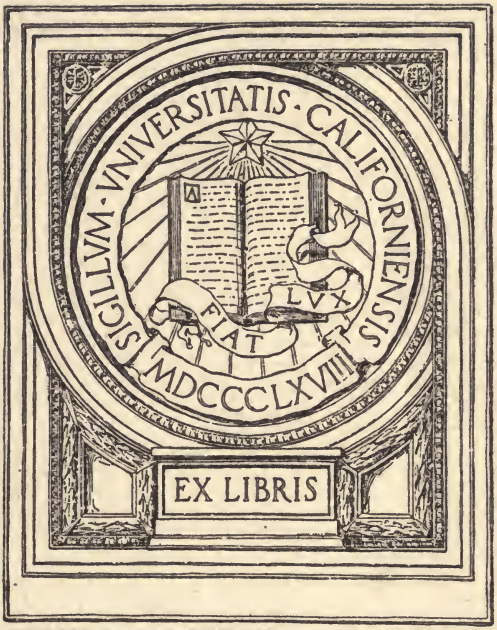
The Changing Order

George W. Wickersham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The Changing Order

Essays on Government, Monopoly, and Education, Written during a Period of Readjustment

By

George W. Wickersham

Sometime Attorney-General of the United States

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PREFACE

THESE essays are bi-products of the writer's work as head of the United States Department of Justice during the four years from March 5, 1909, to March 5, 1913. That period was instinct with great problems. New conceptions of the relation of government to industrial organization were asserting themselves; new theories of government finding expression. The old order was changing. The epochal litigation between the government and great industrial combinations culminated in a series of decisions rendered in cases argued during that period in the Federal Supreme Court. By these decisions, the supremacy of law and government over monopoly was established. During the same period, the laws regulating common carriers in interstate commerce were radically amended, and these laws, and great questions arising out of them, also were brought to the Supreme Court for construction and exposition. The admission of the territories of New Mexico and Arizona into the Union gave rise to the discussion at the National Capitol of profound modifications in constitutional government as it had been theretofore understood and practised. These changes were being embodied in new constitutions of some of the western States. Their

inclusion in the constitutions of the new States, presented to the Congress for approval, compelled a consideration of the meaning of the words "republican form of government," as used in the Constitution of the United States.

The following essays, which originally were prepared for delivery as addresses on special occasions, reflect the conflict of ideas involved in the discussion of these questions—problems which go to the very roots of civilized government. It is because of the vital nature of the problems discussed, rather than of any especial merit, literary or otherwise, in the essays, that I venture to hope that what I have written may be of more than ephemeral interest. Constant requests for copies of some of these papers have encouraged me to publish this collection. For while the old order indeed changeth, yet I verily believe there are some fundamental truths concerning government which have stood the test of time, and which cannot be ignored without unhappy consequence. What some of those principles are, I have endeavored to show in the following pages.

G. W. W.

New York,
April, 1914.

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I

THE PROGRESS OF LAW[1]

IT is related by Herodotus that after the deposition of the usurper who seized the throne of Cambyses, King of Persia, the three leaders of the successful movement debated as to the form of a permanent government for that country. Otanes, who contended for a democracy, finding himself in the minority, proposed to yield his preferences to the other two, on condition that neither Megabyzus nor Darius should reign over him or any of his posterity; which being assented to, he made no further opposition to the establishment of a monarchy, and the historian adds:

At the present period this is the only family in Persia which retains its liberty, for all that is required of them is not to transgress the laws of the country.[2]

[1] Address before the George Washington University, Washington, D. C., February 22, 1910.

[2] Herodotus, Beloe's translation, Book 3, p. 165.

This conception of liberty under law, usually regarded as the product of northern independence of character, and by many, as peculiarly an Anglo-Saxon inheritance, thus appears to be of much greater antiquity, and although often obscured, sometimes for prolonged periods, it has ever recurred as the highest ideal of civilized human society.

Herodotus does not explain to us in what respect the liberty guaranteed to Otanes and his descendants differed from that of the other inhabitants of Persia, for, it will be observed, he considers that the family of Otanes enjoyed liberty because all that was required of them was that they should not transgress the laws of the country; but as he does state that the first act of Darius, after he was proclaimed King, was to divide Persia into twenty provinces, and to fix an amount of annual tribute which each was to pay to him, it would seem that the historian meant to indicate a distinction between government and law, and to imply that, while subject to the *law*, the favored family was relieved from the burdens of *government.*

Mr. James C. Carter, in his work on *Law and its Origin*, maintains

> that while Legislation is a command of the Sovereign, the unwritten Law is not a command at all; that it is not a dictate of Force but an emanation from Order; that it is that form of conduct which social action necessarily exhibits, something which men can neither enact nor repeal, and which advances and becomes

perfect *pari passu* with the advance and improvement of society.[1]

Mr. Carter was a profound student of the English common law, and a strong believer in the value of customary or common law, as opposed to statute law, considering that those customary rules of conduct which are the result of the moral consciousness and progressive thought of a people, afford a better working basis for the government of a civilized state, than do rules of conduct prescribed by legislative authority. It is the function of the judges, he says,

> to watchfully observe the developing moral thought, and catch the indications of improvement in customary conduct, and enlarge and refine correspondingly the legal rules. In this way, step by step, the great fabrics of common law and equity law have been built up without the aid of legislation, and the process is still going on.[2]

Yet he recognizes the necessity for the employment of legislative action, or what he calls "the conscious agency of society," in the improvement of the law in its application to the constantly developing and increasingly complex forms of modern existence; insisting, however, that the sole function both of law and of legislation is "to secure to each individual the utmost liberty which he can enjoy consistently with the preservation of

[1] Pp. 344–5. [2] P. 329.

the like liberty to all others," and adding, that every abridgment of liberty demands an excuse, and that its only good excuse is the necessity of preserving it.[1]

It is the acknowledged duty of all good citizens to obey the law, be that law written or unwritten. The unwritten law, representing, as it does, a generally prevailing public conception of right action, must necessarily command the readiest obedience; statutory laws too frequently embody the ill-considered views of a moment, the expression of a temporary emotion, or the successful determination of a portion of the community to impose their will upon the remainder. The sound growth and development of the written law must follow and make more specific and more readily enforcible the principles of unwritten law, or it becomes an instrument of dissatisfaction and even of oppression. Yet no progress in the improvement of laws is realized through either evasion of or organized opposition to the laws of a self-governing people. As Washington said in his farewell address:

> The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.
>
> All obstructions to the execution of the laws, all combinations and associations under whatever plausible character, with the real design to direct, control,

[1] P. 337.

counteract, or awe the regular deliberation and action of the constituted authorities, are destructive of this fundamental principle and of fatal tendency. . . .

However combinations or associations of the above description may now and then answer popular ends, they are likely in the course of time and things to become potent engines by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people, and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.[1]

The history of every civilized state presents many points of resemblance with that of every other. Primitive communities are bound together more or less loosely, dependent upon the need of union for common defense against some external enemy. As civilization progresses, a necessity arises for rules to govern the action of the individuals in the community toward each other, more than to protect the group against the aggressions of other groups; and as communities become more populous, and civilization more complex, rules of conduct must needs be increasingly minute and specific; but the fundamental principle guiding all successful civilization must be to preserve, in as large a measure as is consistent with the welfare of the whole, freedom of action in the individual. In monarchical countries this freedom is menaced more from the head of the state than from other individuals in it. Under democratic governments,

[1] *Messages and Papers*, vol. i., p. 218.

the individual requires more protection against other individuals or groups of individuals; yet the abuse of monarchical power has often resulted in the same injury to the welfare of individuals as is occasioned by abuse of the power which, under democratic institutions, individuals or groups of individuals may acquire over other individuals or groups.

Queen Elizabeth of England, between the sixteenth and forty-third years of her reign, partly for the purpose of raising revenue, and partly to reward her favorites, granted a very large number of patents, conferring upon their holders the exclusive privilege or monopoly for designated periods of time, to manufacture, sell, or deal in specified articles of commerce. The injury to the community caused by these special privileges became so great as finally to produce a most remarkable and spontaneous outbreak both in and out of Parliament, which led to a complete and absolute disavowal by the Queen of any intention to afflict her subjects, the cancellation of the greater part of these patents, and the submission to the judgment of the courts of law of the validity of the remainder. The odious character of these monopolies in the view of the English people of that day, is vividly depicted in the debates of the time. The list of the objects of the monopolies is truly appalling. They embraced the exclusive right to deal in such articles as iron, powder, cards, leather, cloth, ashes, vinegar, sea coals, steel, brushes, saltpeter, and many

others. One Dr. Bennet, during a discussion in Parliament, is recorded as saying:

In respect of a grievance out of the City for which I come, I think my self bound to speak that now which I had not intended to speak before; I mean a Monopoly of Salt. It is an old Proverb *Sal sapit omnia;* Fire and Water are not more necessary. But for other Monopolies of cards, (at which word Sir Walter Raleigh blusht), Dice, Starch and the like, they are (because Monopolies) I must confess very hurtful, though not all alike hurtful. I know there is a great difference in them; And I think if the abuses in this Monopoly of Salt were particularized, this would walk in the fore rank.

He was followed by another member who severely criticized the monopoly in tin. This brought Sir Walter Raleigh to his feet. He could have contented himself with blushes concerning cards, but the attack on the Tin Monopoly compelled him to speak. The arguments he resorted to in its defense have become familiar to later generations.

When the Tinn is taken out of the Mine, and melted and refined [he said], then is every piece containing one hundred weight sealed with the Duke's Seal. Now I will tell you, that before the granting of my Patent, whether Tinn were but of seventeen shillings and so upward to fifty shillings a hundred, yet the Poor Workmen never had above two shillings the week, finding themselves: But since my Patent,

whosoever will work, may; and buy Tinn at what price soever, they have four shillings a week truly paid. There is no Poor that will work there, but may, and have that wages. Notwithstanding, [he declared, evidently perceiving that the argument fell upon deaf ears] if all others may be repealed, I will give my consent as freely to the cancelling of this, as any Member of this House.[1]

Elizabeth was no less shrewd than Raleigh in understanding the temper of the time, and with a clear perception that the public conscience was against her, she disclaimed all purpose of afflicting her subjects, declared she had acted upon bad advice, and authorized her minister, Cecil, to inform the House that

There are no Patents now of force, which shall not presently be revoked; for what Patent soever is granted, there shall be left to the overthrow of that Patent, a Liberty agreeable to the Law. There is no Patent if it be *Malum in se*, but the Queen was ill apprised in her Grant. But all to the generality be unacceptable. I take it, there is no Patent whereof the Execution hath not been injurious. Would that they had never been granted. I hope there shall never be more. (All the House said *Amen.*)[2]

Therefore, declared Cecil—

there shall be a Proclamation general throughout the Realm to notify her Majesties resolution in this be-

[1] D'Ewes, *Journals of the Parliaments*, pp. 645–6.
[2] *Id.*, p. 652.

half. And because you may eat your meat more savourly than you have done, every man shall have Salt as good cheap as he can either buy it or make it, freely without danger of that Patent, which shall be presently revoked. . . . And they that have weak stomachs, for their satisfaction, shall have Vinegar and Alegar, and the like set at liberty. Train Oyl shall go the same way; Oyl of Blubber shall march in equal rank; Brushes and Bottles endure the like Judgment. . . . Those that desire to go sprucely in their Ruffs may at less charge than accustomed obtain their wish; for the Patent for Starch, which hath so much been prosecuted, shall now be repealed.[1]

In the year following these debates, in the great case of The Monopolies, it was held by the Court of Queen's Bench that a patent granted by Queen Elizabeth, to Ralph Bowes, Esq., conferring on him the sole and exclusive right to make and sell playing cards within the realm for a term of years, was utterly void for two reasons: (1) that it was a monopoly and against common law; (2) that it was against divers acts of Parliament. It was against common law because—

1. All trades, as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labour, for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to

[1] P. 652.

have the sole making of them is against the common law, and the benefit and liberty of the subject.

2. The sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects, for the end of all these monopolies is for the private gain of the patentees; and although provisions and cautions are added to moderate them, yet . . . it is mere folly to think that there is any measure in mischief or wickedness: and, therefore, there are three inseparable incidents to every monopoly against the commonwealth, *sc.* 1. That the price of the same commodity will be raised, for he who has the sole selling of any commodity, may and will make the price as he pleases. . . . The 2d incident to a monopoly is, that after the monopoly is granted, the commodity is not so good and merchantable as it was before; for the patentee having the sole trade, regards only his private benefit, and not the common wealth. 3. It tends to the impoverishment of divers artificers, and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary. . . .

3. The Queen was deceived in her grant; for the Queen, as by the preamble appears, intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public; . . .[1]

The principles of this great decision have been recognized as immutable in all later discussions

[1] 11 Coke's Reports, 84 b.

of the subject in the law of England or America. All subsequent statutes against monopolies in England and America depend for their reason on the principles so clearly and so quaintly set forth in this judgment. In the development of our modern civilization, with our boundless natural wealth and our unexampled facilities of transportation and communication, by individual effort working through the machinery of compact organization, the people of the United States twenty years ago found themselves confronted with conditions strongly resembling those which aroused the people of England and their representatives in Parliament to the point of revolt against even so beloved a sovereign as their Virgin Queen. These conditions, however, unlike those of 1601, were not wholly occasioned by sovereign grant, although they were in large measure the result of the abuses of grants by sovereign powers of corporate existence and the facilities of corporate organization. No such comprehensive control over any one of the great industries which were dominated by those large aggregations of capital called "trusts" could have been attained but through the exercise of powers granted by the sovereign States; and the condition, therefore, was strongly analogous to that which arose in the reign of Elizabeth. True, this form of control had not yet resulted in that absolute power which the patentees of Elizabeth possessed over the sale of salt, vinegar, and the like. But mindful that

"Eternal vigilance is the price of liberty," and to employ Webster's immortal phrase, "While actual suffering was yet afar off." We, like our ancestors of revolutionary days, raised our arms, by the peaceful method of legislation, against a power which we perceived rising cloud-like on our economic horizon. We saw the rapid concentration of power over our great industries in a few hands; a power which no free state can long suffer to endure; the power of fixing prices at will, determining the amount of production, dictating the terms on which thousands of our fellow-countrymen might pursue their means of livelihood; the power to exclude or permit competition; all the elements of those monopolies which so stirred the generation of Englishmen from whom the Pilgrim Fathers came. The problem was complicated by the dual nature of our government. Concerted action by the States was impracticable, it may be said, impossible. Efforts at control by one State were evaded, first by removing to another; then by the device of holding corporations. Therefore the evil could not be met merely through the development and application of the unwritten law, although its principles clearly established the unlawfulness of all monopolies. Some means had to be found through the exercise of national power to check the continued concentration of control of the great industrial life of the country.

In this instance, as in so many others in our national history, there was found in the simple but

comprehensive charter of our national government the basis for a solution of the problem, and the prevention of the further growth of these great abuses, by the exercise of what Mr. Carter called "the conscious agency of society" speaking through the national legislature.

In the power conferred upon the Congress to regulate trade and commerce among the States and with foreign nations, there was discovered a weapon adequate to the need; and the simple, comprehensive enactment that all contracts and combinations in restraint of interstate or foreign commerce should be unlawful, and that the Federal courts should be empowered to enjoin and restrain violations of the act, placed in the hands of the national judiciary the power to stem the rising tide of monopoly.

The underlying principle in this legislation is the preservation of the right of the individual to carry on trade and commerce, free from undue control and restraint on the part of great aggregations of individuals or capital; in a word, to protect the individual from the tyranny of a group.

In the development of civilization, after four hundred years, in a new world, the same menace to free institutions had arisen which had recurred from time to time in earlier civilizations; and by the application of the principles of liberty, based upon the fundamental conceptions expressed by the ancient Persian and recorded by Herodotus,

there was found an effective bulwark for the protection of a people from industrial slavery. Well might Washington say as he did in his farewell message:

To the efficacy and permanency of your union a government for the whole is indispensable. . . . Sensible of this momentous truth, you have improved upon your first essay by the adoption of a Constitution of Government better calculated than your former for an intimate union and for the efficacious management of your common concerns. This Government, the offspring of your own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty.

The need and the purpose of our Federal Constitution never have been more comprehensively and accurately stated than in Washington's declaration in the paragraph just read: "for an intimate union and for the efficacious management of your common concerns."

It is because of the increase in the number and character of our common concerns that we are turning more and more to the source of national power for the principles which permit of its appli-

cation to new evils as they arise, and to the extension of benefits and advantages which are of common concern to all; not merely to a particular State or locality.

The framers of the Constitution were thoroughly imbued with the principles of the common law, and they understood the language of the law. In expressing the grant of power which they agreed upon to the new Federal government, they were possessed by no pedantic love of minute accuracy. On the contrary, they employed the broadest and most comprehensive language possible to express the principles which they were formulating, thus leaving unfettered the application of those principles to the manifold and changing phases which future growth and development might make essential to the preservation of the fundamental object of the Union; to provide "for the efficacious management" of "the common concerns" of the whole country.

Very shrewdly were these great powers devolved upon the national government. Hamilton answered the objection that they would tend to render the government of the Union too powerful in the seventeenth paper in the *Federalist.*

Speaking of the principle embodied in the Constitution of legislating for the individual citizens rather than for the States, and adverting to the objection that such principles would tend to make the Union too powerful and enable it "to absorb those residuary authorities which it might be

judged proper to leave with the States for local purposes," he said:

Allowing the utmost latitude to the love of power which any reasonable man can require, I confess I am at a loss to discover what temptation the persons entrusted with the administration of the general government could ever feel to divest the states of the authorities of that description. The regulation of the mere domestic police of a state appears to me to hold out slender allurements to ambition.

Hamilton's mind was ever imperial!

Commerce [he continued], finance, negotiation and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought in the first instance to be lodged in the national depository.

And so there they were lodged by the charter of our indissoluble union; and to them, as our need bids, we turn for the effective vehicles of the progressive development of a great and free country; whose laws must be adequate to cope with every problem which the restless ambition of man can invent, to the end that this land may ever display a signal example of

Liberty and Union
Now and forever
One and inseparable.

II

THE STATE AND THE NATION [1]

THE administration of Federal justice is the most vital agency of the national government. The system of Federal government under which a separate and distinct sovereignty erects its agencies and expounds, administers, and enforces its laws within the States, independently of those of the States, also in theory sovereign, except where and to the extent that they have voluntarily parted with some attribute of sovereignty, is at once the admiration and the despair of foreign students of our institutions, and is often a source of perplexity to ourselves.

The Constitution of the United States and laws and treaties made pursuant to its authority are, it is agreed, the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. But ever since the foundation of the Federal government a constant pressure has developed, first one way, then another; State against nation, nation against State,

[1] The substance of an address delivered at the opening of a new Federal building in Cleveland, Ohio, March 20, 1911.

to magnify or minimize the powers granted to the Federal government by the Constitution.

During the last decade or two there has been a growing tendency in the States to call on the national government for many things which are properly within the functions and duties of the States, but which, through the extension of certain powers granted to Congress, may be also brought within the scope of Federal regulation.

This tendency has been so marked, that at times the States seem to have abdicated an important part of their ordinary police powers, and to have sought to escape their natural responsibilities by devolving them upon the general government.

The principles regulating the respective powers of State and Federal government are clearly stated by Mr. Justice Harlan in delivering the judgment of the Supreme Court in a very recent case.

There are, he says, certain fundamental principles which prior decisions, to which he refers in his opinion, recognize, and—

> which are not open to dispute. . . . Briefly stated, those principles are: That the Government created by the Federal Constitution is one of enumerated powers, and can not, by any of its agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; that a power may be implied when necessary to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made

under the authority of the United States, constitute the supreme law of the land, a State of the Union may exercise all such governmental authority as is consistent with its own constitution, and not in conflict with the Federal Constitution; that such a power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government; that among the powers of the State, not surrendered—which power therefore remains with the State—is the power to so regulate the relative rights and duties of all within its jurisdiction, so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good; and that it is with the State to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own constitution or the Constitution of the United States.[1]

That these principles have not been always clearly perceived is illustrated by the history of the State of Ohio—not to mention that of other States.

In the Ordinance of July 13, 1787, providing for the government of the northwestern territory, certain articles were formulated as "articles of compact between the original States and the people and States in the said territory" for the purpose of

[1] House *v.* Mayes (219 U. S., 270, 281).

"extending the fundamental principles of civil and religious liberty, which form the basis wherein these republics, their laws, and constitution are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments which forever hereafter shall be formed in the said territory." These articles, it was declared, should "forever remain unalterable, unless by common consent."

These articles in effect embodied those fundamental principles of civil liberty which have been the woof and fabric of Anglo-Saxon institutions since they were first set forth in Magna Charta: principles which were also embodied in the first ten amendments to the Constitution of the United States, adopted in November, 1791.

