a large democracy, but novel only in the broad extent of its proposed application. A conspicuous feature of the method proposed for the operation of Popular Sovereignty was Federation; but this was not new, nor was the Federal Republic a new conception. The Greeks were familiar with various forms of Federation, and they were enthusiastic exponents of Local Self-Government, a form of Popular Sovereignty in which the Fathers of the Republic had had many decades of experience. To these features in Democracy, the Teutonic peoples have added that of Representative government; and these three had already been combined in earlier experiments in democratic government, but without permanent success. The Americans made a distinct advance upon their predecessors, in broadening the scope and enlarging the field of Representation. Now for

*Democracy, p. 20.

the first time was this made an essential settlement in all parts of the system of government, both national or general, and local. "Government, founded *solely* on representation, made its first appearance on this, and not on the European side of the Atlantic," said James Wilson, the earliest lecturer on Constitutional Law in an American College, in 1791; and he well added that in this, "a very important acquisition was made by the Americans, in the science of jurisprudence and government," and that "the American States enjoy the glory and the happiness of diffusing this vital principle throughout all the different divisions and departments of the governments."* Yet not even in the enlarged field now occupied by these principles of governmental action, as thus newly combined, does there appear a sufficient explanation of the unexpected success of the new experiment in government.

In the form in which its fundamental principles were presented, also, there was something distinctive in the American system. For the more clear exposition of these principles, written constitutions were adopted. In the progress of the ages, this form of expression had been growing in favor, until now it was affirmatively adopted and applied by the American mind; as a vital part thereof, there had been evolved and was now put into general practice, the use of the written instrument as a declaration of personal rights and privileges, the existence of which was to be acknowledged and guaranteed. In the American Constitutions, the "Bill of Rights" was early recognized as the most important feature.

But even the adoption of a written form for the con-

*Wilson's Works, v. 1, p. 387, 389.

stitution, with its studious assertion and guaranty of personal rights, would not have sufficed to insure to the Western Republic any greater measure of success than had been won by earlier Federations based upon and operating through like principles and practices. Something more was needed, and the need was felt. The theory upon which the new government was to be operated, appeared to be most excellent, but its operation must be made practical and permanent. How to perpetuate that system which they were so ardently endeavoring to establish, was to the Fathers of the Republic the vital question. Their aim, as expressed by themselves, was not only "to form a more perfect union," but also to *"establish justice,"* and to *"insure* domestic tranquility" and "provide for the common defense"; and these as means by which to "promote the general welfare, and *secure* the blessings of liberty *to ourselves and our posterity."*

## The Problem.

The problem presented to the Fathers was the Problem of Federation; the serious query, How to save Federation from its own weakness. From the earliest ages, the fatal infirmity of that so promising expedient, Federation, had been its own internal dissensions. Local self-governing communities, when federated, had failed because of their independent autonomy. The feeling of local or several right proved stronger than the interest of the whole; witness the Grecian federations. Representative Government did not furnish an adequate remedy; witness the Dutch Republic. The Swiss confederated States endured longer, but ever at the expense

of internal contention, and then only because their neutrality was guaranteed by their powerful neighbors under the promptings of mutual jealousy. Is there no means of guaranteeing and insuring harmonious co-operation between the several parts of a confederation of democracies, without sacrificing the principle of Local Self-Government?

This was an old problem. Mr. Fiske says, that the chief problem of civilization, from the political point of view, is "the very same problem upon which all civilized peoples have been working ever since civilization began"; "has always been, how to insure peaceful concerted action throughout the whole without infringing upon local and individual freedom in the parts"; how to eliminate "that liability to perpetual warfare which is the curse of all primitive communities."*

Only the intervention of some superior force had sufficed to suppress the jealous rivalry between the individual states of earlier federations. It had required a Napoleon to furnish the coherent strength with which to protect against foreign foes the French people who had risen against and overthrown their own inherent political evils. Was a despot needed to cultivate in America a like strength? It was in the "critical period of American history" when this problem of the ages confronted the Fathers of the Republic. Was there for an eager democracy, in this crisis, no alternative between Despotism and Anarchy?

## New Experiences.

Fortunately, the experience which had, in the progress of the ages, fallen to the lot of the American people,

*American Political Ideas, p. 6, 73.

had educated and fitted them to cope with this great problem. The old "puzzle of civilization" which was then taxing the ingenuity of the Americans, "as it had theretofore taxed that of older Aryan peoples," had, when the Federal Union was completed, "already occupied the minds of American statesmen for a century and a half, that is to say, ever since the English settlement of Massachusetts."* During the same period in which the Americans were thus being educated into the Arts of Democracy, the French people, whose contemporary constitution was such an utter failure, were being industriously educated out of those arts. After 1614, when the last States-General met in France, the Third Estate had been allowed not a single meeting until 1789, and then neither one of the three Estates had any practical knowledge of the proper share of the Third Estate in the work of governing France. The progress made by the American people during this lapse of time finds illustration in one striking fact of our history during the "critical period."

The thirteen American states were engaged in their embarrassing Revolutionary struggle against Great Britain, when an internecine contest, such as is "the curse of all primitive communities," brought the two states of Connecticut and Pennsylvania into armed hostilities over the Wyoming valley. While this war was flagrant, the good sense of the Americans invoked an appeal to the scheme of arbitration provided in the Articles of Confederation; and this scheme, as clumsy as it was, proved sufficient to end the contest; the arbitrators decided in favor of Pennsylvania, and the disappointed Connecticut men acquiesced in the decision. Let the much-

*American Political Ideas, p. 94.

maligned Articles of Confederation, the first American attempt at a national constitution, though unsuccessful as such, be cheerfully conceded the credit of standing at the head of a long line of modern successes in International Arbitration.