The Ordinance further provided that—

> The navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same shall be common highways and forever free as well to the inhabitants of the said territory as to the citizens of the United States and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

Freedom of trade and commerce was a matter of the utmost concern on the part of the great men who framed this Ordinance and the Constitution of the United States, and the Jay treaty of 1794 secured to the subjects of both Great Britain and the United States the right—

freely to pass and repass by land or inland navigation into the respective territories and countries of the two parties on the continent of America (the country within the bounds of the Hudson Bay Co. only excepted), and to navigate all the lakes, rivers, and waters thereof, and freely to carry on trade and commerce with each other.

The Ordinance of 1787 also made provision for the erection of States out of the territory to which it applied, whenever any of such States should have 60,000 free inhabitants, provided the permanent constitution and State government which should be formed "shall be republican and in conformity to the principles contained in these articles."

That portion of the articles which dealt with the government of the territory, provided for the appointment of a court to consist of three judges, with common-law jurisdiction, and whose commissions should continue in force during good behavior. Among the provisions which were declared to be unalterable save by common consent was that—

The inhabitants of said Territory shall always be entitled to the benefits of the writ of habeas corpus and of the trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law.

The principles of government embodied in the Federal Constitution, adopted in 1789, were a

distribution of powers among three separate coordinate branches—legislative, executive, and judicial. The legislative power was to be exercised by representatives of the people, and senators representing the States, with the participation of the President, to the extent of recommending legislation and exercising a qualified veto over measures passed in Congress. The executive officers were to be chosen for definite terms, and during such terms were to be free from interference by either of the other branches of government, save when impeached for high crimes or misdemeanors; and the judicial power was to be exercised by judges holding office during good behavior and free from interference or control by the other branches of government. An independent judiciary was regarded by the framers of the Constitution as absolutely essential to the success of the government created by it.

Pursuant to the provisions of the Ordinance, a constitution was adopted, and the State of Ohio was admitted into the Union on March 1, 1803. Those who prepared that constitution had before them as models and guides the Ordinance for the government of the northwestern territory, the Constitution of the United States, and the Jay treaty. But they were unable to grasp the wisdom embodied in those famous documents.

Rufus King, in his sketch of the history of Ohio, says of this constitution:

It was framed by men of little experience in matters of state, and under circumstances unfavorable to much forecast. With such a model of simplicity and strength before them as the national Constitution, which had just been formed, the wonder is that some of its ideas were not borrowed. It seems to have been studiously disregarded, and Ohio, as well as some States farther westward, which her emigrant sons, with filial regard, induced to follow her example, has suffered ever since from a weak form of government, made up in haste and apparently in mortal dread of Gov. St. Clair. . . . Briefly stated, it was a government which had no executive, a half-starved, short-lived judiciary, and a lopsided legislature.[1]

The student of American history must constantly wonder at finding so often developed a hostile attitude toward the judiciary. Disputes which can only be settled by the arbitrament of independent and incorruptible judges constantly arise between citizens, between States, between a State and the nation. The existence of a standing body of judges—men of learning and character, withdrawn from the ordinary pursuits of business life, and independent of all influences which might warp their judgment and prevent them from reaching decisions based only upon the fair and unbiased consideration of the law as applied to the evidence in the case—would seem to be of such obvious advantage to every member of the community that no argument were needed to demonstrate it.

[1] *Ohio*, by Rufus King. Houghton, Mifflin & Co., 1903.

Yet in the early history of Ohio, as in the later history of some of our present States and Territories, from time to time waves of feeling hostile to the judicial establishment arose, generally originating in the resentment of some class of the community to judicial decisions preventing that particular class from carrying out schemes for its own advantage, to the detriment of the rest of the community.

The latest manifestation of this spirit in constitutional provisions for the recall of judges by popular vote, is, in effect, the same as that which was resorted to in Ohio in 1809, as a means of punishing the Common-Pleas judges who had ruled that an act of the Legislature granting to justices of the peace jurisdiction to try suits for any amount not exceeding $50 without a jury, was a violation of the right of trial by jury secured by the Seventh Amendment to the Constitution of the United States, in all suits at common law where the value in controversy shall exceed twenty dollars.

Although this decision was affirmed by the Supreme Court of the State, an effort was made to impeach the judges who rendered it, and when this failed, resort was had, as Rufus King states in his history of Ohio, "to a more efficacious course":

> The term of office was seven years, and the term of seven years since the State constitution went into operation was just expiring. Most of the judges had been chosen much later, either as new appointments

or to fill vacancies. It was resolved by the majority in both branches of the assembly that their terms of office must all be limited by the original term of those who had been first appointed. The three supreme judges, three president judges of the common pleas, all the associate judges of that court, more than a hundred in number, and all the justices of the peace, were discharged at a swoop.[1]

The history of Ohio furnishes no repetition of such an attack on the independence of the judiciary as this, but it was many years before the courts recovered from the effects of this blow to their independence. Not, indeed, until after the decision by the Supreme Court of Ohio, in 1887, that it was empowered and in duty bound to declare a law invalid if not passed in due constitutional form, did the judiciary of Ohio take the place which that branch of the government must occupy, in order that republican government as it was understood by the framers of the Constitution of the United States may be accomplished.

Ohio, in common with many of the other States, had her experience in resisting the supremacy of the Constitution of the United States and laws and treaties made in pursuance of it. In 1819 she undertook to impose a tax on each of the two branches of the United States Bank, and Osborn, the auditor of state, summarily took from one of the branches a sum of money large enough to cover the tax on both. He was advised by counsel

[1] *Ohio*, Rufus King, p. 314.

that as the State could not be sued by the nation he was secure from Federal redress.

But the supremacy of the national government was declared, and the insufficiency of Osborn's defense demonstrated, in an opinion by Chief Justice Marshall, which is one of the great landmarks of constitutional law. The act of the Legislature of Ohio under which Osborn proceeded, was declared to be in conflict with the Federal Constitution and therefore void; consequently Osborn's act was not the act of the State; he was a mere trespasser, and as such amenable to the process of the Federal court.[1]

Representative republican government is founded upon a practical recognition of the fact that in a busy, prosperous community the average citizen can give but little time to the details of his government. He therefore joins with his fellow-electors in selecting representatives to frame the laws by which he is to be governed, and in choosing the principal officers who are to execute them. His life, liberty, and property are protected from undue invasion by either branch of the government by means of constitutional restrictions upon their powers; and by limiting the terms for which they are chosen, there is required of representatives and agents alike a periodical account of their stewardship. This system secures freedom from undue interference during the term of office, thus affording a reasonable time to work out any given

[1] Osborn *v.* U. S. Bank, 9 Wheat., 938.

problem, and to submit it to the test of experience before it is either approved or condemned. The most beautiful work of the most skilled artisan presents a crude and unlovely appearance, promising anything but perfection, at some stage of its production, and if the capacity of its author and the value of the work were determined at that period, neither the artist nor the work could ever win approval.

Abuses of power occur under all forms of government. The representatives chosen to make laws for State or nation have not always been faithful to their trust. The greater importance of the national legislature, upon which the eyes of the nation are constantly turned, has, as a rule, preserved it from the corruption and the inefficiency of many of the State legislatures. The history of the latter has been too often a history of venality and stupidity. But is the remedy to be found in the overthrow of the whole system of representative government? If the head of a large commercial establishment should discover that his clerks and officials had disobeyed his instructions, stolen his money, and impaired his fortune, would he mend the case by undertaking to do all their work himself, or by so hampering his new employees with restrictions and penalties and threats of instant dismissal for apparent offenses, that their only certainty in not offending would lie in doing nothing? Can public business be carried on by a system based on distrust, any better than private

business can be successfully so conducted? Is not the remedy to be found rather in greater care in the selection of agents and the more rigid enforcement of their responsibilities? Political and social reformers alike are prone to advocate the overthrow of a system rather than the more difficult task of selecting fit agents to carry on government.

How can any man who gives the subject a moment's reflection view with indifference any interference with the dignity and independence of the judiciary? What are judges but impartial arbitrators, to whom any one may be compelled at any moment to turn for protection of life, limb, or property? What will become of that protection if our system of government should subject him to the despoiling rage of the mob, when he asserts the supremacy of law in the face of unjust clamor? Who will be secure in life or property, if judges only can retain their places by consulting the passing fever of the crowd, instead of the laws of the land? A glib, cheap answer is made by the advocates of the destruction of representative government when objection is made to their schemes: "You do not trust the people," they say. On the contrary, it is *they* who do not trust the people. Their whole program is based on the assumption that the people are unfit or unable to choose honest and faithful representatives, and therefore that those whom they do select must be fettered with minute instructions, deprived of any freedom of action, subject to recall, and to be cast out a

once if they do not photograph into instant action every passing wave of popular feeling which may be worked up as a result of misinformation or inflamed prejudice. Under such a system, the people abandon all self-restraint and the necessity of sober second thought, based on accurate information and thorough discussion, before condemning their servants. It would seem an affront to intelligent readers to suggest even the possibility of such a change in the nature of our governments, State or national, were it not that in some of the Western States and Territories such theories have already found expression in constitutions and laws; and even in our Eastern States, there are not lacking those who have seized upon those notions as a gospel which is to bring salvation as to a people sitting in darkness.

Indeed, these ideas seem to have gained such currency in some parts of the country, that one is tempted to exclaim, in the language of James Russell Lowell:

Is this the country that we dreamed in youth,
When wisdom and not numbers should have weight,
Seed field of simpler manners, braver truth,
Where shams should cease to dominate
In household, church, and state?

But if we reflect on the history of our country, we must realize that its people are "the heirs of wise tradition's widening cautious rings," and that in the long run they never yet, as a nation, have proved unworthy of their birthright.

III

COLLEGE MEN AND PUBLIC QUESTIONS[1]

I ASSUME that when you invited me to be your guest this evening you expected me to talk to you about the relations of college men to public questions. As one busied in the tremendously important and equally absorbing business of government, I am greatly interested in meeting you who are coming out into the workaday world to assume your share of the duty and the privilege of making efficient the conduct of our public affairs, municipal, State, and national.

To be truly efficient, a government must be administered honestly and wisely. How these results shall be accomplished, you and men like you should in large measure determine. If you do not play an important part in the solution of this problem, then, whatever proficiency you may have attained here in your studies, whatever prowess you may have displayed in athletic sports, you will have failed to realize the highest aim of university education.

[1] Address at the annual banquet of *The Daily Princetonian*, Princeton, N. J., May 1, 1911.

I congratulate you on coming out into the world at this particular time in its history. Within your grasp is life, and life abundantly. In the words of the Psalmist, your feet are planted in a large room. The world is all before you, where to choose. When your fathers were graduated at the university thirty-odd years ago, the thoughts of the people were centered principally upon industrial and business activity. The railroads were opening up the great western country for development; mining and manufacture were being stimulated by new inventions and increased facilities of transportation, leading to cheapened production and improved product; and the rapid progress in facilities of intercommunication of thought were bringing the ends of the earth into closer touch with each other. The surplus population of Europe poured into our country, and brawny arms from many lands developed our mines and carried on the work of our factories. Plenty was scattered over a smiling land. The way was open for every one. If the older communities were too crowded, there was room for all in the great West. Industry and enterprise and intelligence found ample scope; wealth was garnered in many fields. The power of coöperation and organization in the conduct of business has been applied during the past thirty years to an extent never before dreamed of. Men learned then how far-reaching a control over industry and commerce could be effected through organization. Commercial empires were

formed. Great fortunes were amassed in the hands of a few, but prosperity came also to many. What wonder that materialism became rampant and that the golden calf was erected for worship in the market-places!

But the vision of truth and justice has never wholly failed before the eyes of the American people, and in the full flush of their highest prosperity they heard the voice of the national conscience reminding them that righteousness alone exalteth a nation. In the period of their greatest material progress, they paused to consider whether their institutions were securing justice between man and man.

The laws of State and nation alike during this period of great industrial progress were molded to facilitate the conduct of business on a colossal scale. There was nothing more natural. They met the needs of the hour. True, they went beyond those needs, and, in so doing, they aroused the people to a recognition of the fact that they had gone too far. In the triumphal progress of expanding industry and accumulating wealth, the rights of individuals and of classes of individuals who had but an humble share in it were not always considered. Here and there occasional peaks of garnered riches rose high above the plain, and like the robber barons of the Rhineland, great masters of capital sat enthroned upon them. But their very height lifted them up where all men could see and begin to question how they came there, and

whether it was for the common weal that such inequalities of condition should exist.

So to-day, the great question confronting you as you enter upon the drama of matured life is to find the means of maintaining the true balance between the freedom which the individual citizen must enjoy in order that he may justly prosper, and the protection of the mass of the people from unjust discrimination in favor of the few.

In a country whose government is based on manhood suffrage, any abuse can continue only until a majority of the people are convinced that it is wrong. Then there is bound to be a change. But whether or not the change proposed to remedy the evil is a wise one and will not result merely in jumping out of the frying-pan into the fire, depends upon whether or not the remedy is sufficiently discussed to be thoroughly understood. The first popular impulse to right a wrong often results in committing another wrong. It is in putting clearly before the people the nature of civic ills, and the character and effect of proposed remedies, that men who have had the benefit of systematic university training may best justify their advantages.

Public attention has been and now is focused on these wrong tendencies. Recognizing the existence of evils, two classes of remedies are presented. One class deals with forms of government and new rules of conduct, another class addresses itself to a consideration of the character

of the men who make our laws and carry on our public affairs. It is characteristic of our race that we are more prone, in the face of civic ills, to the making of new laws than to securing a better class of public servants. We pass laws very much as the Chinese buy a paper prayer and hang it up to placate their gods. A common expression on many lips is "there ought to be a law about that." We are in truth a law-ridden people; and this tendency is encouraged and stimulated by those who seek popular favor by pointing to easy remedies for obvious ills. Not satisfied with the ever-swelling volume of statute laws, we are now urged to tinker with our constitutions. There is nothing new in this kind of demagoguery. Mommsen, writing of the Rome of Cato's time, says:

> In reality these demagogues were the worst enemies of reform. While the reformers insisted above all things and in every direction on moral amendment, demagogism preferred to insist on the limitations of the powers of the government and the extension of those of the burgesses.

So in our own day, there is much clamorous advocacy of measures to limit the powers of those charged with the administration of our highly complicated government, and to increase the direct intervention of the public in the conduct of its operations.

The idea that a busy, prosperous, commercial people will, or can, make or administer laws better

than representatives chosen from among the people for the purpose, is one that is almost as old as recorded history, and all recorded history proves its fallacy. But it is said that in the workings of representative government, representatives do not represent the people. I believe that to be a superficial comment. Representatives have and, being human, always will, from time to time fail in their duty; but in the long run, our representative bodies must and do give expression to precisely what the matured thought of the majority of the people demands. They may not yield at once to a spasmodic and artificially stimulated emotion induced by one particular class of society for its own ends as against all other classes. God forbid that they should! But they are inevitably controlled in the long run by the deliberate thought-out will of the people. Impatient reformers, desirous of securing the prestige of immediate success in the advocacy of their nostrums, chafe at delays. But you, who have had the advantage of learning the lessons of the past, will, I am confident, lend your influence to the maintenance of a system of government which protects the legitimate interests of a commercial people from destruction by the sudden gusts of popular passion. You will carefully examine existing laws and institutions before lending your aid to their overthrow. No system of law can be devised that automatically will work good. All laws must be administered by human agencies. The best

human agencies can only be secured by attaching confidence and honor and dignity to the office. A few laws easily understood are of more value than a thousand laws impossible of comprehension. Remember the advice that Don Quixote gave to Sancho Panza for his guidance in the government of the island of Barataria:

> Make not many proclamations; but those thou makest take care that they be good ones, and above all that they be observed and carried out; for proclamations that are not observed are the same as if they did not exist; nay, they encourage the idea that the prince who had the wisdom and authority to make them had not the power to enforce them; and laws that threaten and are not enforced come to be like the log, the king of the frogs, that frightened them at first, but that in time they despised and mounted upon.

A people as numerous as ours cannot as a body lay aside their business occupations and meet in the market-places, like the Athenians, to debate on matters of public concern, and to enact into law or executive order the result of their deliberations. Industry and commerce will long continue to engross the attention of the majority. As education continues to be widespread, it is to be expected that the people will take, increasingly, an active, intelligent interest in public affairs. But the business of governing a highly complex modern civilization, so as to ensure the best results

to the greatest number, will always require the absolute devotion and entire attention of a large number of men. Temporary abuses may be corrected, but continuously effective government cannot be conducted through the spasmodic intervention of popular uprisings. Nor can competent men for the conduct of public affairs be secured if they are to be commissioned as untrustworthy, subjected to constant misrepresentation, and liable to be turned out branded as unfaithful servants at a moment's notice for temporarily unpopular acts.

IV

PALIMPSESTS[1]

IN extending to me the invitation of your Club to be its guest this evening, your President neglected to furnish me with a definite statement of the aims and objects of the Club, or the record of its accomplishments, leaving me to infer from the name you bear, the character of the interests which unite you in this organization. I, therefore, have been left to speculate as to whether or not you devote your meetings to the study of paleography, reading the photographic copies of famous palimpsests which are now sent anywhere by the great libraries of Europe for the convenience of scholars in other lands, or if the name of your Club is merely a figurative suggestion of broader human interests, leading into fields of history and philosophy, far beyond the mere deciphering of ancient writings.

I have preferred to adopt the latter theory, and to assume that your palimpsests are the leaves in the great book of human history, which each genera-

[1] Address before the Palimpsest Club, Omaha, Neb., Oct. 16, 1911.

tion seeks in part to read for its own edification, and in part to wipe clear of the records of previous ages, in order that it may write its own story upon them.

The scribes of the early Christian centuries sought to erase from the parchment and vellum, which then were limited in quantity and costly to procure, the earlier writings which they bore, without thought or care that these discarded records might be of infinitely more worth to humanity than those for which they had to make room. They sought to expunge the thrilling tales of Troy's siege—that wide expanse "That deep-brow'd Homer ruled as his demesne"; the treatise on the Republic, which preserves to us a knowledge of the political acumen of Rome's greatest orator; early Greek versions of the Christian gospels and epistles; that work which has made the name of Euclid synonymous with Mathematics, and many other works of lasting value; and they covered the pages, once glowing with the immortal language of Homer, Cicero, John, Luke, or Paul, with the dry-as-dust scribblings of an Ephraem Syrus and a Severus of Antioch.

But great ideas, once recorded, seldom perish! Eternal truths survive; and the destructive work of these pedants failed in its purpose, for what they wrote was forgotten, while from under the overlay of tedious monastic dialectics and incomprehensible verbiage, the eager, thirsty students of "the new learning" uncovered the records of

The glory that was Greece
And the grandeur that was Rome.

Their discoveries awakened the mind of Europe, as the sunshine opens the flowers. In the words of Symonds, the Renaissance wrought

the recovery of freedom for the human spirit after a long period of bondage to oppressive ecclesiastical and political orthodoxy—a return to the liberal and practical conceptions of the world which the nations of antiquity had enjoyed, but upon a new and enlarged platform.

That rediscovery of the classic past restored the confidence in their own faculties to men striving after spiritual freedom, revealed the continuity of history and the identity of human nature in spite of diverse creeds and different customs; held up for emulation master works of literature, philosophy and art; provoked inquiry; encouraged criticism; shattered the narrow mental barriers imposed by mediæval orthodoxy.

From these records of the splendid development of the Greek and Roman intellect, and its keen appreciation of what was most beautiful in nature and most attainable in art, the modern European mind was quickened into an activity whose impulse, projected across four centuries, now stimulates what is best and most vital in the thought of our own time in our own country.

Emerson says:

The advancing man discovers how deep a property he hath in all literature, in all fable, as well as in all

history. He finds that the poet was no odd fellow who described strange and impossible situations, but that universal man wrote by his pen a confession true for one and true for all. His own secret biography he finds in lines wonderfully intelligible to him, yet dotted down before he was born.

It is only when we come to realize that the men who in long-gone-by days "fought and sailed and ruled and loved and made our world" were men like us; that their joys and sorrows, their triumphs and defeats, were such as we suffer and enjoy, and that the record of their thoughts and actions is but a chapter in our own history, musing upon which we may take note of our own dangers, find solutions for our own problems in this our day and generation, and say,

The future I may face, now I have proved the past.

How extraordinarily modern and human and real, for example, the Romans of the second century become as we read the letter of Pliny the younger to the Emperor Trajan, written while the former was proconsul in Bithynia, in which he tells of a fire that had broken out at Nicomedia, and consumed not only several private houses, but also two public buildings, the town house and the temple of Isis, though they stood on opposite sides of the street. He says:

The occasion of its spreading so far was partly owing to the violence of the wind and partly to the indolence

of the people. . . . The truth is, the city was not provided either with engines, buckets, or any one single instrument to extinguish fires.

He then unfolds to Trajan a plan to organize a permanent fire company, consisting of one hundred and fifty members. He says:

I will take care that the privileges granted them shall not be extended to any other purpose. As this incorporated body will consist of so small a number, it will be easy enough to keep them under proper regulation.

But Trajan put no faith in the abilities of even so keen-minded and vigilant a governor as Pliny to confine the activities of such a company within its chartered powers. Public Service Commissions had not yet been invented. He wrote in reply:

. . . . it is to be remembered that this sort of societies have greatly disturbed the peace of that province in general, and of those cities in particular. Whatever name we give them, and for whatever purposes they may be founded, they will not fail to form themselves into assemblies, however short their meetings may be. It will therefore be safer to provide such machines as are of service in extinguishing fires, enjoining the owners of houses to assist upon such occasions, and if it shall be necessary, to call in the help of the populace![1]

It would seem as if Trajan must have had a prophetic vision of the famous Moyamensing hose-

[1] Melmoth's *Pliny*, vol. ii., pp. 620–22.

company of our American Philadelphia, and as if, even in far-off Asia Minor, eighteen hundred years ago, corporations were apt to exceed their chartered rights, and to reach out to exercise powers not expressly granted to them—a tendency which has been at times observed of incorporated bodies in later days!

The fear of the tumult which Trajan seemed to think incident to assemblies of members of the corporation "however short their meetings may be," was like the dread the rulers of France had of the consequences of calling together the States-General in 1789. Self-restraint in nations, as well as in individuals, is the result of the *exercise* of regulated freedom, of liberty under law. It is not the product of centuries of tyranny. It can only be acquired by practice.

But the study of our palimpsests suggests another thought; and that is, that before we seek to wipe out what has been written on the books of human experience by those who have gone before us, we should first carefully read, consider, and make sure that what we propose to substitute is really better than what we would destroy. There is a certain presumption arising from age alone—not an irrebuttable presumption, to be sure; but institutions which have stood the test of an hundred years or more are entitled to be considered presumptively good for much longer, unless the evidence is very clear that they have broken down under the strain of new burdens which advancing

time has imposed upon them. When automobiles came into general use, it was not thought necessary to depress the roads and carry them by tunnel under all intersecting streams; we merely strengthened the bridges so they would bear the increased weight. Growth by modification and adaptation, rather than by staccato-like inventions, is the safest progress for human institutions.

Man is said to be the only animal that profits by the experience of others. Sometimes it would appear as if he were not entitled to this distinction.

Emerson says:

> All history becomes subjective; in other words there is no history, only biography. Every soul must know the whole lesson for itself—must go over the whole ground. What it does not see, what it does not believe, it will not know.

But a wise generation will endeavor to avoid repeating experiments which previous history has demonstrated to be doomed to failure. The meeting of the States-General in France in 1789 brought together a great body representative of the different classes of the French people. They were almost all inexperienced in the science of government. They were wholly inexperienced in legislation. Nearly two centuries had elapsed since the representatives of the three estates of the realm had met to discuss measures affecting the nation. The delegates to the National

Assembly of 1789 were therefore at best mere theorists. They were guided by philosophical hypotheses, unaided by experience. They were all too familiar with evils and abuses. They resorted to philosophy and speculation—not history—for remedies. They proposed to enact into law the wildest Utopian dreams. They conceived of man (that is, the abstract political man who was to be the unit of control in the new state they dreamt of) as possessed of the most exalted virtues, and of a wisdom which sprang, like Minerva, full armored from the head of Jove. Being endowed by nature with virtue and wisdom, he needed but the opportunity to decide, in order that he should direct the state along the paths of justice to success in protecting life and property at home, and in sustaining the honor of the nation abroad. This virtue was not found in the chosen representatives of the people, but only in the individual when he acted as an elector in exercising direct popular sovereignty. Therefore, the nation must in its aggregate capacity make its own laws, determine all controversies, and initiate and control all actions which the exigencies of national existence might require. What the people willed at any moment must become at once the rule of action for the commonwealth. Representatives of the people suffered a loss of virtue by being detached from the mass to perform especial functions. At best, they should serve only as a large committee to suggest to the whole body of the people the prob-

lems which the people would then solve. They must be under the direct control of the popular will, or they would cease to be truly representative of the people. There was no God but Reason, and Rousseau and Tom Paine were his prophets!

And after they had hurried from one excess to another, had killed their monarchs and every leader who for a brief while stood forward as the chief exponent of the prevailing theories—Robespierre, Danton, Marat, Joubert—and an hundred others of lesser note, and had demonstrated the utter insecurity of life, liberty, and property under such a system, a military absolutism was erected on the ashes of unrestrained democracy.

Again, in 1848, after the revolution of July, the poets and philosophers attempted to conduct the government of France on the basis of unrestricted and immediate control of the government by the popular will. This time the experiment was of shorter duration, and nearly twenty years of the empire of Louis Napoleon followed.

But back in 1787, there gathered together in America a body of men of different caliber. They had won liberty, and they were resolved it should not degenerate into license. They conceived of a government which should be adequate to the protection of life, liberty, and property at home, and should command respect abroad. They took the philosophical theories of the time and applied to them the touchstone of history. They rejected

Jean Jacques Rousseau and Tom Paine, and adopted the principles of Magna Charta, and the Bill of Rights. Dealing with theories of government on the basis of examining all things, holding fast that was best, they refrained from adopting those institutions which experience in the past had demonstrated to be fraught with peril to freedom, however attractive they might seem as abstract philosophical theories. Without the demonstration which the experience of the French nation was shortly to furnish, they distrusted the practicability of the doctrines of Rousseau and the Encyclopedists. They found more useful and robust suggestion in Montesquieu's famous *Esprit des Lois*. They turned to the history of popular government in the past—in Greece and in Rome—and in their plan of a government which was to secure the blessings of liberty to themselves and their posterity, they carefully guarded against those opportunities for self-destruction which had proved the ruin of the republics and democracies of the older world.

As one reads the inadequate record of their deliberations, one is filled with wonder and admiration at the evidence of their thorough familiarity with the history of governments in the past, and at their prescience in respect of the future. They were at pains to save their country from the disasters which past history demonstrated had ever attended upon popular forms of government. They never lost sight of the fact that a people is

but an aggregation of individual men, and that if a government by the people is to be successful and lasting, it must contain within itself some means of protecting the whole people from the follies or weaknesses or ignorance of a minority who, under the impulse of temporary emotion, may draw to themselves enough support to accomplish what reflection and sober second thought would demonstrate to be an injustice, but which might be discovered too late to prevent irretrievable mischief.

So they devised a scheme of representative republican government, with a distribution and balance of powers, so adjusted that it can never fail to respond to the real deliberate judgment of the people, but which is strong enough to protect the commonwealth from the effect of temporary impulse, resulting from misinformation, passion, or prejudice. They conceived of a government which would be dignified and respected, in which the whole people would be represented, and which should be controlled and directed by the best thought and highest ideals of the people. Their experience in the colonial governments had taught them the great advantage of establishing a government on certain fundamental outlines contained in a written constitution which should represent the deliberate will of the whole people, and which should limit and control the action of the representatives of the people in making, interpreting, and enforcing the laws. This constitution, they

provided, should be altered only by the affirmative act of a real majority of the whole people. They did not leave it to be the sport of a minority, taking advantage of the apathy of the majority. It was to be the settled government of all, until a secure majority of all should affirmatively and deliberately determine to change it. By these means they secured for the nation the benefits of that self-restraint which in nations, as in individuals, coupled with self-knowledge and self-reverence, lends life to sovereign power. Their government was a growth—a continuity of the institutions which the hardy, upright, self-respecting men of the American Colonies had worked out for the preservation of that liberty and independence which to them was dearer than property or life.

It was the product of the best thought and the highest statesmanship of the American people. The civilized world has done homage to their learning, their wisdom, and their practical common sense. While the institutions established by the Constitution of the United States thus far have resisted the recrudescence of the theories of the philosopher of Geneva, and his modern disciples of Oregon and Oklahoma, they have been found sufficiently elastic to adapt themselves to the changing needs of a people whose numbers have increased from three millions to ninety, and for the government of a nation of forty-six States, and possessions beyond the seas. The cardinal principles of the government are simple: a nice balance

of powers, confidence in representatives who make, judges who interpret, and administrators who execute the law; freedom from interference for a period adequate to enable them to demonstrate the fidelity with which their tasks are discharged; and accountability to the people when this period is passed.

But iconoclasts, such as arise in all ages, threaten the overthrow of this system. Already their destructive work has been commenced in several States. Opposition to them is sought to be discredited by the cheap and ready cry that those who oppose the proposed changes do not trust the people. The sponge and the eraser of the eager social reformer and the more eager demagogue are set to work on the pages to which were appended the immortal names of Hamilton, Franklin, Madison, and Washington. So vociferous are these iconoclasts, and so apathetic the friends and supporters of constitutional government, that one is tempted to share the fears of Hamilton that it may be

> . . . forgotten that the vigor of government is essential to the security of liberty; that in the contemplation of a sound and well informed judgment, their interest can never be separated; and that a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found a much more cer-

tain road to the introduction of despotism than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues and ending tyrants.

To an American of to-day, the suggestion of an individual tyrant accomplishing the overthrow of liberty in this country seems grotesquely absurd and impossible. But the overthrow of representative republican government of the type established by the Constitution of the United States, and by those of practically all the States of the Union until a very recent date, eliminates entirely the element of protection of the commonwealth from the immediate and disastrous action of an organized and aggressive minority; weakens government, by making executive officers dependent entirely upon momentary popular favor, and results in the destruction of all security of property and liberty, by creating a spineless and servile judiciary. Even the worst individual tyrant has limitations to his rapacity and his cruelty. But an unrestrained populace, stimulated by strong emotion, knows no limits, and is capable of any extreme.

"Know this also," says Carlyle, in closing his *French Revolution*,

that out of a world of unwise nothing but an unwisdom can be made. Arrange it, constitution-build it, sift it through ballot-boxes as thou wilt, it is and remains

an unwisdom—the new prey of new quacks and unclean things, the latter end of it slightly better than the beginning. Who can bring a wise thing out of men unwise? Not one!

It has been the boast of America that our system was carefully framed so as to protect against unwisdom, by a system of checks and balances so devised as to secure equal rights to all, and to prevent injustice to any.

Before we wipe away the institutions so carefully planned by our forefathers, to write over their ruins the new social contract, and the revised and latest edition of "The Rights of Man," shall we not pause and consider whether we would not throw away a priceless heritage, and like Esau, barter away a precious birthright of freedom for a mess of delusive pottage?

V

BUSINESS AND THE LAW[1]

FROM time immemorial, merchants and traders have recognized the necessity of laws to regulate the conduct of business. Human nature, always more or less the same, makes it necessary, to prevent perpetual strife, violence, and bloodshed, that the rights of those engaged in business with each other, and of the public in dealing with them, should be defined and recognized, and some method—the simpler the better—established for compelling the observance of those rights, by awarding redress to any one who is injured by an invasion of them, and by protecting society at large from the consequences of such invasion, by adequate punishments to prevent repetitions of the offense.

From an early day, customs grew up among merchants which became settled and uniform, and were recognized as binding upon them, and as embodying the best methods of securing fair play among them and protection to the public. As

[1] Address before the Commercial Club, St. Louis, Mo., Feb. 16, 1912.

early as the fourteenth century, in England, in the towns where foreign commerce was carried on—known as "staples" or "staple markets"—there were established special tribunals for the ready enforcement of these laws of trade. Those early courts—known as "Courts Pie Poudrous" or "Pi-Powders"—set an example which it would be well for more modern tribunals to imitate—of sitting during fair time from hour to hour, both morning and afternoon, hearing and disposing of cases in a summary and informal way, so that disputes arising with regard to contracts, charter parties, bills of lading, or other commercial matters, might be disposed of, in the language of the old books "between tide and tide." The very name of these courts carries the suggestion of a simplicity and expedition of legal procedure as far remote from our modern ways as the time of Edward III is from this age. We can imagine strange-looking bearded men, speaking all manner of foreign tongues, and clad in sea boots and fur-lined robes, with the dust of the market place on their feet, and the salt of the sea in their hair and beards, making their complaints or their defenses before the judges of the staple, producing their witnesses, and receiving speedy judgment, according to their own usages, at the hands of judges in whose fairness and wisdom they had confidence, and so going their ways recompensed, or cast in damages, as the justice of the case might require, ere the sun went down. These courts were

established, as a statute of Edward III declared, to give courage to merchant traders to come with their wares and merchandise into the realm. And the knowledge of the fact that foreign merchants might come and trade according to the best usages of the business, and be protected by the summary administration of justice, gave an impetus to the commerce of Great Britain which carried her into the first rank among the nations of the world. The staple system was established not only for the purpose of facilitating the collection of the royal customs, but to insure the *quality* of exported goods.

Commercial morality [says a writer on the history of this system] was none too high in those days, and the average trader fully appreciated the maxim *caveat emptor*. He had not the ingenuity of his nineteenth century successor, but such tricks as he knew for the undoing of the consumer he, too, practiced with energy and perseverance.[1]

The rules and usages of the merchants ripened into a code which later on was recognized as the Law Merchant, and came to be administered in the royal courts of law, and has come down to us as part of our common law, much of it now being embodied in statutes of the different States.

During the years while the foreign trade and commerce of Great Britain was receiving its great impetus through the Staples, the makers of various

[1] *Select Essays in Anglo-American Legal History*, vol. iii., p. 22.

articles of commerce in the towns began to organize themselves into associations or guilds, which regulated the processes of manufacture, and the prices, materials, tools, working hours, wages, number of apprentices and the nature of their duties. They punished dishonest workmanship, the use of bad material, short weights and measures. In a word, the traders of every town united in the protection and pursuit of their common trade interests. By and by, these guilds were recognized by law, charters were granted to them by Parliament, and they controlled in each city the conduct of every particular trade or business. In course of time, as towns grew, some masters prospered more than others, the wealthier members grew into a guild aristocracy and endeavored to monopolize the guild privileges, and sought to keep the inferior class from sharing in them. As a result, the excluded workmen formed new associations—craft guilds of their own—and being more numerous than the members of the merchant guilds, became more powerful, and gradually superseded those older organizations whose selfishness had brought about their own extinction. In other words, the successful associations of merchants of the fourteenth century did precisely what similar organizations have done in the nineteenth and twentieth centuries. Insiders became selfish, and excluded from membership all but the favored few, so that by keeping down their numbers they might keep up their profits; they sought to absorb to them-

selves the entire control of lines of business; they excluded all competition. In the end, the number of outsiders became so large that they formed new guilds—or unions—imitated the selfish performances of their predecessors, and the outsider who was not a member of either a merchant guild or a craftsmen's guild was ground between both. So the law of the realm had to be invoked—in a measure, the old common or customary law, and sometimes direct legislative action—to protect the individual against the tyrannous power of these organizations. The problem arose then, as it has in larger form in our own times, of how to adjust the rights of *all* the people with the legitimate rights of a *small number* of the people associated together for the conduct of a particular business.

Centuries rolled by; America was discovered, colonized, grew up mid stress and storm; fought for independence, won it upon the basis of a creed that all men were endowed with certain inalienable rights, among which are life, liberty, and the pursuit of happiness, and that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed. Such a government our fathers established by means of a written constitution, adopted for the declared purpose of establishing justice, insuring domestic prosperity, and securing the blessings of liberty to the people of the United States and their posterity. Lecky, in his *Democracy and Civil Liberty*, says that the ends which the great

American statesmen set before them and which they in large measure attained in framing the Constitution, were:

to divide and restrict power; to secure property; to check the appetite for organic change; to guard individual liberty against the tyranny of the multitude as well as the tyranny of an individual as a class; to infuse into American political life a spirit of continued and of sober and moderate freedom.

During the first fifty years of national existence under the Constitution, it may be said that these ends were almost absolutely attained. Lord Acton, writing of this period, says that the causes of Old World trouble—popular ignorance, pauperism, the glaring contrast between rich and poor, religious strife, public debts, standing armies, and war—were almost unknown. "No other age or country, had solved so successfully the problems that attend the growth of free societies," and, he adds, "time was to bring no further progress."[1] I pray that the day may be long distant when it can truly be said of American institutions that time can bring them no further progress. Progress is only attained by meeting and overcoming problems. The more complex and apparently insoluble the problems, the greater the progress to be realized by solving them. Growth of nations, as of individuals, is the result of struggle. The same causes which operated to cause the Old

[1] Acton, *Essays on Liberty*, p. 56.

World trouble referred to by Lord Acton, exist in a far less degree in our country than they did there. We have no religious strife; our public debts are not onerous; we have had but one great war, and that half a century ago; it was not a war of aggression, but a war which rid us of the great moral evil of slavery, and established a basis of united and reinforced nationalism strong enough to cope with the great problems the future holds for us. We have no popular ignorance, but a widespread popular intelligence. True, we have had, and we still have, some glaring contrasts between rich and poor. Progress and poverty have gone hand in hand, but to nothing like the same extent as in the greatest civilizations of ancient times.

The century just passed has been one of unparalleled progress in the application of science to industry and the affairs of daily life. The almost boundless natural resources of this great American continent have been developed and applied in the light of a rapidly increasing knowledge of the laws of nature, and an equally increasing control over natural forces. A century which saw the application first of steam and then of electricity to transportation, the invention and development of the electric telegraph, wireless communication, the invention of the cotton-gin and the spinning jenny, the automobile and the aëroplane, and a thousand other devices, cannot be judged by the standards which should be applied to any other

age in recorded history. Population increased as by magic; the most energetic and most adventurous of the peoples of the Old World poured into our country. Our natural resources were exploited, developed, controlled, and marketed with bewildering success. Wealth accumulated as by the wave of a magician's wand; little heed was given to the laws of business or of business association, because the field was open to all, and energy and enterprise were impatient of restriction or control. A community into whose lap was poured increasing and apparently inexhaustible wealth, took little interest in suggestions to interfere with the activities of men who were achieving such conspicuous success. But man is an insatiable creature; though he heap up untold riches, yet his appetite grows by what it feeds upon, and he is never content to cry "Enough!" The more he has, the more he covets, and the less willing he becomes to allow others any share in the common wealth from which his power or his cunning can exclude them. The garnered fortunes of American merchants and of American specu ators assumed such magnitude, the influence exerted by them in public affairs became so obnoxious to the welfare of the community and to the safety and continuance of free institutions, that a gathering wave of protest began to rise and to sweep with increasing force across the land. It found expression in legislation of a character which would have seemed impossible to the statesmen of our older

days. Students of Jefferson, who believed that that people is best governed that is least governed, were appalled at the growing volume of legislation which they claimed interfered with the exercise by men of the ordinary avocations of life. Indignant protest cried out from the ranks of those whose onward career towards increasing wealth and power was sought to be thus checked. It was the old problem that had arisen in Europe over five hundred years previously—the problem of protecting the rights and opportunities of all the people against the selfish tyranny of the organizations or groups that had acquired wealth and power so great as to lose sight of the rights of all those outside of their own ranks. The evil was to be met by the application, on behalf of all the people, of those same rules of fair trade which had grown up among the sturdy traders of the fourteenth and fifteenth centuries.

The first subject to be wrested from the unfair control of special groups or interests was the greatest agency of modern commerce—transportation by railroad. During the years of development of a new country, railroad charters had been freely granted by State governments to any who chose to take them, and the right of eminent domain was freely conferred upon all who were bold enough to undertake the construction of lines of railroad. The shrewdest merchants were swift to perceive the advantage of controlling transportation, and the greatest impetus to monopo-

listic control of industry was afforded by securing special privileges in rates and methods of transportation.

One looks back on the history of American railroad construction with mingled feelings of pride and shame! Pride in the enterprise and courage with which men undertook to build lines of railroad in the face of every conceivable natural obstacle, and invoked the highest engineering skill to overcome difficulties which in any other age would have daunted and defeated the most enterprising; shame at the conscienceless way in which the public was defrauded by the issue of securities without value, by the methods with which trustees of great properties juggled with them in their own interests, and enriched themselves at the expense of those they should have protected. One looks back on the history of the growth of American business during the last forty years with the same mingled feelings—admiration and pride at the splendid development of methods of production and distribution which made American manufacturers and American merchants the foremost in the world; which invented the department store and the mail-order house; which devised the most perfect system of manufacturing and delivering goods to the purchaser ever known in history—but shame at the birth and growth of a system of underhand, concealed, and unfair dealing, whereby competition was stifled, industries monopolized, equality of opportunity denied, and charters of

incorporation, granted for the benefit of all the people, made instruments for the enrichment of the few at the expense of all others.