### A Quest for Peace.

So the quest of the Fathers was a quest for Peace; associated America was herself the first great Peace Society. Democracy now required an arbiter possessing the power of a despot; none but a despot had theretofore been able to save Federation from its own inherent weakness; but Democracy cannot consistently invoke or lean upon Despotism. What shall the Fathers do? Can a benevolent despot be found, or invented?

### A New Discovery.

At this point the Fathers made a discovery. Federation is at stake; let Federation itself provide the superior force and thus save itself. Let a higher Federation do for federated societies what each of the latter does for persons. Make Federation itself the arbiter over the disputes of the federated; not merely an arbiter by convention, like the clumsy arbitrator of the Confederation period, but a compulsory arbitrator, with power to enforce its decrees. Let the Nation be the arbiter of the disputes of the States.

This was the simple and effectual Dual System of Constitutional Government.

### The Dual System.

The governmental details of the American system do

not require repetition here. That system, both politically and historically, is an open book. Its unique contribution to the science of democratic government, a wholly novel device, presents itself to the student in two phases, one the political and the other the jurisprudential aspect. Politically, the Nation was made supreme, was given control over all the sub-divisions, portions and classes within the entire domain, and was made the exponent of all external sovereignty. Jurisprudentially, its courts were converted into tribunals for the efficient and conclusive determination of all inter-state controversies. To the elements of democratic government which the Americans found in use, and applied in their system, they added two others, namely: The Dual System of Government, and the Judicial Power over Constitutional Questions. These two gave active force and efficient operation to Federation, converting its olden weakness into power. These furnished the solvent, by which Federation, Local Self Government, and Representation, elements which hitherto had been more antagonistic than harmonious, were now enabled successfully to combine in one scheme of government.

### America's Position Ascertained.

This is America's solution of the Problem of the Ages. Historians, philosophers, diplomatists and political economists, while they award to America the palm of successful leadership, may find, in this her contribution to governmental science, the secret of her conceded success. "In the creation of the United States," says a generous and sympathetic Englishman,* "the world has reached

*Green's History of the English People, v. IV, p. 264.

one of the turning points in its history." A perspicacious and equally generous American says of the same epoch; "It was the first attempt in the history of the world to apply on a grand scale, to the relations between states, the same legal methods of procedure which, applied in all civilized countries to the relations between individuals, have rendered private warfare obsolete."* The advent of this new dispensation in democratic government signalizes the assignment to the United States of her appropriate position with reference to the world's History. She "stands at a place where all experiences converge, where all roads meet."† She opens up for Humanity the present epoch, during which Federation finds it possible to govern itself. This is an epoch in which not America alone, but the whole world, finds occasion for congratulation. Says another scholarly Briton: "There remains no doubt that the American (Revolutionary) war was a great crisis in the history of England, and that if the colonists had been defeated, our liberties would have been for a time in considerable jeopardy."‡

America's first share of the work of the new era was done at home; she commenced with her own federated States. The disposition toward local jealousy which had ever been the bane of Federation, was first exorcised from our own shores. Progressively, not immediately, was this work accomplished. America inherited this primal evil of Federation. She fell heir to several state boundary disputes, to which nine of the thirteen States were parties, not counting that one between Connecticut

*Fiske's American Political Ideas, p. 99.

†Mann's Epochs in History, p. 266.

‡Buckle, History of Civilization in England, v. I, p. 346.

and Pennsylvania above referred to, nor another between Georgia and South Carolina which those States had just settled in April, 1787. All of these controversies, besides several others which have since arisen, have been successfully subjected to the peaceful arbitrament of the Federal judiciary. Thus has America learned to command peace at home. Thus has she achieved one of the objects for which she grouped together her quarrelsome states in the new form of Federation, that object which was, as expressed in the preamble of the Constitution, to "insure domestic tranquility," and has been able to enjoy already more than one hundred years of that tranquility.

A nation which can thus command peace at home, becomes thereby fitted to encourage and promote peace abroad. Thus was it that America became qualified for her present high position in the councils of the world; qualified to become the world's leading advocate of international arbitration, to be a participant already in more than fifty conventions for such arbitration, and many times as an arbiter therein; ready to be an early advocate of the establishment of the Hague Tribunal, and a party to the first national dispute submitted to the judgment of that court, and competent to so use her persuasive power with the warring nations as to influence them voluntarily to agree in ameliorating the old-time harshness and severity of war. America, "a new nation in a new world, from the beginning of her existence made herself the champion of a freer commerce, of a sincere and genuine neutrality, of respect for private property in war, of the most advanced ideas of natural rights and justice."*

*Foster's Century of American Diplomacy, p. 3.

PACIFIC FEDERATION.

The office of this Republic is to hasten the ultimate triumph of her own type of Federation, the pacific type. The place of her history in the world's record marks the advent of a new era. Her national seal, adopted in 1777, appropriately bears the motto, "*Novus Ordo Seculorum.*" She is to realize Kant's pacific dream, when "a powerful and enlightened people form themselves into a republic which by its very nature must be disposed to perpetual peace," and which "will furnish a center of federative union for other states to attach themselves to."* She is to be, she is now, the cynosure of all English-speaking peoples, for she "is already the main branch of the English people, and in the days that are at hand, the main current of that people's history must run along the channel, not of the Thames or the Mersey, but of the Hudson or the Mississippi."†

History opens her pages to record the fact that Democratic Government is at last *established,*—Government "of the people, by the people, for the people."

"And the war-drums throb no longer,
And the battle-flags are furled,
In the Parliament of Man
The Federation of the World.

*Immanuel Kant, "Perpetual Peace" (1795).

†Green, History of the English People, v. IV, p. 263.

# INDEX