The first attempt to cope by national legislation with the evils which had resulted from the enormous growth of wealth in our country, therefore, naturally was directed at the management of the railways; for that subject concerned almost every inhabitant of the country. Probably no business man to-day could be found who would not applaud the legislation which, beginning with the Interstate Commerce Act of 1887, has been added to, amended, expanded, and finally has found its last expression in the act of 1910. By these statutes, the principle has been firmly established that rates shall be reasonable; that there shall be no unjust discrimination between those who use the railroads; and that any violation of the laws declaring these principles shall be punished with fine and imprisonment. The railroad companies consistently and persistently have fought every effort to make these laws adequate to the protection of the in- individual merchant or shipper, and to secure him that fairness and equality of treatment to which every citizen is entitled; but step by step the battle has been fought and the victory won for the whole people.

Next, the attention of the national legislature was directed to the great artificial aggregations of manufacturers and dealers which had grown up under the lax system of legislation existing in every

State in the Union, whereby charters were handed out, without inquiry, conferring power to engage in any form of industry; and legal immortality, and immunity from personal liability upon any group of men who could raise enough money to pay the nominal organization fees. Like the medieval guilds, many of these associations had grown rich and great, and in the plenitude of their power, had ruthlessly invaded the rights and trampled on the liberties of every one not within their organization. Those who were in control of their machinery had in many instances utilized their position and the advantages of the knowledge and power which they possessed, to enrich themselves even at the expense of their own constituents; and these combinations had become so strong that nothing but the power of the nation was adequate to check them and drive them back to their proper bounds. A growing recognition of these evil conditions led to the enactment of the Sherman Law of 1890. I do not propose here to review the history of that law—of how it was first treated with contemptuous indifference; how the Supreme Court of the United States at first failed to grasp its proper application; how a better knowledge of its scope and meaning grew; how decision after decision finally made manifest to the people their power, by means of that law, to check the growing evil of unfair methods of controlling the trade and commerce of the nation, and finally through it to break up the great monopolies of trade and prevent new ones from forming.

The law at first was almost murdered in the house of its friends, because there was given to it by some courts and some judges a construction which, if finally established by the Supreme Court, would have reduced it to absurd consequences, and made of an act established for the purpose of preventing unlawful restraints upon the commerce of the nation, a means of accomplishing the destruction of that commerce.

Surely, no thoughtful man, reading the history of his country during the past sixty years, can fail to feel thankful at the demonstration of the power of his government peaceably to cope with the great forces of monopoly and unfair trade, and to force back within their bounds the scope of successful enterprise; so that, however rich, however powerful in the progress of trade and commerce they may become, men shall be compelled to recognize the rights of others, and be prevented from, by unfair competition, achieving the ruin of all competitors.

This is a big country; large capital is required to conduct business in a manner adequate to the needs of an hundred millions of people. We cannot go back to the days of small trading, and continue to supply the wants of our people at prices which would be adequate returns on small investment. The wages reasonably demanded by American standards of living can only be paid as incident to the conduct of business on a large scale. But the essential principle, upon the enforcement of which

alone can the welfare of the people permit the continued existence of artificial bodies with large capital, is the recognition of the power of the government as greater than that of any corporation or group of men, and the constant exercise of that power to preserve the rights of the humblest citizen as well as the richest.

Probably negative, restrictive legislation has gone as far as is necessary. The great principles that the highways of commerce shall be open to all on equal terms to those under like conditions and similar circumstances, and that men may not band themselves together by unfair methods to destroy competitors, are now fully recognized by law, and adequate means are provided to prevent violations of that law. Most men are learning the difference between a combination to get business, and a combination to get a competitor.

What is left as yet untouched, is the provision by national legislation of some adequate law of association, under which there may be retained the great advantages of coöperative effort in the conduct of business—which in our day and generation must be great in volume successfully to meet the needs of the people—while at the same time protecting the people from the consequences of unrestrained association, which in the past has resulted in unfair competition and grossly unequal fortunes. Nothing but continued confusion can result from leaving the creation and regulation of these associations to the varying caprices of forty-

eight or fifty States. Until the national government courageously faces the question and accepts the responsibility which the assertion of power involves, the proper equation between business and the law cannot be adequately settled. In our corporate laws we have shown little of the sagacity which characterized our forefathers in framing our constitutions.

In the development of a new continent there was, of course, a tremendous advantage in laws which enabled a number of coadventurers to contribute toward a common fund to be devoted to a particular enterprise without liability beyond the amount so contributed. But when this contribution became a mere sham and subterfuge; when the actual capital of a corporation was only the money borrowed on the faith of a fictitious capital, and representations as to its business, in which imagination and hope played a much greater rôle than facts, corporate organization became in a large measure an instrument for fraud. When partnerships between corporations were legalized by State authority, and one creature of legislation extended its control over an indefinite number of others through the acquisition of shares of their stock, there was built up an irresponsible engine for monopolizing business such as the world had never witnessed. It is probably safe to say that a very small percentage of even the successful great combinations of business were created for legitimate business purposes, or in the recognition

of a legitimate demand for business extension. They were often created to enable those who controlled their machinery, and the financiers with whom they dealt, to issue and sell to the public vast amounts of stocks and bonds at prices far beyond their actual value, and thus greatly to enrich themselves at the expense of the country. They piled up fortunes without precedent. Sometimes the stockholders profited, sometimes they did not. Seldom, if ever, did they profit in the same degree as the group who were in control. In the rush and progress of industry, few thought of, and still fewer acted in accordance with, the principle that makes an agent or trustee liable to account to his principal for all the profits realized in carrying out the principal's business. These things are so well known that it is but repeating well-ascertained facts to refer to them. They constitute one of the scandals of an age which has so much in other ways to be proud of. Surely, the generation that has seen these things, that has been made keenly alive to their evil influence in the State and to their false economic results, should not pass away without enacting legislation and securing methods of so enforcing it as to forever prevent the recurrence in the future of any such conditions.

How shall this be done? How can it be done, save through Federal legislation which shall deal with the conduct of business among the States and with foreign nations by associations of men

in corporate form; which shall so regulate the methods of organization of such associations as to prevent those who deal with them from deception concerning their capital or business; which shall, by appropriate provisions, make it certain that every person who invests either by way of stock-purchase or loan shall have at all times the means of securing adequate information concerning the property, business, and earnings and expenses of the associations; and that shall prevent them from being used as engines of unfair competition and destruction of others engaged in fair competition with them? No limit can or should be set to the capacity of such an association for legitimate, normal growth; but it should be impossible for it to inflate itself by mythical values based upon nothing but expectation, hope, or misrepresentation. No individual carrying on business as such, and no mere partnership, has ever yet succeeded in absorbing so large a share of the trade or commerce of the country as to accomplish, or threaten to accomplish, monopoly. Individuals united by secret agreements restraining their own action, and plotting the destruction of competitors by secret, unfair methods, have threatened the stability of trade, abnormally increased the price of products, and disturbed the normal currents of business; but the great monopolies which have arisen have always operated under corporate form, and only by means of controlling corporate organization can the national government effectively

prevent the recurrence of evil, and introduce that certainty into the law of the conduct of business by association which is so requisite to wholesome national trade conditions.

No right-minded man begrudges to superior intelligence the fruits of honest ingenuity and industry; but no patriot would be willing to see Americans become mere servants of great corporate organizations. Only free men—not industrial slaves—can maintain free institutions. The problem before the business men of to-day is, in Lecky's language, to infuse into and retain in American political life a spirit of continued sober and moderate freedom.

VI

ENGINEERING AND CULTURE[1]

THIRTY-FOUR years ago I was an undergraduate of Lehigh, a student in the School of Civil Engineering; destined, as I then thought, to follow that profession as my life work. Fortunately, I found a wise counselor in Dr. Henry Coppée, at that time President of the University, a student and teacher of literature, quick to recognize in a young student a taste for letters, and who, charitably excusing my lack of aptitude for scientific pursuits by attributing to me capacity in other directions, advised me to give up the study of calculus for that of Blackstone. For this counsel I have been always grateful. I refer to it, not as in itself a matter of interest to others than myself, but as evidence of the far more important fact that, even in those early days, the student at Lehigh was given by the faculty that suggestion and direction which was suited to his particular needs. This was hardly to have been expected at that time, for the absorbing interests of the institution

[1] Address on receiving the honorary degree of LL.D., at Lehigh University, Bethlehem, Pa., June 8, 1909.

were then technical and practical, and as a rule the students were endeavoring to acquire a sufficient training in scientific and engineering lines to enable them to make a living; and the faculty was addressing itself to the accomplishment of that effort.

The country was slowly recovering from the panic of 1873; the resumption of specie payments and the era of prosperity was yet several years off. But the great need of railway and industrial development was even then appreciated, and it was felt that soon there would be a great demand for well trained engineers.

The thoughts of many eager young men were therefore centered in preparation for the different branches of engineering, in the belief that those vocations offered the most promising pathways to success and prosperity. Pennsylvania, particularly the Lehigh Valley, was recognized as a great field for a development in which engineering and chemistry would necessarily play a large part.

Foreseeing this, and the advantage to the youth of the Lehigh Valley of proper preparation for its demands, Judge Packer had in 1865 endowed and founded this institution, with the object, as set forth in the *Register* of the University, "to afford the young men of the Lehigh Valley a complete education, technical, literary and scientific, for those professions represented in the development of the peculiar resources of the surrounding region." Analytical chemists and mining and

civil engineers were at first, therefore, as was natural, almost the sole products of the institution, and during the first ten years of its existence, out of eighty-one degrees conferred by Lehigh, only six were of Bachelor of Arts.

The early graduates of the University easily obtained profitable employment, and their successes inspired many others to come here for that training, the commercial value of which met with such ready recognition.

Your honored President, Henry S. Drinker, an alumnus of only three or four years' standing when I entered the University, had already won distinction by his work in the building of the Amboy tunnel, and his accomplishments were taken as an example of the opportunities which were open to every graduate of the Engineering School, although few felt they could acquit themselves with as much distinction as he had done.

It was natural at that time for Americans, with a sense of the great natural resources of their country, to turn to the study and application of practical science, in order that they might aid in the development of those resources, and share in the material results thereby to be realized.

It was natural, too, that on the threshold of a great industrial and material development, young men should address themselves to technical studies with the view to fitting themselves in the shortest possible time for practical work, and that they should be impatient of what seemed to them a

waste of time in such preliminary academic preparation as was required for the professions of law and medicine. This spirit was not confined to Lehigh. It was characteristic of other technical schools; perhaps of all of them. But the engineering profession, it seems to me, has suffered in consequence, and while American engineers have led the world in practical achievement, I think I am correct in saying they never have taken quite the rank in American social and political life commensurate with their accomplishments in their own profession. I ascribe this to the fact that their training has been too purely technical; they have specialized too early in life, and without that broad and catholic foundation upon which special training should be based.

The gentleman who delivered the alumni address at your last commencement said:

> Our older collegians are almost universally graduates of the literary schools. When we go forth into the world at large and come into contact with them, we find that they are unwilling to concede the full value of the technical education.

I do not agree with that statement. All educated men concede the full value of the technical education: its results fully demonstrate it. But the defects in a *merely* technical education are also easily perceived. "It is true," as was said in that address, "that the requirements of civilization have gone far beyond that which is *purely* culture;"

that is to say, an age conspicuous for its ascertainment and practical application of the forces of nature has, of course, gone beyond the period of merely conning the texts of sacred books, after the manner of the Chinese. But the requirements of a civilization that is not purely materialistic have not dispensed with art and literature, nor ignored the tremendous importance of the imagination—the value of poetry and song, in inspiring that impulse which achieves the greatest practical results,—nor can they minimize the importance of the study of the past history of man, for contrast and example, for warning and for emulation.

The art of measuring [says Mommsen] brings the world into subjection unto man; the art of writing prevents his knowledge from perishing along with himself; together, they make man—what nature has not made him—all powerful and eternal. . . . Measurement [he adds] necessarily presupposes the development of the several ideas of units of time, of space and of weight, and of a whole consisting of equal parts, or in other words of number and of a numeral system.

This development—this adequate development of the units of time, space, and weight—is suggestive of that development of the capacity of the mind of man which, availing of the knowledge of man's experience in the past, preserved from perishing by the art of writing, is, or should be, the aim and object of the education of all men. The best superstructure of special technical knowledge is

built on the broad foundation of general intellectual and moral culture.

In an age of great technical and industrial development, the tendency, almost the irresistible tendency, is towards pure materialism—the exalting of practical accomplishment in the production of wealth over the less tangible results of the study of history, literature, and art; and so there is on the part of many men who have attained success in business life, or in the practical sciences, a disposition to extol such accomplishments beyond all others, and to undervalue, or not at all to realize the value of, mental culture in any other than purely technical lines.

It is to be noted, however, that the greatest discoveries in science followed that great intellectual awakening which is known as the Renaissance. The revival of learning, the desire for general culture, which found inspiration in the study of the art, the literature, and the history of the Greeks and Romans, produced as its first fruits the marvelous architecture of Bramante, Michelangelo, and Brunelleschi: the Basilica of St. Peter's in Rome, and the Duomo of Florence; the paintings of Leonardo, Raphael, and Titian; the sculpture of Ghiberti, Luca della Robbia, Donatello, and Michelangelo; the immortal *Divine Comedy* of Dante, and the tender lyrics of Petrarch. Then followed the philosophy of Erasmus and Colet and More, the epic poem of Ariosto, and the historical work of Guicciardini.

Upon this splendid foundation of art and poetry and letters was built the stately structure of modern science.

Copernicus while studying mathematics devoted his spare time to painting. Galileo was an earnest student of literature, accomplished as a Greek and Latin scholar, a musician, and a painter, when the vibrations of the great swinging lamp at Pisa first directed his attention to a problem in physics which led to his great discoveries. Newton pursued his studies at Trinity College, Cambridge, and was graduated in 1665 with the degree of Bachelor of Arts. Galvani and Volta, Priestley and Lavoisier, were contemporaries of Rousseau and the Encyclopedists. The steam engine was invented by Watt, the locomotive by Stephenson, and the spinning jenny by Arkwright, at a time when the whole civilized world was in a ferment of intellectual agitation concerning the rights of man and the theories of social order, and when the history and the literature of the ancient world were eagerly studied for light on the fundamental principles of civil government and individual liberty.

Almost without exception, the great men whose names have been written large in the history of science were men of broad culture, often almost as proficient in literature and art as in science.

Leonardo da Vinci, that nearly universal genius, the reviver of the science of hydraulics, the inventor of the camera obscura, and of innumerable designs for engines of war, tunnels, and canals for

traffic, united, as is well known, these achievements with the highest accomplishments in painting and sculpture. His training was obtained under Verrocchio, goldsmith, sculptor, painter, and teacher, and the universality of his education is testified to not only by his early sketches and paintings, but by the tales of his daring architectural and engineering projects. Bramante and Brunelleschi are known almost as well for their proficiency in art and letters as because of St. Peter's Church and the Duomo of Florence. The versatile Franklin, the all-wise Humboldt, the accomplished Bunsen, and the cultured Priestley, are illustrations of the fact that mere technical education alone has never secured the first rank in the life of the community. The written word is more imperishable than marble and steel.

"The aspiring youth that fired the Ephesian dome outlives in fame the pious fool that raised it."

The epic tales of Homer, the *Divine Comedy* of Dante, the logic of Aristotle, the human drama of Shakespeare, all teach the lesson of human life, in the knowledge of which is to be found power to comprehend and help and guide and lead men, which is the supremest accomplishment of man.

The temple of Diana at Ephesus has crumbled away, but the tragedies of Æschylus and the comedies of Euripides remain. The Roman Forum is an interesting collection of ruins. Only fragments remain to indicate to us the skill of the

forgotten engineers who built the great aqueducts and bridges and temples of imperial Rome. But the Odes and Satires of Horace, the Letters of Pliny, and the Lives of Plutarch make the great men of Rome as real to us as those of yesterday in France or England. From them, from their experience, their ideas, their failures, and their accomplishments, many an inventive mind has caught inspiration and has had imagination stimulated to the solution of great problems in art, in architecture, and in science. The man who goes out into the world without the knowledge of these humanities is therefore lacking in a mental equipment which leaves him subject to a serious handicap. True, he may make it up after leaving college, but it is difficult, and requires exceptional character.

Robert Louis Stevenson, writing of his grandfather Robert, one of the most distinguished engineers of his time, describes him as "a man of the most zealous industry, greedy of occupation, greedy of knowledge, a stern husband of time, a reader, a writer, unflagging in his task of self improvement."

Such a man will overcome all lack of early advantages. But general cultivation to-day is so widespread, that the man who enters upon his life work with a mere technical training, when he comes in competition with men of broad culture is at a decided disadvantage.

That the faculty of this institution shares these

views is demonstrated by this announcement in the *Register:*

> The desirability of a liberal training for an engineer has led the University to offer courses in which, by combining the studies of the several technical departments with the work of the course in arts and science, a student may gain both a literary and professional education, with the corresponding degrees, in six years.

That this is not an extravagant expenditure of time will be appreciated when it is considered that the work of a course in arts and law requires seven years, and in arts and medicine eight.

To quote the *Register* again:

> These courses possess decided advantages over the usual engineering curriculum of four years, the studies of which are necessarily almost wholly technical, and the value of the wider training for which they provide far outweighs the extra expenditure of time.

The combination of the ideals of purely technical study with broad university culture, offers to students the opportunity of becoming not merely engineers, but educated gentlemen.

I have thus far dwelt only upon the practical advantages of this broader than merely technical education. But the refining influence and the intellectual pleasures opened by such study should not be lost sight of.

James Russell Lowell once exclaimed out of the fullness of his scholarly mind:

"Neither would I have you neglect the humanities. I would wish that every one of you could enjoy in the originals, Homer and Virgil and Dante and Rabelais and Goethe." In an essay written shortly before his death he revised this list somewhat, and characterized Homer, Dante, Shakespeare, Cervantes, and Goethe as "the five indispensable authors." Certainly if the work of any one of them were eliminated from our literature and speech, there would be ragged spaces in the fabric.

Is it not then well worth the time and effort of an engineer or a chemist, as well as of a lawyer or doctor, to study and know the works of these great, these indispensable authors? From them each of us may catch something of their knowledge, their insight, their inspiration; and with quickened imagination and sharpened perceptions may more clearly see the solution of problems which have baffled us. As the sage of Israel long ago declared:

> Wisdom is the principal thing; therefore get wisdom, and with all thy getting get understanding. . . . Take fast hold of instruction, let her not go, keep her; for she is thy life.

VII

THE STUDY OF LAW AND THE WORK OF LAWYERS[1]

THERE can be no higher mission in life than the work of educating men in a knowledge of the laws of our country, unless we regard law merely as described in Blackstone's definition, "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."[2] But if we consider our laws as the expression of the will of God working through his people—the manifestation of their sense of right and justice; sometimes, as is true of all human institutions, clouded by misunderstanding and misapplication, but always, in so far as they are permanent and vital, reaching out to establish justice and insure domestic tranquillity, then we come to a realization that the study of the law has a higher aim than the mere ascertainment of police regulations.

No better description ever has been given of the

[1] Substance of an address before the Law School of Georgetown University.

[2] 1 Bl. Com., p. 44.

Anglo-Saxon conception of law than that embodied in the quaint language of the statute 25 Henry VIII, c. 21, in which the Parliament addressed the King in these words:

This your grace's realm, recognizing no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained *within* this realm, for the wealth of the same; or to such other as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same; not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the *customed* and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise.[1]

It is characteristic of the thought and character of our British ancestors, that side by side with a studied courtesy towards their sovereign, there runs through this statute a strain of conscious recognition of the subjection of even the sovereign himself to the will of the people. They declare themselves free from any man's laws *except* such as have been devised, made, or ordained within the realm for the commonwealth, and such as by immemorial custom and usage, the people "have

[1] 1 Bl. Com., p. 80.

taken at their free liberty, by their own consent to be used among them."

This is the language of a people who three hundred years before had extorted from King John the solemn covenant:

No free-man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land.

To none will we sell, to none will we deny, to none will we delay right or justice.

A covenant solemnly made, sworn, and sealed—

that the men in our kingdom have and hold the aforesaid liberties, rights, and concessions, well and in peace, freely and quietly, fully and entirely, to them and their heirs, of us and our heirs, in all things and places forever, as is aforesaid.[1]

The conception that the people themselves are the source of law as well as of government; that kings are but one kind of symbol of popular sovereignty, and that—

when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them [the people] under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security,

[1] Magna Charta, Barrington, Phila., 1900, pp. 239, 250.

found its most concrete formulation in that passage in the Declaration of American Independence which is inextricably interwoven into the woof and fabric of American institutions:

> We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

Among a people, therefore, whose laws are self-imposed—made by themselves for their common weal, or by which they have bound themselves by immemorial usage and custom; and whose government is created by themselves and for themselves—a knowledge of domestic laws and institutions is essential to a continuance of liberty and justice.

This was well understood by those who established our form of government. Washington, in his Farewell Address, advised posterity to resist "the spirit of innovation upon its principles however specious the pretexts," especially warning against alterations in the form of the Constitution "which will impair the energy of the system and thus undermine what cannot be directly overthrown." The best advice he could give as to the means of preventing this impairment and ultimate destruction, was to promote "as an object of primary importance, institutions for the

general diffusion of knowledge." For, he declared, "in proportion as the structure of a government gives force to public opinion, it is essential that public opinion be enlightened."

I take it, therefore, that the object of all properly conducted law schools throughout our country, is not merely to train artisans in the law to exercise their mechanical functions as attorneys, but to teach the young men of this land the principles of the laws by which we govern ourselves, and the history and the nature of our institutions, to the end that there may be disseminated among our people such an understanding that enlightened public opinion may control the enforcement of our laws, the administration of our government, and all projects for the amendment or alteration of laws or institutions.

In that charming old-fashioned novel, *Ten Thousand a Year*, Dr. Warren describes a conversation between his hero, Mr. Aubrey, who had been robbed of his estates by the chicaneries of the attorneys, Quirk, Gammon, & Snap, and the Attorney-General of England whom he was consulting as to the advisability of taking up the practice of the law as a means of livelihood. The Attorney-General was not very encouraging as to immediate pecuniary results.

> Certainly [he said] I have no cause to be dissatisfied; I've done pretty well; but I can tell you that eight years passed over me before I earned enough a year to pay my laundress!

I wonder how many men would prepare themselves for the practice of the law to-day if they believed that there was even a possibility of having to wait eight years before earning enough to pay the laundress!

But, the Attorney-General added—and it is true to-day and here—"if you determine to get on at the bar, you will."

> Certainly [he said] law is difficult; but its difficulty is often greatly overrated, especially by imperfectly educated, and ill-disciplined, quick, sharp men. . . . What is wanted is a clear head; a good memory; strong common sense; fixity of purpose; an aptitude for analysis and arrangement: before these combined, the difficulties of law fly like the morning mist before the sun.[1]

The students of modern American law schools are not left to haphazard and desultory methods of study such as obtained in the time whereof Dr. Warren wrote. At an earlier time, the law student in England enjoyed facilities of study that in the latter part of the eighteenth and the early nineteenth century fell into disuse. Thus Fortesque, writing in the time of Henry VI, described the advantages enjoyed by the students of law at that time in England. The place of their study—the Temple—he noted was

> much more commodious and proper for the purpose than any University. It is situated near the King's

[1] Warren, *Ten Thousand a Year*, Tauchnitz Ed., 1845, vol. ii., p. 194.

Palace at Westminster, where the Courts of Law are held, and in which the Law-Proceedings are pleaded and argued, and the resolutions of the Court, upon cases which arise, are given by the Judges, men of gravity and years, well read and practiced in the laws, and honored with a degree peculiar to them. Here, in Term-Time, the students of the law attend in great numbers, as it were to public schools, and are there instructed in all sorts of Law-Learning, and in the practice of the Courts: . . . the place of the study is not in the heart of the city itself, where the great confluence and multitude of the inhabitants might disturb them in their studies; but in a private place, separate and distinct by itself, in the suburbs, near to the Courts of Justice aforesaid, that the students, at their leisure, may daily and duly attend, with the greatest ease and convenience.[1]

This is an apt description of an ideal place of study. Whether or not the remainder of the narrative would appeal to a modern American student may be questioned.

Upon festival days and after the offices of the church are over, they employ themselves in the study of sacred and prophane history: here everything which is good and virtuous is to be learned: all vice is discouraged and banished. . . . The discipline is so excellent that there is scarce ever known to be any picques or differences, any bickerings or disturbances amongst them.[2]

[1] *The Laws of England,* Translation by A. Amos, Cambridge, 1825, pp. 178–79.

[2] *Id.*, p. 186.

It is an old maxim that the law is a jealous mistress. He who would acquire a thorough knowledge of law must give himself to it heart and soul. Especially during his novitiate must he literally eat, drink, talk, and sleep law. He should live in a community of those who are doing the same. His effort should be always to get at the underlying principle in whatever he is studying. That principle should be to him like the thread by which Theseus successfully escaped the labyrinth. And the Ariadne, from whose deft fingers the line runs, must in his case be Clio, the Muse of History. The laurel wreath she wears may be won from her, and the fame of the student proclaimed through her trumpet, only if the papyrus in her hand be searched diligently and its record applied wisely.

But the students should not be left to wander unaided through the wilderness of legal literature. Wise guides must be furnished them for their journey. Warning signs should be erected for their benefit. Their footsteps should be directed along well cut paths. In their progress they should remember the legend of the sleeping beauty and "be bold, be bold, and evermore be bold. Be not too bold." They should study thoroughly before venturing to criticize or condemn. They must beware of rash judgments. The statute laws of the States and of the United States fill many volumes. The unwritten or customary law is found in those conceptions of right and justice

which are the result of a thousand years of civilization, and which have found authoritative expression in many thousands of judicial opinions, recorded in thousands of volumes. The duty of instructors is to help the students to winnow out of this mass those decisions which are the great beacon lights of the law, and which once thoroughly mastered will enlighten their understanding to comprehend the law in its entirety. It was said of Sir George Jessel, one of the greatest judges England ever produced:

> His learning was profound, yet he was no mere follower of precedent, no mere directory of cases. He was able to take up the confused mass of the law and mould it to the ends of justice.

In the case of Re Hallett's Estate[1] he delivered one of the greatest of his opinions. In the course of it he expressed his views of the proper use of authorities:

> The only use of authorities, or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him. There is, perhaps, nothing more important in our law than that great respect for the authority of decided cases which is shewn by our tribunals. Were it not for that our law would be in a most distressing state of uncertainty.

Lord Bowen likened the common law to an "arsenal of common-sense principles," and he used

[1] 13 Ch. D., 676.

that arsenal, whenever possible, to overcome mere technical obstructions to justice, by the application of fundamental principles of right and morals.

"There is no magic at all in formalities," he contended.[1]

In most cases, when a supposed rule of the common law would work iniquity, it will be found on careful investigation that the true principle has been lost sight of, and has become encrusted over by a later growth resulting from misunderstanding and misapplication. In the long run the people's sense of justice finds expression in principles of immutable right.

Yet as Lord Bowen said in Dashwood *v.* Magniac:

> It is not a valid objection to a legal doctrine that it will not be always easy to know whether the doctrine is to be applied in a particular case. The law has to face such embarrassments.

The boldness with which a Jessel or a Bowen applied the principles of the law, seemingly careless of their authority, was only the deft skill of an expert swordsman, which would be fatal to one of less adroitness.

Plutarch tells us that even the great Demosthenes never made any oration on the sudden,

> and that oftentymes when he was sette in the assemblie, the people would call him by his name, to say his opinion touching the matter of counsell then in

[1] Dashwood *v.* Magniac (1891), 3 Ch., 306.

hand: howbeit that he never rose upon their call, unless he had first studied the matter well he would speake of.[1]

I would that, like wise old Odysseus, I could command those winged words that move the hearts of men to impress upon every young man the importance of his thoroughly mastering the principles of the law in the years of his preparation for the bar. The law is not an exact science, and yet it is not absolutely empirical. It is founded upon immutable principles of morality and justice. The application of those principles through a thousand years of Anglo-Saxon civilization has gradually evolved a code of rules which can be understood only by a knowledge of their history. Yet in large measure they are felt, recognized, acted upon, believed in by thousands, hundreds of thousands of people who know nothing of their origin, but recognize in them a practicable standard of conduct. But a lawyer must know more about them. He must know what principle is generally applicable to a given state of facts, so that with this governing principle in mind, he may turn to adjudged cases and statutes to determine the precise application of the principle which the given circumstances require. Such ready command is only possible if one have a thorough familiarity with the history of the origin, growth, and development of the law sought to be applied.

[1] North's *Plutarch*, v., p. 288.

It was said of Judge Cooley that his "remarkable success as a law writer was largely due to his ability to extract from a multitude of cases the essential principles involved, to arrange them in logical order, and to state them, with the reasoning on which they were based, accurately, clearly, and briefly."[1]

The same ability would lead to like success in a counsel or an advocate.

A biographer of Judge Jeremiah S. Black records:

> The keynote of his method is probably to be found in his own remarks upon his despair when first set to study the law. His heart sank within him when he first saw the tools he must handle, the multiplicity of those sources from which he must draw his knowledge of the law. "I did not know the value of general principles, or how legal problems could be solved by the application of fundamental maxims." Through the pain and perplexity of the following years he had learned that lesson. . . . It was not ignorance of, but mastery over, precedent, which made him apparently independent of the authority of decided cases, and freed his recorded decisions from the useless multiplication of citations upon points which he knew to be no longer questionable.[2]

A like absence of the use of precedents is noticeable in the opinions of Chief Justice Mar-

[1] Dean Hutchins, in *Great American Lawyers*, vol. vii., p. 480.

[2] Margaret S. Klinglesmith, in *Great American Lawyers*, vol. vi., p. 13.

shall. "Brother Story will furnish the authorities," he is said to have observed, after having delivered one of his matchless expositions of the law.

The young men now engaged in the study of the law in our leading American law schools are fortunate in the opportunities for public service which their studies will afford them, whether they shall be applied as a means of livelihood in the practice of the profession, or as a means of helping to create that enlightened public sentiment upon which so absolutely depends the permanence of free institutions.

It has often been said of the United States that it is a nation of lawyers; and when the part played by lawyers in the molding and preservation of our institutions is considered, the characterization may be accepted as just. Yet it is a matter of common remark that lawyers to-day do not enjoy the influence which they formerly possessed. The explanation is not far to seek. During the quarter of a century just past, the greatest pecuniary rewards for lawyers were earned in the application of legal knowledge and skill in the organization and conduct of great commercial enterprises in corporate form, and they too often were led to become either the business associates, or the salaried employees of their clients, thereby losing their distinctive position as counsel, taking on the nature of joint adventurers, contributing

their knowledge and capacity to the capital of a given enterprise, and sharing with their associates not only in the pecuniary success or failure, but in the resultant public criticism.

The period since the close of the Civil War has been one of the most extraordinary industrial and commercial development ever known in any land during any other period of equal length in recorded history. The natural development of our great resources was aided by wonderful discoveries in science, and the application of them to mining, manufacture, transportation, and distribution of product. Bold and skillful men seized upon the opportunities thus presented to realize, and they did realize from the public, profits beyond the wildest dreams of earlier imagination.

Able lawyers, with specialized training, devised the legal machinery by which these great enterprises were organized, developed, and combined, and through which vast industries were brought under centralized control.

An absence of the personal responsibility which inheres in partnership relation, continuity of existence irrespective of changing individual interests, and the ability to split up interests in the capital of an undertaking, and to dispose of any part at will without affecting the legal entity, were necessary to enable these great businesses to be promoted, and vast projects realized. These results were secured—they could only be secured—through legislative action. States vied with each

other in offering facilities for corporate organization. Some of them virtually offered the boon of perpetual corporate life with power to do, not merely all that an individual could do, but things which no individual could have dreamt of doing, and with no accountability to any one for any acts done. What amounted to partnerships between corporations, without the characteristic liability of partners for the debts of the firm, were authorized, fostered, and, encouraged. The most efficient instruments for the creation of monopoly were handed over the counter of every State Legislature.

But when the people began to take alarm at the growing power of such organizations, it was the lawyers of the country who suggested remedies for the evil, to be worked out by the application of old established principles to the new conditions. The people in many States had generously, even recklessly, conferred the privilege and convenience of corporate machinery. But by the exercise of the power of amendment, wisely reserved in most charters, it was found that the people might restrain and correct abuses of privileges they had granted. The power to regulate commerce among the States and with foreign nations had been conferred upon the national government by the Constitution of the United States. Commerce was recognized by the highest judicial authority as having a comprehensive meaning far more extensive than mere trade. It embraced all forms of intercourse, and

the power to regulate it involved the establishment of rules by which such intercourse should be governed. No State under the guise of creating a corporation could charter a commercial libertine against the paramount control of Congress over interstate and foreign commerce. There was another principle of the common law, too, the application of which, it began to be realized, was not limited to any particular field, but was co-extensive with the principle itself. This was the principle formulated by Lord Chief Justice Holt upwards of two hundred years ago[1] quoted by Chief Justice Waite in support of a famous decision of the Supreme Court of the United States that a State may regulate the charges of a warehouseman for the storage of wheat.[2]

That principle he stated in these words:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

The announcement of this decision in 1876 helped to pave the way for the enactment of the

[1] In *De Portibus Maris*, 1 Harg. Law Tracts, 78.

[2] Munn *v.* Illinois, 94 U. S., 113.

first act for the regulation of interstate commerce in 1887, and the succession of statutes affecting the management of interstate railways enacted by Congress in subsequent years. The Sherman Anti-trust Law of 1890, sought to apply the power to regulate commerce in such manner as to check the tendency of the great industrial organizations to effect monopolies, and to prohibit contracts, combinations, and conspiracies in restraint of interstate and international commerce.

The work of such eminent lawyers as Reagan and Cullum, Edmunds, Thurman, Hoar, Sherman, and Cooley, attest the influence of the educated lawyer in dealing with these great fundamental problems of national economics. Judicial decision has affirmed the soundness of the principles thus invoked in their application to the problems dealt with by legislative action. Perhaps the full effect of the principle of legislative control over property affected with a public use has not yet been fully grasped. But it may be suggested that in that principle lies a means for the effectual protection of the public from injury or destruction through any form of industrial organization which is so used—to employ the language of Chief Justice Holt—as to make it a matter of public consequence, and to affect the community at large.

The thought and the work of the great lawyers I have named, and of many others in less conspicuous fields, who wrought out solutions of these vast problems, should redeem the profession from

the reproach of being merely the trained experts of selfish forces. But the conspicuous pecuniary rewards of those who were identified with the great corporate interests have been used to fill the popular mind with distrust of an entire class, and for a time even the disinterested and devoted labors of such men as I have mentioned, could not redeem the bar from the reproach of being antagonistic to the interests of the people. Perhaps the envy of the unsuccessful and the unskilled also has contributed somewhat to discredit their more able or more prosperous professional brethren. Be that as it may, the great opportunity that is open to the men entering upon the profession of law to-day is to reinstate it in the place to which it is entitled, by learning, by character, and by usefulness, in any community in which popular government is established and maintained.

There are many avenues open through which this may be accomplished—open not only to them who adopt the practice of law as a means of livelihood, but to them who shall enter into public life and become legislators or administrators in the government of the State or the Nation, and to them who in business or private life may use and apply the lessons learned in this institution.

In a certain sense, the greatest opportunity is that of the practitioner. His life will afford him constant opportunity to test the practical value of theory. His danger will be the tendency to lose sight of the ethical aim of all law in the

intense technical interest of the game. Lawyers are not only by nature and training conservative, but they are apt to become so enamored of the technical skill involved in legal procedure, as to lose sight of the fact that rules of practice are devised merely to the end that litigants may present the merits of their controversy to a tribunal for decision, in the simplest, most expeditious mode consistent with apprising each of the contention of the other, and giving him an opportunity to prepare for the trial. The old English lawyers made a fetish of pleading—the written statements of their case made by the respective litigants in advance of trial. The modern American lawyers have made a fetish of procedure, and have created a mass of artificial rules which in some States presents as great an obstacle to reaching the judgment seat, as did the common law rules of pleading before the English judicature reform acts.

It will be the high privilege of the young men now coming into the profession to contribute to the work of clearing away this mass of worse than useless machinery, and of substituting a few simple regulations for the legislative minutiæ that now make up our codes of procedure. But to the effective accomplishment of such reform, an accurate knowledge of conditions and requirements is indispensable. More harm is done by ill-considered reforms than by a continuance of existing evils. It is always important, too, that changes in law or procedure shall be developed along lines

of established and well-recognized principles, rather than across the grain, as it were, with no continuity between the new regulation and the old.

Finally, may I add, that all law to be effective must be based on a broad sense of right. It is that fact which gives to the customary or unwritten law a greater sanctity in the minds of the people than acts of the Legislature.

The greatest safeguard of popular liberty lies in the inherent respect for their law felt by a self-governing people. The enactment of statutes which are not based upon eternal principles of justice, but upon mere temporary or class expedients, tends to impair or destroy this attitude of the people towards their law.

Respect for law is the Alpha and the Omega of a free government. That respect can exist only when the law is that which the people establish "at their free liberty," which is just to all classes, and which binds the hearts and the consciences of men to respect even the law they may violate.

With such laws in the hearts of the people and on their statute books, we may say as did the great lawgiver of Israel:

> Keep therefore and do them; for this is your wisdom and your understanding in the sight of the nations, which shall hear all these statutes, and say Surely this great nation is a wise and understanding people.
>
> For what nation is there so great, who hath God so

nigh unto them, as the Lord our God is in all things that we call upon him for?

And what nation is there so great, that hath statutes and judgments so righteous as all this law, which I set before you this day? [1]

[1] Deut. iv., 6, 7, 8.

VIII

RECENT INTERPRETATION OF THE SHERMAN ACT [1]

THE only legitimate end and object of all government is the greatest good of the greatest number of the people. The means by which this end is attained, vary in accordance with the experience and the temperament of the people. Government is necessarily more or less of an experiment at all times, but as men have been making similar experiments since the dawn of recorded history, the waste of repeating unsuccessful experiments of the past may be avoided by studying the records of the results of earlier effort. Other things being equal, all thoughtful persons will agree, the probabilities of success will be greater if action be taken along lines which in the past, under similar conditions, has been attended with benefit to the common weal. All history demonstrates the fact that the greatest prosperity to the State has resulted from allowing to individual effort in trade and com-

[1] Address before the Michigan State Bar Association, Battle Creek, Mich., July 6, 1911.

merce the utmost freedom consistent with the protection of society at large.

Yet the experience of the remote, as well as of the recent past, demonstrates the necessity of some governmental regulation of private enterprise, in order that the fruits of industry may not be entirely garnered into a few hands, and that the freedom of individual effort may not be unduly restrained.

We need look no further than to the history of England, from which we derive most of our conceptions of civil liberty, for evidence of the character of evils affecting trade and commerce which commercial prosperity tends to develop, and of the methods which have proved most effective in restricting those evils.

The first statute enacted in England in 1436 against agreements in restraint of trade[1] was directed against regulations made "by persons in confederacy" for their "singular profit and the common damage of the people." Note that even at that early date, the action of the Legislature was directed at curbing the selfish exercise of power by a few for their own benefit, but to the common damage of the people.

The considerations upon which contracts in restraint of trade were held void at common law, as our Supreme Court has often pointed out, were: (1) the injury to the public by being deprived of the restricted party's industry; and (2) the injury to the party himself by being precluded from pur-

[1] 15 Henry VI, re-enacted 1503, 19 Henry VI, c. 7.

suing his occupation, thus tending to make him more or less of a public charge.[1] In the case of a corporation chartered by a State to carry on a particular business, any agreement voluntarily entered into by it which impaired or restricted in any material degree its power to discharge the functions conferred upon it by the State, was necessarily contrary to public policy and void.[2]

Monopolies in trade have been at all times, under all forms of government, regarded as obnoxious to the general welfare. They were early declared to be contrary to the law of England, and the outburst of popular resentment to the grant by Queen Elizabeth to certain of her favorites of the exclusive right of dealing in particular commodities, compelled even that powerful monarch to disclaim any intention to offend against the popular sense of right and justice of her subjects, and to blame her advisers for the acts which she formally disavowed.[3]

The vice of monopoly was recognized in England to be the power acquired by the monopolist to control prices by excluding competition. With the great development of the vast natural resources of a new country, and the unprecedented powers conferred by State legislation, throughout the United States, upon associations of individuals under corporate form, the opportunity and the

[1] Gibbs *v.* Baltimore Gas Co., 130 U. S., 396, 409.
[2] People *v.* N. River Sugar Ref. Co., 54 Hun., 354.
[3] D'Ewes, *Journal of the Parliaments of Elizabeth*, p. 652.

machinery for the centralization of control over great industries proved so tempting to cupidity, that twenty odd years ago, even so busy, self-satisfied a people as the prosperous citizens of these United States, was aroused to the necessity of checking the rapid tendency to the concentration of control of great industries in a few hands. While the State Courts and Legislatures attempted to deal with the subject, it was soon recognized that only the National Government could adequately grapple with an evil which had become national in its extent. The simple but unlimited power vested in Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes," furnished the general government with sufficient jurisdiction to protect the commerce of the nation from undue restraints and monopolization.

So the act of July 2, 1890, was passed, declaring in terms so comprehensive, yet so simple that it has required two decades of judicial exposition to bring their meaning home to the people with living force, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of commerce among the States, or with foreign nations," is illegal, and that every person who shall monopolize or attempt to monopolize any part of such trade or commerce, is guilty of a misdemeanor; and that the United States Circuit Courts sitting in equity shall have jurisdiction, at the suit of the United States, to prevent and re-

strain all violations of the act. Very slowly indeed has a full consciousness of the meaning of this law come over the intelligence of the American people. The first effort to apply it, in the Knight case,[1] proved abortive, partly because of an imperfect recognition of the remedies which should have been sought; partly because of a too narrow conception of the extent of Congressional power over interstate commerce.

It was then successfully directed in the Trans-Missouri[2] and the Joint Traffic Association[3] cases against agreements between interstate railroads made to control rates of interstate transportation; but an extreme statement of the meaning of the phrase "restraint of trade" enunciated in the opinions of the court in those cases, became the basis of a school of literal interpretation which seemed bent upon reducing the law to an absurdity, and thus creating a public sentiment which would make impossible its enforcement. Yet the author of those opinions, in the second of them, rejected with some sarcasm the interpretation sought to be placed upon his language in the earlier one. Observing at the outset that no contract of the nature described by counsel as those which he suggested, would be invalidated by the application of the meaning given by the Court to the words of the act, was before the Court in the case under consideration, and that there was, therefore, some embarrassment in assuming to decide just how far

[1] 156 U. S., 1. [2] 166 U. S., 290. [3] 171 U. S., 506.

the act might go in the direction claimed, Justice Peckham said:

Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of a contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant, of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a goodwill of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vendor sells his business.

In the Addyston Pipe case[1] it was held that the act operated to invalidate an agreement between members of an association of corporate manufacturers of iron pipe, made for the purpose of controlling prices by suppressing competition among themselves. Montague *v.* Lowry[2] was to the same effect.

[1] 175 U. S., 227. [2] 193 U. S., 38.

In the Northern Securities case, it was held that control of two competing lines of interstate railway could not be acquired by vesting a majority of the stock of each in a corporation organized under the laws of New Jersey, without violating the act. In the Swift case,[1] a combination between competitors in the business of buying and shipping live stock and converting it into fresh meats for human consumption, suppressing bidding against each other, and arbitrarily, from time to time, raising, lowering, and fixing prices, and combining to make uniform charges to the public, was also held within the prohibition of the statute.

In the Danbury hat case,[2] a combination of individuals to prevent defendants (manufacturers of hats) from manufacturing and shipping hats in interstate commerce was condemned; and in the Continental Wall Paper case,[3] a combination of manufacturers of wall paper, fixing prices and providing against sales except under agreements between members of the combination, was held to violate the law.

In the meantime, certain of the decisions had drawn a line of differentiation, by holding that the act was not intended to affect contracts which have only a remote and indirect bearing upon commerce between the States,[4] and that a covenant by the vendor of an interstate business to protect the pur-

[1] 196 U. S., 375.

[2] Loewe *v.* Lawler, 218 U. S., 274. [3] 212 U. S., 227.

[4] Field *v.* Barber Asphalt Co., 194 U. S., 618; Hopkins *v.* United States, 171 U. S., 578.

chaser from competition for a reasonable period, made as a part of the sale of the business and not as a device to control commerce, was neither within the letter nor the spirit of the act.[1]

While the intent of parties entering into a particular agreement or combination, etc., was held to be immaterial, where the necessary inference from the facts was that the direct and necessary result of the agreement was to restrain trade; yet in the Swift case, Justice Holmes pointed out that intent was *almost* essential to a combination in restraint of commerce among the States, and *was* essential to an attempt to monopolize the same.

> Where acts are not sufficient in themselves to produce a result which the law seeks to give them—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen . . . But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.[2]

The proceeding against the American Tobacco combination, brought before the Court for the first time the question of the full interpretation of the statute in its application to attempts to monopolize,

[1] Cincinnati Packet Co. *v.* Bay, 200 U. S., 179.
[2] Swift & Co. *v.* United States, 196 U. S., 396.

and in deciding the case in the Circuit Court, Judge Lacombe expressed the extreme view of the school of literal interpretation, by asserting that the act prohibited every contract which to any extent operated to restrain competition in interstate commerce.

> Size [he said] is not made the test: Two individuals who have been driving rival express wagons between villages in contiguous States, who enter into a combination to join forces and operate a single line, restrain an existing competition; and it would seem to make little difference whether they make such combination more effective by forming a partnership or not.[1]

On the other hand, Circuit Judge Hook, in the Standard Oil case, decided in the Eighth Circuit after the decision in the Tobacco case, said:

> The construction of the act should not be so narrow or technical as to belittle the work of Congress, but on the contrary it should accord with the great importance of the subject of the legislation and the broad lines upon which the act was framed. The language employed in the act is as comprehensive as the power of Congress in the premises, and the purpose was not to hamper business fairly conducted, but adequately to promote the common interest in freedom of competition and to remove improper obstacles from the channels of commerce that all may enter and enjoy them. The wisdom of the law lies in its spirit as well

[1] 164 Fed., 702.

as in its letter, and unless they go together in its construction and application justice goes astray.

Speaking of the application of the second section of the act, he added that the modern doctrine with respect to monopoly "is but a recognition of the obvious truth that what a government should not grant, because injurious to public welfare, the individual should not be allowed to secure and hold by wrongful means."

This being the state of the law, the four decisions involving a construction of the act rendered by the Supreme Court during the term just closed are of especial interest.[1] The first case decided came up on writ of error, brought by the United States to reverse a judgment of the Circuit Court in New York sustaining pleas in bar to an indictment for conspiracy to restrain interstate commerce in violation of the first section of the act.[2] The facts stated in the plea showed that the conspiracy had been originally entered into more than three years before the finding of the indictment. The Circuit Court had held that the crime was completed as soon as the conspiracy was formed. But the indictment charged a continuing conspiracy to eliminate competition. The Court said:

A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to

[1] October Term, 1910. [2] U. S. *v.* Kissel, 218 U. S., 601.

drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success.

The facts set forth in the indictment as the means by which the alleged purpose was to be accomplished, showed that the acts committed by the defendants were for the purpose of preventing a competing company from engaging in business; that this prevention continued and could only be terminated by the affirmative act of the defendants, which act had not been performed. The plea was therefore held bad.

A conspiracy in restraint of trade [said Mr. Justice Holmes] is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself; just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous; the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act. . . .

The next case decided was that of Dr. Miles Medical Company *v.* John D. Park & Sons Company.[1] That was a suit in equity brought by a

[1] 220 U. S., 373.

manufacturer of proprietary medicines prepared in accordance with secret formulæ, to prevent dealings in them by third parties in violation of a system of contracts with its purchasers, denominated as agents (wholesale distributing agents and retail distributing agents), to maintain certain prices fixed by it for all sales of its products at wholesale or retail. The Court held that the evidence showed that complainant had created—

> a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or sub-purchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition.

The Court quoted the description of the essential features of the system given by Mr. Justice Lurton in his opinion in the Circuit Court of Appeals, as follows:

> The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to

sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about.

That these agreements restrained trade the Court held to be obvious. That, having been made, as the bill alleged, with most of the jobbers and wholesale druggists, and a majority of the retail druggists of the country, and having for their purpose the control of the entire trade, they related directly to interstate as well as intrastate trade, and operated to restrain commerce among the several States, was also stated to be clear. The Court analyzed and dismissed the contention that the restraints were valid because they related to proprietary medicines manufactured under a secret process. It further held that a manufacturer cannot by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales. Reference was made in this regard to the decision by the Supreme Court in the case of Bobbs-Merrill Co. *v.* Strauss[1] that no such privilege exists under the copyright statutes, although

[1] 210 U. S., 339.

the owner of a copyright has the sole right to vend copies of the copyrighted production, and it was said that the manufacturer of an article of commerce not protected by any statutory grant was not in any better case. The agreements in the case at bar were obviously designed to maintain prices after the complainant had parted with title to the articles, and to prevent competition among those who traded in them, and for that reason they were held to be void. The Court cited a long line of cases by which it had been adjudged that agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interests and void.

They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. . . . And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.[1]

Following these two cases, the Supreme Court next addressed itself to the decision of the case

[1] 220 U. S., 373, 408.

of the two great monopolistic combinations—the Standard Oil and the American Tobacco.

In the Standard Oil case, the Supreme Court affirmed a decree of the Circuit Court which adjudged that the individual and corporate defendants had entered into and were carrying out a combination or conspiracy in restraint of interstate and foreign commerce in petroleum and its products, such as was prohibited by the first section of the act; and that by means of this combination those defendants had combined and conspired to monopolize, had monopolized, and were continuing to monopolize a substantial part of the commerce among the States, in the Territories, and with foreign nations, in violation of Section 2 of the act.

This conclusion was based on the following considerations, viz.:

1. Because the unification of power and control over petroleum and its products, which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gave rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had

normal methods been followed; the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

2. Because this *prima facie* presumption was made conclusive by considering the conduct of the persons and corporations who were mainly instrumental in bringing about the acquisition by the New Jersey corporation of the stocks of the large number of corporations which it acquired, as well as the modes in which the power vested in the New Jersey corporation had been exerted and the results which had arisen from it.

The acts of the defendants preceding the transfers to the New Jersey company of the shares of stock of a large number of other corporations were held by the court to evidence

an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which on the contrary necessarily involved the intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view.

Confirmation of the finding of a continuous intent in the defendants to exclude others from the field and themselves to dominate it, was found in

an examination of the exercise of its power by the combination after it was formed.

. . . The acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and trade in each district in oil was turned over to a designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

Briefly, therefore, the decision of the Court was put upon the ground that the defendant, by vesting in a New Jersey corporation the stocks of a large number of other corporations engaged in various branches of the production, refining, transportation, and marketing of petroleum and its products, which but for such control would or might have been engaged in competition with each other in interstate and foreign commerce in those commodities, had acquired the control of that commerce; and that such control was acquired and had been and was exercised with the intent and purpose of maintaining it—not as a result of normal methods of business, but by new means of combination, resorted to in order to secure greater power than would have been acquired by normal

methods, and of driving out and excluding, so far as possible, all competitors in the business, thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

It was not *alone* the acquisition of a large share of commerce among the States and with foreign countries, upon which the Court predicated the conclusion of unlawful combination and monopolization; but the attainment of dominion over a substantial part of that commerce by means of intercorporate stock holdings in actually or potentially competing corporations, accompanied by the exclusion of competitors, and attended with continued acts evidencing an intent and purpose to retain controlling power over the business, and to exclude and suppress all competition with it.

In reaching the conclusions stated, the Chief Justice reviewed the history of the English law on the subject of monopolies and restraints of trade, and held that the Sherman Act "was drawn in the light of the existing practical conception of the law of restraint of trade," and that

> in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute, under this view, evidenced the intent not

to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

The Chief Justice further said that as the act had not defined contracts in restraint of trade, the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced in the statute, was intended to be the measure used for determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided. He rejected the idea that the use of the words "every contract, etc., in restraint of trade" in the statute, leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its "prohibitions to every case within its literal language." This, he said, would be to make the statute "destructive of all right to contract or agree or combine in any respect whatever, as to subjects embraced in interstate trade or commerce." He cited the language of Justice Peckham in writing the opinion of the court in Hopkins *v.* United States.[1]

To treat as condemned by the act all agreements under which, as a result, the cost of conducting an

[1] 171 U. S., 578, 592.

interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act.

And he observed:

If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide . . .

A consideration of the text of the second section, he said, serves to establish that it was intended to supplement the first, and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded.

In other words, having by the first section forbidden all means of monopolizing trade—that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibition of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section—that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about are not embraced within the enumeration of the first section.[1]

[1] Hopkins *v.* U. S., 171 U. S., 578, 592.

Mr. Justice Harlan, in a separate opinion, while concurring in the main with the decision of the Court, interpreted the majority opinion as amounting to a reading into the statute of the word "unreasonable" before the words "restraint of trade," and vigorously protested that such interpretation was in substance the reversing of the previous deliberate judgments of the Court to the effect "that the act interpreting its words in their ordinary acceptation, prohibits *all* restraints of interstate commerce by combinations in whatever form, and whether reasonable or unreasonable."

Two weeks after the decision in the *Standard Oil* case, the Court rendered its decision in the case against the *Tobacco* combination. In his opinion, which was concurred in by all the associate justices but Harlan, the Chief Justice interpreted the opinion in the former case and answered the criticisms of Mr. Justice Harlan and those who had expressed views similar to his as to the meaning of the Standard Oil decision.

> In that case [said the Chief Justice], it was held, without departing from any previous decision of the Court, that as the statute had not defined the words "restraint of trade" it became necessary to construe those words, a duty which could be discharged only by a resort to reason.

He quoted the language of Justice Peckham in the Joint Traffic case.[1]

[1] 171 U. S., 568.

The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.

"Applying," said the Chief Justice,

the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words restraint of trade at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were unreasonable, but that the duty to interpret, which inevitably arose from the general character of the term restraint of trade, required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of

interstate commerce—the free movement of which it was the purpose of the statute to protect.[1]

The facts presented in the Tobacco case were more intricate and involved than those in the Standard Oil case. Not only was the American Tobacco Company the holder of stocks in other companies, but it was itself a consolidated company formed by the merger, under the laws of New Jersey, of three pre-existing companies. The combination of many previously competing companies, was created, first by the transfer of shares of stock from one to the other, afterwards cemented by absolute conveyances of land, plants, and other property and business. The nucleus of the combination was the original American Tobacco Company, organized in January, 1890, and to which were at once conveyed by deed and transfer the plants and business of five different concerns, competitors in the purchase of the raw product which they manufactured, and in the distribution and sale of the manufactured products. The result of this combination was to give to the new company immediately on its organization a practical monopoly of the cigarette business of the United States, and that accomplishment colored all subsequent proceedings in the widening sweep of the combination, the progress of which was noted by the Supreme Court as being attended with the constant acquisition of competing con-

[1] U. S. *v.* American Tobacco Co., *et al.*

cerns, buttressed by covenants on the part of all their officers and principal stockholders not to engage in business in competition with the purchaser; and in the acquisition of many competitors, not for the purpose of continuing their operation, but of closing them down and putting them permanently out of business. A summary of the salient facts dwelt on by the Court as the basis for its decision was made in this language:

Thus, it is beyond dispute: First, that since the organization of the new American Tobacco Company that company has acquired four large tobacco concerns, that restrictive covenants against engaging in the tobacco business were taken from the sellers, and that the plants were not continued in operation but were at once abandoned. Second, that the new company has besides acquired control of eight additional concerns, the business of such concerns being now carried on by four separate corporations, all absolutely controlled by the American Tobacco Company, although the connection as to two of these companies with that corporation was long and persistently denied.

Thus reaching the end of the second period and coming to the time of the bringing of the suit, brevity prevents us from stopping to portray the difference between the condition in 1890 when the (old) American Tobacco Company was organized by the consolidation of five competing cigarette concerns and that which existed at the commencement of the suit. That situation and the vast power which the principal and accessory corporate defendants and the small number of individuals who own a majority of the

common stock of the new American Tobacco Company exert over the marketing of tobacco as a raw product, its manufacture, its marketing when manufactured, and its consequent movement in the channels of interstate commerce, indeed, relatively, over foreign commerce, and the commerce of the whole world, in the raw and manufactured products, stand out in such bold relief from the undisputed facts which have been stated. . . .[1]

These undisputed facts, the Court said, involved questions as to the operation of the anti-trust law not theretofore presented in any case. They clearly demonstrated that the acts, contracts, agreements, combinations, etc., which were assailed were of such an unusual and wrongful character as to bring them within the prohibitions of the law.

Indeed [said the Chief Justice] the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible.[2]

[1] U. S. *v.* American Tobacco Co., *et al.* [2] *Ibid.*

These conclusions were stated to be inevitable, not because of the vast amount of property aggregated by the combination, not because *alone* of the many corporations which the proof showed were united by resort to one device or another, not *alone* because of the dominion and control over the tobacco trade which actually existed, but because the Court was of opinion that the conclusion of wrongful purpose and illegal combination was overwhelmingly established by the following considerations:

1. The fact that the first organization or combination was impelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to the combination.

2. Because, immediately after that combination, the acts which ensued justified the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure, either by driving competitors out of the business or compelling them to become parties to the combination.

3. By the ever-present manifestation of a conscious wrong-doing by the form in which the various transactions were embodied from the beginning—now the organization of a new company, now the control exerted through taking up stock in one or another or in several, so as to obscure the result actually attained, evidencing

a constant purpose to restrain others and to monopolize and retain power in the hands of the few who, from the beginning, contemplated the mastery of the trade which followed.

4. By the absorption of control of all the elements essential to the manufacture of tobacco and its products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers against others in the trade.

5. By persistent expenditure of large sums in buying out plants, not to utilize but to close up, rendering them useless for the purposes of trade.

6. By the constantly recurring stipulations exacted from manufacturers, stockholders, or employees, binding themselves generally for long periods not to compete in the future.

From all of these acts, the Court deduced the conclusion that the defendants had been engaged in a largely successful effort, extending over a period of years, to monopolize (that is, wrongfully to acquire to themselves) the dominion over the manufacture and marketing of tobacco and its products and accessories, not by normal methods of business, but by unfair and subtle methods of combination, resorted to in order to secure greater power than they could have acquired by normal methods of business, and with the intention of driving out and excluding so far as possible all other competitors, and centralizing in the combination a perpetual control of the movements of

tobacco and its products and accessories in the channels of interstate and foreign commerce.

The remedy to be applied in the *Standard Oil* case was comparatively simple and obvious, and the decree of the Circuit Court which, with slight modifications, was affirmed by the Supreme Court, to use the language of that court,

> commanded the dissolution of the combination, and therefore, in effect, directed the transfer by the New Jersey corporation back to the stockholders of the various subsidiary corporations entitled to the same, of the stock which had been turned over to the New Jersey corporation in exchange for its stock, and enjoined the stockholders of the corporations after the dissolution of the combination from, by any device whatever, recreating directly or indirectly the illegal combination which the decree dissolved.

A far more intricate problem was presented in the Tobacco case, as was frankly recognized by the Court. Conveyances, consolidations, and mergers, and the dissolution of previously existing corporations whose stocks and properties had been acquired, had so blended the whole combination into new form, as to make it impossible to effect a dissolution by the simple method applicable to the Standard Oil case, and therefore the Supreme Court said that, in determining the relief proper to be given, it might not model its action upon that granted by the Court below, but in order to award relief coterminous with the ultimate redress of the

wrongs which the Court found to exist, it must approach the subject of relief from an original point of view. In considering the subject from that aspect, the Court said that three dominant influences must guide its action:

(1) The duty of giving complete and efficacious effect to the prohibitions of the statute; (2) the accomplishment of this result with as little injury as possible to the interest of the general public; and (3) a proper regard for the vast interests of private property which may have become vested in many persons . . . without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning.

For the purpose of meeting that situation, the Court declared that it might at once resort to one or the other of two general remedies:

(*a*) The allowance of a permanent injunction restraining the combination as a universality and the individuals and corporations which form a part of or co-operate in it in any manner or form from continuing to engage in interstate commerce until the illegal situation be cured . . . ; or (*b*) to direct the appointment of a receiver to take charge of the assets and property in this country of the combination in all its ramifications for the purpose of preventing a continued violation of the law, and thus working out by a sale of the property of the combination or otherwise, a condition of things which would not be repugnant to the prohibitions of the act.

The Court, however, in consideration of the public interests and that of innocent participants, determined to send the case back to the Circuit Court, with directions to endeavor to ascertain and determine upon some plan or method of dissolving the combination and working out a lawful condition of things, if that could be done within a period of six months, with a possible extension of two months longer; but that in the event that such condition of disintegration in conformity with the law should not be brought about within that time, it should be the *duty* of the Circuit Court,

either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or foreign commerce, or by the appointment of a receiver, to give effect to the requirements of the statute.

Probably no more drastic decree has ever been entered by the Supreme Court than this. The Court remits to the Circuit Court the execution of a decree of dissolution of a combination of sixty-seven corporations and twenty-nine individuals, with assets amounting to upwards of $400,000,000 book value, and net earnings exceeding $36,000,000 per annum; which had acquired 77 per cent. of the entire business of the United States in manufactured tobacco, plug and smoking tobacco; 96 per cent. of snuff; 77 per cent. of cigarettes; 91 per cent. of little cigars; and 14 per cent. of cigars and stogies; and which has acquired probably the most exten-

sive monopoly of interstate and foreign commerce ever created in the world. This combination was ordered to be resolved into, not necessarily its original elements, but, in effect, to be divided up into a number of separate and distinct integers, no one of which should threaten monopoly, and which should not either by reason of their organization and business, or in their relation to each other, constitute combinations in restraint of interstate or foreign commerce. The Supreme Court not only *empowered*, but *directed* the Circuit Court, in case this lawful condition should not be brought about within a period of six or eight months, to either appoint a receiver of this vast property for the purpose of, by sale or otherwise, working out the ordered disintegration; or by injunction to paralyze and end its conduct of interstate business. Those who have thoughtlessly yielded to the superficial conclusion resulting from the application by the Chief Justice of the rule of reason to the interpretation of the Sherman Law, can find but little to justify the idea that the Sherman Law has been rendered ineffective by those two decisions, for precisely the contrary is clearly established by these great judgments. The most cursory examination of the decree in the Tobacco case,—the most casual consideration of the drastic and far-reaching remedy imposed, makes it perfectly apparent that the Sherman Law, perhaps for the first time, has been demonstrated to be an actual, effective weapon to the accomplishment of the

purpose for which it was primarily enacted, namely, the destruction of the great combinations familiarly known as "trusts."

The main reliance of the defendants in both the Standard Oil and the Tobacco cases was the decision in United States *v.* Knight[1] to the effect that the acquisition of a number of manufacturing plants in one State by a corporation of another State was not within the intent of the Sherman law, even though the purchaser thereby acquired upward of 90 per cent. of all the refineries of sugar in the United States, because manufacture alone and not commerce, was involved. The Knight case had been distinguished in subsequent cases as not involving any questions of interstate commerce. In the Standard Oil case the Court dismissed it with scant consideration, saying:

> The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this Court in connection with the interpretation and enforcement of the Anti-trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice.[2]

[1] 156 U. S., 1.

[2] The Court cited as illustrative of this point the cases of United States *v.* Northern Securities Co.,[3] Loewe *v.* Lawler,[4] United States *v.* Swift & Co.,[5] Montague *v.* Lowry,[6] Shawnee Compress Co. *v.* Anderson.[7]

[3] 193 U. S., 334. [4] 208 U. S., 274. [5] 196 U. S., 375
[6] 193 U. S., 38. [7] 209 U. S., 423.

But the decision in the case of West, Attorney-General, *v.* Kansas Natural Gas Company, rendered May 15, 1911, goes further in overthrowing the doctrine of the Knight case than any of those cited by the Chief Justice in the Standard Oil case, or than the obvious disregard of its authority in the latter case. In the *Knight* case, the facts presented in the evidence were taken by the Court as involving merely the acquisition by one corporation of manufactories wholly within the State, and it was held that such acquisition was not within the power of the Congress of the United States to regulate commerce among the States and with foreign countries.

Doubtless [said Chief Justice Fuller] the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not a primary sense. . . . Commerce succeeds to manufacture and is not a part of it. . . . The regulation of commerce applies to the subject of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities and articles bought, sold, or exchanged for the purpose of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.

The cases of Coe *v.* Errol[1] and Kidd *v.* Pearson[2] were cited in support of the proposition that functions of manufacture and commerce were different, that to hold otherwise would be to invest Congress, "to the exclusion of States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry." That contracts, combinations, or conspiracies to control domestic enterprises in manufactures, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, the Court conceded; but it said that such restraint would be an *indirect* result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy. So it was held in Kidd *v.* Pearson that the refusal of a State to allow articles to be manufactured within her borders, even for export, did not directly affect external commerce and did not trench upon the Congressional control over interstate commerce.

In the *West* case, the Supreme Court reviewed decisions of the U. S. Circuit Court in suits having for their common purpose an attack upon the constitutional validity of a statute of Oklahoma, framed for the purpose of prohibiting the transportation or transmission of natural gas from points within that State to points in other States. This

[1] 116 U. S., 517. [2] 128 U. S., 1.

prohibition was sought to be accomplished by various provisions in the statute under review. The statute was held to be prohibitive of interstate commerce in natural gas, and, consequently, a violation of the commerce clause of the Constitution of the United States. Mr. Justice McKenna, writing the opinion of the Court, said that the act presented no embarrassing questions of interpretation:

> It was manifestly enacted in the confident belief that the State has the power to confine commerce in natural gas between points within the State. . . . And the State having such power, it is contended, if its exercise affects interstate commerce it affects such commerce only incidentally—in other words, affects it only, as it is contended, by the exertion of lawful rights and only because it cannot acquire the means for its exercise.

The results of the contention, the Court held, repel its acceptance.

> Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business

welfare of the State, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a State would confine them to the inhabitants of the State. If the States have such power a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one State has it, all States have it; embargo may be retaliated by embargo, and commerce will be halted at State lines. And yet we have said that "in matters of foreign and interstate commerce there are no State lines." In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court. . . . At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a State, and that it cannot be regulated or restrained by a State, or that a State cannot exclude from its limits a corporation engaged in such commerce.

If, therefore, the State cannot control the transmission of natural gas produced within its borders to other States, because to concede that control would be in effect to empower it to cut off at its source all of the objects of interstate commerce, how can it retain the right to prohibit the manufacture within its limits of commodities intended to be shipped in interstate commerce? Commodities when so manufactured are precisely like natural gas reduced to the possession of the owner—that is, a commodity which belongs to him as his individual property, is subject to sale by him, and may be the subject of interstate and intrastate commerce. It is true the statute did not deal with the *production* of the gas, and to that extent, possibly, it is not in conflict with Kidd *v.* Pearson and Coe *v.* Errol. Yet if the constitutional right of Congress to regulate interstate commerce attaches to the commodity the moment it is in existence in the hands of the owner, so that the State may not prohibit its shipment in interstate commerce, does it not apply as well from that moment to prevent the owner from himself, by combination or agreement, imposing an undue restraint upon its shipment in such commerce. What the State is prohibited from doing, the citizen may not do, and the Sherman Act attaches from the moment the commodity comes into existence to prevent any impediment being laid upon its possible passage into the ordinary and usual currents of commerce among the States.

Summing up the results of these late decisions, therefore, it will be seen that the area of uncertainty in the law has been greatly narrowed, and that its scope and effect have been pretty clearly defined; the school of literal interpretation has been repudiated, and the application of a rule of reasonable construction declared. There will be always, of course, a field of uncertainty in so far as an investigation of facts—particularly when intent becomes a necessary consideration—is required. But this much may surely be said to be now beyond controversy:

That ordinary agreements of purchase and sale, of partnership, or of corporate organization, do not violate the first section of the Sherman Act, even though incidentally and to a limited degree they may operate to restrain competition in interstate or foreign commerce between the parties to such agreements.

But any contract, combination, or association, the direct object and effect of which is to control prices, restrict output, divide territory, refrain from competition or exclude or prevent others from competing in any particular field of enterprise, imposes an undue restraint upon trade and commerce and is in violation of the first section of the act. This principle applies to all associations of competitors of the character usually known as pools; to agreements with so-called wholesale or retail agents, whereby the manufacturer of an article, even though made according to some secret process or formula, seeks to control the price at

which it may be sold by purchasers directly or indirectly from the manufacturer. It applies also to attempts to control competition between independent concerns by means of a stock-holding trust, whether individual or corporation holder.

Size alone does not constitute monopoly. The attainment of a dominant position in a business, acquired as the result of honest enterprise and normal methods of business development, is not a violation of the law. But unfair methods of trade, by destroying and excluding competitors by means of intercorporate stockholdings, or by means of agreements between actual or potential competitors, whereby the control of commerce among the States or with foreign countries in any particular line of industry is secured or threatened, expose those who are concerned in such efforts to the penalties prescribed in the second section of the act, because they are engaged in monopolizing or attempting to monopolize such commerce.

It is also now settled that no form of corporate organization, merger, or consolidation—no species of transfer of title, whether by sale, conveyance, or mortgage; and no lapse of time from the date of the original contract, conspiracy, or combination, can bar a Federal Court of equity from terminating an unlawful restraint, or compelling the disintegration of a monopolistic combination. The maxim *nullum tempus occurrit regi* is applicable to any continuing combination or conspiracy which the Anti-Trust Act of 1890 condemns.

Speaking of the conscious development of institutions in America, Woodrow Wilson in his work on "The State," writes:

It is one of the distinguishing characteristics of the English race, whose political habit has been transmitted to us through the sagacious generation by whom this government was erected, that they have never felt themselves bound by the logic of laws, but only by a practical understanding of them based upon slow precedent. For this race, the law under which they live is at any particular time *what it is then understood to be*, and this understanding of it is compounded of the circumstances of the time. Absolute theories of legal consequence they have never cared to follow out to their conclusions. Their laws have always been used as parts of the practical running machinery of their politics— parts to be fitted from time to time, by interpretation, to existing opinion and social condition.

If this law, designed to protect the people of this country from the evils of monopoly, and to preserve the liberty of the individual to trade freely, shall now be clearly understood; if its true purpose shall be recognized and its beneficent consequences realized; the twenty years of slowly developed interpretation and widening precedent will not have been without great value. For the law will henceforth be used, to employ Dr. Wilson's language, as a part of the running machinery of our political system, adapted to the needs of our social condition.

IX

FURTHER REGULATION OF INTERSTATE COMMERCE[1]

ONE of the most important questions—perhaps *the* most important—before the country to-day is that of the proper relation of the national government to corporations engaged in carrying on commerce among the States and with foreign countries. The Sherman Anti-Trust Law was held applicable to railroad companies in 1897, but the Interstate Commerce Law of 1887, and the various amendments to it, particularly the Elkins Law of 1903, the Hepburn Act of 1906, and the Mann–Elkins Law of 1910, have dealt so comprehensively and effectively with common carriers by railroad, express, pipe line, telegraph, telephone, and to a certain extent by water, that but few civil suits have been brought against such carriers under the Sherman Act, and—so far as I am aware—no criminal indictments have been found for violation of its provisions by railroad companies or other carriers. The gradual interpretation of the Act of July 2,

[1] Address before Minnesota State Bar Association, Duluth, Minn., July 19, 1911.

1890, resulting in the decisions and decrees rendered by the Supreme Court at its last term, has at last clearly demonstrated the effectiveness of that law to destroy existing combinations in restraint of interstate or international commerce, and attempts to monopolize any part of it, and to prevent renewed combination or monopolistic effort.

The first practical application of the "rule of reason," to combinations in violation of the anti-trust law, made since the Supreme Court decisions in the Standard Oil and Tobacco cases, was that of the United States Circuit Court for the Third Judicial Circuit, in the Government's suit against the so-called Powder Trust.[1] Certainly, no person interested in the maintenance of any monopoly or other restraints of interstate commerce can derive comfort from the stern demonstration of unlawful combination contained in the Court's opinion in that case, or the impending doom foreshadowed in its decree.

The recent decisions of the Supreme Court in Standard Oil Co. *v.* United States, and American Tobacco Co. *v.* United States [says Judge Lanning in rendering the opinion of the Court] make it quite clear that the language of the anti-trust act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. As we read those decisions, restraint of interstate trade

[1] United States *v.* E. I. du Pont de Nemours & Co., *et al.*, decided June 21, 1911, U. S. Cir. Ct., Dist. of Delaware.

and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the anti-trust act, restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the act there might have been restraint of competition that did not amount to a common law restraint of trade. . . .

While all this is true, the recent decisions of the Supreme Court make it equally clear that a combination cannot escape the condemnation of the anti-trust act merely by the form it assumes or by the dress it wears. It matters not whether the combination be "in the form of a trust or otherwise," whether it be in the form of a trade association or a corporation, if it arbitrarily uses its power to force weaker competitors out of business or to coerce them into a sale to or union with the combination, it puts a restraint upon interstate commerce and monopolizes or attempts to monopolize a part of that commerce in a sense that violates the anti-trust act.

In determining the form of decree to be entered, the Circuit Court said that the relief which it proposed to give was preventive and injunctive.

If our decree, limited to that purpose, shall necessitate a discontinuance of present business methods, it is only because those methods are illegal. The incidental results of a sweeping injunction may be serious to the parties immediately concerned, but, in carrying out the command of the statute, which is as obligatory upon this Court as it is upon the parties to this suit, such results should not stay our hand; they should only challenge our care that our decree be no

more drastic than the facts of the case and the law demand. . . . The present decree will therefore be interlocutory. It will adjudge that the 28 defendants are maintaining a combination in restraint of interstate commerce in powder and other explosives in violation of Section 1 of the anti-trust act, that they have attempted to monopolize and have monopolized a part of such commerce in violation of section 2 of that act, that they shall be enjoined from continuing said combination, and that the combination shall be dissolved. . . .

The decree further provided that in order that the Court might obtain such further information as should enable it to frame a final decree which should give effective force to its adjudication, a hearing should be given the parties at the next term "as to the nature of the injunction which shall be granted herein and as to any plan for dissolving said combination," the defendants being enjoined in the meantime from doing any acts to further extend or enlarge the field of operation or the power of the unlawful combination.

Therefore, within such time as the ascertainment of facts and the preparation of evidence necessary to the initiation and conduct of appropriate proceedings by the Government may require, such of the known monopolistic combinations in restraint of interstate trade and commerce as shall not voluntarily dissolve, will be brought before the Courts for judgment, and the precedents furnished by the Standard Oil, Tobacco, and Powder

cases afford some assurance of the results which may be anticipated.

But the question remains, can the great end and object of the Sherman Law—namely, that the normal course of trade and commerce among the States shall not be impeded by undue restraints and monopolies—be realized through the operation of that law alone?

In dealing with transportation, Congress was not content to rely simply on the process of injunction to restrain, and indictment to punish violations of the anti-trust law. It also established an administrative commission clothed with powers—greatly enlarged from time to time—over those engaged in the transportation business, which Congress enacted should be carried on for a reasonable compensation and without unjust discrimination as between parties or localities similarly situated. While Congress has not specifically incorporated corporations to carry on such business—save in a very few instances—nor directly licensed them to engage in interstate transportation, nor expressly exempted them from State interference, the Federal Courts have substantially held that Congress, by regulating the rates and practices of common carriers in interstate commerce, has prohibited State regulation which would conflict with that of the nation. The decisions of the Federal Courts on this subject have not been always consistent, and in some instances State legislation has been allowed effect, despite ap-

parent conflict with Federal regulation of the same subject. But in the absence of direct Congressional exclusion of state law, or an avowed direct and exclusive license system, or system of national incorporation, the Courts have very properly considered the susceptibilities of the States, and have upheld State legislation whenever it seemed to be not destructive of national control over the essentials of interstate commerce.

A more frankly logical system would be, of course, more satisfactory; but Congress—in common with other legislative bodies—is apt to shrink from taking a clearly logical position in legislation which may involve conflict with other sovereignties or quasi-sovereignties, and to leave judicial interpretation to add to statutory authority a power the legislature was desirous to confer, but feared to express.

There are many reasons why a similar attitude may be expected when Congress comes to deal with the difficult problem of regulating the conduct of large commercial businesses among the States by corporations.

The existing system, whereby every State charters corporations without the slightest regard to other States, or to the nation, empowered to roam at will—so far as the creator is concerned—but subject to any restriction or condition which any other State into which they may desire to go in carrying on their business, chooses to impose, naturally led to a demand for authority in one corporation to take and hold stock in another, in

order that the business of a corporation organized in one State might be carried on in another State, without subjecting the parent company and its entire capital and corporate organization to the laws of the latter. Probably no one thing has done more to facilitate restraint of trade and the growth of monopoly than the departure from the early rule of law that one corporation cannot own stock in another. That departure was the most baneful result of the *laissez-faire* policy in dealing with corporations to which the country abandoned itself during the last thirty years of the nineteenth century. The conditions which have resulted from the exercise of the expressly conferred power in one corporation to take and hold stock in another, present the most serious obstacles to effectively dealing with the "trust" problem. For few corporations, if any, solely by means of the direct acquisition of property and the widening scope of their own business, have acquired such control of the particular commerce among the States with which they are concerned as to constitute monopoly, or to threaten it. Whenever competitors have been excluded by unfair means, and a very large part of the commerce absorbed by a particular interest, the machinery by which such result has been accomplished will be found on examination to be the control of various corporations by means of intercorporate stock holdings.

The cases of the Standard Oil, American To-

bacco, the Powder Company, the American Sugar Refining Company, and others, furnish abundant judicial demonstration of this fact.

In a large number of cases, it has been sought to perpetuate the control secured by one corporation through the acquisition of stocks of other corporations, by pledging such stocks as security for issues of notes or bonds; and enormous amounts of securities have been sold to the public in faith of such pledges.

If Congress should enact that no corporation engaged, in interstate commerce shall hereafter acquire any stock of any other corporation so engaged, and that unless all such corporations should dispose of all stocks held by them in other corporations engaged in interstate commerce within some specified period, they should be prohibited from carrying on interstate commerce until they did so dispose of such stocks, the axe would indeed be laid at the root of the trust evil; but justice to the innocent holders of securities issued to the public based on pledged stocks, acquired and held pursuant to express legal authority, would require consideration to be given to their case, and such exceptions to be made from the prohibitions as might be necessary to their protection. These necessary acts of justice might seriously interfere with the enactment of legislation effective to the accomplishment of the main purpose in view.

But such drastic legislation, while logical and effective, is hardly to be expected, and the ques-

tion will therefore remain: Within what limits is legislation to regulate corporations engaged in interstate commerce other than transportation expedient and practicable? Should the analogy of the Interstate Commerce Law and Commission be followed? Is *any* regulatory legislation necessary besides the Sherman Act and the statutes prohibiting railroad rebates?

Conservative minds naturally shrink from accepting a conclusion which would devolve upon the national government the comprehensive powers and duties involved in extending the principles of the Interstate Commerce laws over commercial and industrial corporations; for the increased centralization of control in Washington over the trade of the country, the multiplication of Federal office-holders, and bureaucratic intermeddling with business, may be necessary, but are undesirable incidents to the conduct of daily business life.

That some further regulation over corporations carrying on commerce among the States may be necessary, is a matter of current comment. It has been openly advocated by representatives of some of the largest combinations of capital, perhaps as a means of salvation, and to preserve, under government supervision, great organizations whose continued existence is menaced by the recent interpretation of the Sherman Act, and the disintegration of which would be necessarily attended with much loss. To such, it is a case of "any port in a storm." Better continued co-

operative life, even under a powerful master, than disseminated properties and segregated activities, without constant governmental supervision.

But there are other reasons for such regulation. The Federal Department of Justice is not organized or equipped to maintain constant supervision and control over business organizations. It deals only with cases of violation of the law. The activities of an administrative board or commission would be directed to preventing such violations, and in aiding business men to maintain a continued status of harmony with the requirements of law.

Moreover, unless Congress shall provide for the establishment of corporations drawing their life and powers only from the national government, and subject only to its control, or shall confer specific powers on State corporations which will enable them to carry on commerce away from the State of their creation, without the interference of States into which they go, the present unsatisfactory condition of conducting business in the different States by means of many different corporations, owned or controlled through stock ownership by a parent company created by some one State, will continue, and in the natural, normal, healthy, and legitimate growth of such business, questions of the application of the Sherman Law must arise, which cannot properly be settled with the District Attorney or the Department of Justice, but should be dealt with by an administrative body having appropriate jurisdiction.

There are still further considerations involved in the question. The tendency of this age is toward coöperation in every field of activity. The early form of coöperative business effort by means of partnerships was found insufficient for large enterprises, because of the unlimited liability imposed on the partners, and the inelastic character of the investment. The great commercial development of the country would scarcely have been possible but for the introduction of coöperation in the form of corporations for business purposes, in the early part of the nineteenth century. The growth of the incorporated companies, the development of close relations between them by agreement, and through reciprocal stock ownership, so unified their power and extended their control, that their employees were driven to coöperative association for protection against the suppression of their rights, and for the purpose of compelling better recognition of their claims to larger recognition in the division of profits. The problems of modern commercial life are vast. They affect not only employer and employed, but the public. Facilities of transportation and for the transmission of intelligence have brought all parts of the world into close touch. Any economic disturbance in one part of the country affects to a greater or less extent every other part of the country. Common needs have developed, and commodities of many kinds are standardized. Prices, should be reasonable. Destructive com-

petition, while it is attended with abnormally low prices, never produces *reasonable* prices. Indeed, abnormal price is one of the *indicia* of monopoly. Fair competition is essential to healthy national life, but it is more than doubtful whether or not there can be fair competition without concert of action or coöperative effort to some extent. Business men of integrity are naturally desirous of avoiding violations of law. The construction of the Sherman Law originally contended for would have condemned them for any concerted action which imposed *any* restraint on trade. The more enlightened view which has been expressed by the Supreme Court limits the prohibition to *undue* restraints—those which are not the result of normal business methods, but which are intended to accomplish, or have for their direct and primary purpose, interference with the natural course of trade and commerce among the States or with foreign countries. Yet even within these rules, it is contended, there is an area of activity where coöperation and association should only have play under government supervision and control.

With such supervision, a natural economic force may be utilized to the public benefit and to the general satisfaction of the commercial world. By it, while monopolies and restraints of trade will still be held at bay by the terrors of the anti-trust act, thousands of small traders may by regulated coöperation protect themselves from the ruin of destructive competition on the one

hand, and from the constant apprehension of indictment on the other.

Whether or not such a Federal Industrial Commission should have power to regulate prices would almost certainly arise for serious consideration. The Interstate Commerce Law prescribes as a legislative rule that prices for transportation by rail, or wire, or pipe line, shall be reasonable, and that no unjust discrimination shall be made between individuals or localities similarly situated. It leaves it to the Commission to determine when this legislative standard is departed from and to take proceedings appropriate to compel compliance with it. A similar rule might be declared by Congress with respect to the prices of commodities the subject of interstate commerce.

We have become accustomed to the regulation of rates of transportation, but the suggestion that prices of commodities be regulated by Congress seems novel and radical. Yet the principle on which the regulation of transportation rates is based, is simply that when property is used in a manner to make it of public consequence and affect the community at large it becomes clothed with a public use, and may be controlled by the public for the common good. In the early days in some parts of this country statutes were enacted to regulate the business of millers and the rates they might charge for grinding. At that time it was a matter of public concern that every farmer should have the right to have his corn ground at a

reasonable rate. So to-day the conduct of the great commerce in staple articles among the States is become a matter of public consequence, and the courts have upheld legislation regulating it by prescribing some of the conditions under which it may be carried on. To require as one of these conditions that prices for commodities dealt in interstate commerce must be reasonable, only involves a new application of the same principle.

Indeed, unless prices be dealt with under such a law it would fail to reach the essential evil; for "unified tactics with regard to prices" has been authoritatively declared to be the essence of modern monopoly, and as was said in the case of National Cotton Oil Co. *v.* Texas (197 U. S., 115–129), "It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them." But legislative control of prices smacks of medieval sumptuary legislation and is foreign to the genius of our institutions. Students of Adam Smith are taught to believe that the natural price of an article is that which is fixed by the operations of the natural unrestrained law of supply and demand, working without any artificial restraint. The anti-trust legislation of the United States and of most of the States is based upon this theory. It is said in *The Wealth of Nations:*

The price of monopoly is upon every occasion the highest which can be got. The natural price, or the

price of free competition, on the contrary, is the lowest which can be taken, not upon every occasion, indeed, but for any considerable time together.[1]

But the fact is, that the law of supply and demand does not and has not for many years worked in this country in a natural, unrestrained, and unfettered manner. The Government, in the first instance, interposes an artificial restraint in the protective tariff on imports. True, the theory of this tariff is to equalize conditions of competition; to place, as it were, a handicap on the foreign competitor who has produced his commodities under conditions less burdensome than those under which the American manufacturer produces his. In fact, the inequalities resulting from the methods of tariff legislation are very often impossible to justify on the theory of sufficient protection only, and the resulting price is that fixed by a limited competition between dealers in the market from which foreign competitors are to a certain extent excluded. Nor is this all: It is probably safe to say that in almost every one of the great staple industries, prices have been for years fixed by agreement between the principal producers, and not by the normal play of free competition even among the domestic producers, nor by the unfettered operation of the law of supply and demand.

[1] Ed. Geo. Bell & Co., London and New York, 1896, vol. i., p. 62.

Take, for instance, the facts concerning the powder and explosive business, as found by the United States Circuit Court in the recently decided case to which I have already referred.

The record of the case now before us [said Judge Lanning] shows that from 1872 to 1902, a period of thirty years, the purpose of the trade associations had been to dominate the powder and explosives trade in the United States by fixing prices, not according to any law of supply and demand, for they arbitrarily limited the output of each member, but according to the will of their managers. It appears, further, that although these associations were not always strong enough to control absolutely the prices of explosives, their purpose to do so was never abandoned. Under the last of the trade association agreements—the one dated July 1, 1896, and which was in force until June 30, 1904—the control of the combination was firmer than it had before been. Succeeding the death of Eugene du Pont in January, 1902, and the advent of Thomas Coleman du Pont and Pierre S. du Pont, the attempt was made to continue the restraint upon interstate commerce and the monopoly then existing, by vesting, in a few corporations, the title to the assets of all the corporations affiliated with the trade association, then dissolving the corporations whose assets had been so acquired, and binding the few corporations owning the operating plants in one holding company, which should be able to prescribe policies and control the business of all the subsidiaries without the uncertainties attendant upon a combination in the nature of a trade association. *That attempt resulted in complete success.*

For years, the Court said, trade agreements between all manufacturers of powder and explosives in the United States have been in existence. There were times when the parties to these agreements broke away from and disregarded them, but usually the fines and penalties imposed on the violators were effective to protect and effectuate them.

A large number of indictments recently found in the Southern District of New York, were based upon evidence of the continued existence during a number of years, and until a recent date, of pools, or associations of manufacturers of various kinds of wire, under which official and noncompetitive prices were fixed, determined, agreed upon, and maintained.

The fact seems to be, that the prices of many standard articles of consumption sold in the United States for a number of years past have not been fixed at all by the operation of the laws of supply and demand, or by unrestrained competition, but by associations of the producers, without the participation of the consumer or the general public —that is, without those who have had to pay the bill having any voice in fixing the price. In this view, it is certainly not unreasonable that the purchasing public should desire to have some part in determining the price it is to pay—in like manner as has been recognized to be just with respect to the cost of transportation.

If there could be any assurance that the free play of competition would be assured, and the

natural price resulting from the unrestrained operation of supply and demand maintained, then no governmental supervision of business—beyond occasional prosecutions for violations of the Sherman Law—would be necessary. But the habits formed through years of following a system are not easily shaken off, and the artificial forms of organizations made necessary by the conflicting laws of many States with those of the nation will always present a border land of doubt, which will furnish, on the one hand, opportunities for those who wish to violate the law to do so with some show of justification; and on the other, to perplex those who are sincerely desirous of keeping the law, but by reason of the complexity and conflict of different State laws find it difficult to do so without seeming to run counter to the anti-trust law. The supervision of a Federal commission might supply a satisfactory method of reaching this difficulty.

In theory, it would seem that such a commission should have some power over prices; but the practical difficulties in the way of exercising such power so as not to inflict a greater evil than that it is intended to cure, are so great as perhaps to be insurmountable. It would be well-nigh impossible to fix a maximum price which would not be, on the one hand unjust to the small producer, and on the other hand unduly to increase the profit of the large producer. For the large producer, with an adequate supply of raw material, and the economies

and efficiencies only possible with a large capital and extensive organization, can always afford to sell at prices which would be ruinous to the small producer.

These problems go to the very root of the continued prosperity of our people. They can only be solved by a careful consideration free from any partisan bias. I have not attempted to express a conclusion, but merely to state the elements of a problem which, if wisely determined, will "scatter plenty o'er a smiling land," and if unwisely dealt with, may paralyze the hand of industry that maketh rich—not with the unequal wealth of monopoly, but with the distributed wealth which brings national prosperity and continued peace.

X

RESULTS OF THE TRUST DISSOLUTION SUITS[1]

THE trust question; that is the question of the proper relation of the Government to large business organizations, is a great economic question which should not be made the football of politics. The men who united in framing the Sherman Anti-trust Law were Democrats as well as Republicans. In the final debate in the Senate, one of the clearest statements of the need and purpose of that legislation, was made by Senator George, a Democratic Senator from Mississippi.

Since President Taft came into office, eleven (11) final decrees have been entered in equity suits brought by the Government under the Sherman Law to prevent and restrain violations of the act; two (2) large combinations of competitive concerns have been voluntarily dissolved, following criminal prosecutions of individuals concerned in them; and in one other instance, a temporary

[1] From an Address before the Finance Forum, West Side Young Men's Christian Association, New York, Nov. 13, 1912.

injunction resulted in the abandonment of a comprehensive movement to increase railroad rates, prior to the enactment of the law which gave to the Interstate Commerce commission power to prevent increases until it should have investigated the justice of making them. Of these decrees, three (namely, those against the Standard Oil Combination, the Tobacco combination, and the Powder combination) were directed against what are technically known as *trusts;* that is, the kind of things spoken of by Senator Sherman when he introduced his original bill into the Senate in March, 1890:

> Associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and they have invented a new form of combination commonly called *trusts*, that seek to avoid competition, by combining the controlling corporations, partnerships and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals. . . .

Perhaps the simplest definition of a modern trust is "a partnership of competitive corporations." Now, the decrees in the cases above mentioned struck down three of the greatest existing partnerships of competitive corporations controlling great industries which ever have grown up in the United States. They also established the principle that monopoly and unfair restraint of com-

petition could not successfully entrench themselves behind stock ownership; but that in whatever form the control of great industries is absorbed into a few hands, the law can search into the organization, and if it be found that an *undue* restraint is put upon interstate commerce, or a monopoly threatened, the Court can end that restraint or break up that monopoly.

In another case, namely, the suit against the Terminal Association of St. Louis, the unification of substantially every terminal facility by which the traffic of that city was served, was scrutinized by the Supreme Court, and, recognizing the peculiar topographical conditions of the city, the combination was permitted to continue; but only upon condition that its organization be so modified that the Association should act as the impartial agent of every line which was under compulsion to use its instrumentalities.

Eight (8) of the other decrees mentioned ran against combinations of (1) manufacturers of incandescent electric lamps; (2, 3) manufacturers of plumbing supplies and of sanitary enamel ware; (4) wholesale grocers; (5) manufacturers and dealers in kindling wood; (6) manufacturers of window glass; (7) manufacturers of what is known as plate matter and ready print matter for use in newspapers; and (8) manufacturers and importers of aluminum and the raw material from which it is produced. All of these were cases where independent manufacturers or dealers—competitors in

business—had united in various agreements, having for their purpose and necessary effect the fixing of prices, control of territory, and partitioning of business among themselves, and the exclusion of competition.

Following the prosecution of the Beef Packers in Chicago, who were charged with combining for the purpose of controlling the price in meat and meat products, the National Packing Company (a corporation which had been organized to take over a very large number of competing plants which had been acquired by representatives of the three great packing interests) was dissolved, and its properties scattered all over the United States, aggregating upwards of sixty million dollars in value, were distributed *pro rata* to and among the owners of the stock of the Packing Company. This distribution was so made as not only to remove the restraint on competition which was wrought by keeping all of these properties under one corporate control, but in many instances to induce competition in places where there was previously none. Moreover, many of these plants had been conducted under the names of their original owners, their actual ownership being unknown. This practice was terminated, and the business at these plants is now being conducted in the names of their actual owners. Besides these cases, in which final decrees have been actually entered, suits are pending and now being actively prosecuted against such large combinations as:

The United States Steel Corporation; the American Sugar Refining Company; the National Cash Register Company; the United Shoe Machinery Company; the Keystone Watch Case Company; the American Naval Stores Company (known as the turpentine trust) the International Harvester Company; the New Departure Company (the combination manufacturing and controlling coaster brakes).

These various concerns are charged with existing in violation of the anti-trust law.

A suit to terminate the control by the Union Pacific Railroad system of the Southern Pacific Railroad system has been argued in the Supreme Court of the United States and now awaits decision.[1] A suit to dissolve the combination between the carriers and producers of anthracite coal in Pennsylvania, New Jersey, and New York has also been argued in the Supreme Court and awaits decision.[2] A suit to terminate a combination of bituminous coal-carrying roads in Ohio and West Virginia has been argued and submitted to the Circuit Court of Appeals in the Ohio circuit, and awaits decision.[3] Four (4) different suits are pending against combinations of steamship lines which control certain forms of traffic between the

[1] Decided in favor of the Government, Dec. 12, 1912 (226 U. S., 61, 470).

[2] Decided partly in favor of Government, partly in favor of defendants, Dec. 16, 1912 (226 U. S., 324).

[3] Decided in favor of the Government, Dec. 28, 1912. Final decree entered March 14, 1914.

United States and foreign countries; five (5) suits are pending against combinations of lumber dealers formed for the purpose of regulating and controlling competition in that business, and especially of preventing retail dealers from purchasing directly from the wholesalers, instead of buying directly from jobbers; one (1) suit is pending against a combination of magazine publishers formed to control prices and fix the terms on which retailers may deal in their publications; and one (1) suit against a combination of bill-posters, organized to monopolize the business of bill-posting throughout the United States, was recently brought and is now pending. A prosecution of a number of persons engaged in a pool formed for the purpose of controlling the entire supply of free cotton of a given season has been twice argued in the Supreme Court and awaits decision.[1]

Now, before considering the effect of all these suits, we must first stop to consider what the law upon which they are based was intended to accomplish, because that must be the criteria by which to judge the results achieved. There seems to be a good deal of popular misconception on this point, and much current discussion has proceeded, apparently on the theory that the object of the law was to secure the confiscation or destruction of the property employed by the combinations declared to be illegal by the act. Indeed much of the

[1] Decided in favor of the Government, Jan. 6, 1913 (226 U. S., 525).

criticism of the results of the dissolution of the Tobacco and the Standard Oil combinations has been based simply upon the fact that the selling value of the stocks of the constituent companies had increased.

Yet the Supreme Court declared in the Standard Oil case, and reiterated in the St. Louis Terminal case, that while injury to the public by the prevention of an undue restraint on, or the monopolization of, trade or commerce, is the foundation upon which the prohibitions of the statute rest, one of the fundamental purposes of the statute is to *protect*, and not to *destroy* rights of property. And in the Tobacco case, the Supreme Court laid great stress upon its duty, while giving complete and efficacious effect to the prohibitions of the statute, to do so with as little injury as possible to the interests of the general public, and with a proper regard to the vast interests of private property involved.

This principle was observed in the Standard Oil decree, by directing the distribution of the stocks of the corporations held by the New Jersey Company *pro rata* among its stockholders, and enjoining the several corporations from in the future doing any acts of the character of those by which the combination had been created and maintained. In the Tobacco case, where upwards of an hundred millions of bonds, and nearly eighty millions of preferred stock in the hands of the investing public were involved, the Court ordered

such a distribution of the properties of the combination among fourteen separate corporations as should give to no one of them an actual or potential monopoly of any part of the business, and then enjoined those companies from methods of organization or business which would make possible new combination or monopoly.

The first great combination that was broken up under the Sherman Law was one of manufacturers of sewer pipe, to divide territory, suppress competition in bidding, and control the prices of their product. This was consummated by the judgment of a Circuit Court of Appeals presided over by President Taft, when he was Circuit Judge, which was unanimously affirmed by the Supreme Court in 1899.

The next great result obtained was the dissolution of the Northern Securities Company in 1904. The decree there practically compelled the Securities Company to distribute the stocks of the two great trans-continental railroad companies which it held (that is, the Northern Pacific and Great Northern) *pro rata* among its stockholders. The immediate result of that distribution was to make the same people owners, in the same proportion, of the stocks of those two competing systems. That was, however, but a temporary condition, and for a long time past no one has suggested that these two systems are under a common control. It was also followed by an enormous rise in the market price of these railroad stocks; yet no

one has ever questioned the great benefit resulting to the public from the termination of the unified control over those two particular systems; and, far more important, it resulted in arresting the process of concentrating the ownership of railroads into a few hands, which was then going rapidly forward.

The third great step in the enforcement of this law was its application to the great industrial trusts in the Standard Oil and Tobacco cases. The beneficial results of those decisions ought not to be obscured by the temporary high prices of the stocks of the constituent companies quoted on the curb market. There is a perfectly obvious reason for these high prices. Before the Government suits were brought, no outsiders knew anything about the value of the properties of the Standard Oil combination; nor with accuracy of the Tobacco trust. The evidence adduced in those suits afforded the public some idea of the vast amount of property which had been acquired by them, and led to the speculative prices which followed the distribution. The great accomplishment of the decisions is in wiping away all artificial barriers to the enforcement of the law, establishing its supremacy over the largest combinations, and demonstrating its sufficiency to reach the actual evil of monopoly, no matter in what form it is clothed.

The properties and business of the Standard Oil combination were distributed among more than

thirty corporations, which were compelled thereafter to conduct their businesses separately and independently of each other. The properties and businesses of the Tobacco combination were distributed among fourteen, and those of the Powder trust, among three separate corporations. The decrees prohibited the different companies from having common directors, common officers, common agents; from occupying the same offices; from making contracts with each other tending to prevent the freest competition and the most independent action; from carrying on business in any name but their own, and from lending financial assistance to each other. In the decrees against the various combinations of independent manufacturers formed by agreement among themselves, a large variety of practices which in the past had resulted in crushing out fair and useful competition, and in centralizing control over the business in the combination, have been expressly prohibited. Thus, in the suit against the Pacific Coast Plumbing Supply Association twenty-four corporations and sixty individuals were enjoined:

From combining, etc., to prevent manufacturers of plumbing supplies from selling to persons not members of the association or not listed in a blue book published by the association;

From publishing any such book;

From publishing any list of manufacturers who had not agreed to sell only to members of

the association or to persons listed in the blue book;

From advertising lists of persons in the business who are not members of the association;

From combining to boycott a manufacturer for having sold to persons not members of the association and not listed in the blue book;

From conspiring to prevent persons located in a given territory from purchasing plumbing supplies from manufacturers or other dealers;

From communicating with a manufacturer or dealer to induce him not to sell to persons not members of the association or not conforming to the definition of a jobber, given in the blue book.

In the decree against the manufacturers of electrical incandescent lamps, a large number of corporations, all of whose stock was owned by the General Electric Company, had carried on business ostensibly as independent companies, but really under the control of the General Electric Company; they were ordered to be dissolved and their business in the future to be conducted in the name of the General Electric Company. The making and performance of certain contracts whereby the manufacturers agreed to sell goods only to the General Electric, or as permitted by them, or on terms or prices fixed by them, were enjoined. Independent competitive companies were enjoined

From fixing prices by agreement;

From maintaining by agreement, differentials between lamps which did not in fact differ in

quality or efficiency and from allowing discounts based on the aggregate of purchases from different manufacturers.

From making agreements with jobbers, etc., under which they could only secure goods manufactured by the General Electric Company on condition of agreeing to take all other goods manufactured by them;

From making more favorable terms of sale to customers of any rival manufacturer than it at the same time offered to its established trade, with the purpose of driving such rival out of business.

An interesting decree was rendered in the case against the Central West Publishing Company and the Western Newspaper Union. These two concerns are substantially the only ones in the country engaged in the business of manufacturing and selling ready-print papers, and stereotype plates, both of which are used by a vast number of newspapers, largely the country press. They were enjoined against combining with each other and thus preventing any competition whatever in the business, and they were both enjoined:

1. From underselling any competing service with the intent or purpose of injuring or destroying a competitor.

2. From sending out traveling men for the purpose or with instructions to influence the customers of the competitors or either of them so as to secure the trade of the customers, without regard to the price.

3. From selling their goods at less than a fair and reasonable price with the purpose or intent of injuring or destroying the business of a competitor.

4. From threatening any customer of a competitor with starting a competing plant unless he patronized the defendant.

5. From threatening the competitors of either one that they must either cease competing with the defendants or sell out to one of the defendants, under threat that unless they did so their business would be destroyed by the establishment of nearby plants to compete with them.

6. From in any manner, directly or indirectly, causing any person to purchase stock or become interested in the other for the purpose or effect of harassing it with unreasonable demands or inquiries.

7. From circulating reports injurious to the business of the other.

8. From persuading customers of competitors to violate contracts made with them by undertaking to indemnify them against loss and damage by reason of so doing.

Every one of these decrees dealt with forms of unfair competition, which investigation had shown to have been resorted to for the purpose of controlling prices and suppressing competition. An examination of the different decrees will demonstrate that the decision in the Tobacco case has been put into practical effect and that the Federal

courts are exercising in equity suits under the Sherman Law, a power to restrain which is co-extensive with the evils against which it was enacted. That statute strikes at *undue* restraints of the trade and commerce of the United States and attempts to monopolize it, and empowers the courts of equity of the United States to make such decrees as will be effective to prevent and restrain every form in which such restraints or attempts to monopolize may be found to exist.

The first tangible result of these dissolution suits is found in the fact that no new combinations or trusts, such as the Standard Oil, Tobacco, Sugar, Steel, Harvester, or the like, have been formed during the last four years. So long as the statute remains in its present form, none will be formed, unless the law department of the national government shall cease to be vigilant in the enforcement of the law. The next result is, that it has become apparent that the field of enterprise is open to competition if any choose to embark in it. Only a few days since, the formation of a new corporation with a substantial capital was announced to engage in the tobacco business in competition with the companies resulting from the disintegration of the trust. Since the disintegration of the Tobacco trust, all of the stock of the United Cigar Stores has been sold to persons having no connection with the old trust, and that big retail corporation is carrying on its business independently of the companies with which it was formerly affiliated.

A fight for the control of the company between the holders of a majority of the stock of the Waters–Pierce Oil Company, to whom it was distributed by the Standard Oil Company, after the Supreme Court's decision, and the minority holders, has resulted in the sale of that majority stock, or a large part of it, to that minority, and thereby the elimination of Standard Oil interests from that corporation.

The regulation of rates of transportation of oil through the pipe lines owned by the companies, which were controlled by the Standard Combination by means of the enforcement of the Hepburn Act by the Interstate Commerce Commission, also promises to remove all unfair advantage of the large refining and marketing companies over the terms and conditions of transportation, which constituted so potent a factor in building up the trust.

But the criticism is made that these suits have not resulted in reducing the price of commodities dealt in; and it is argued that as one of the evils of monopoly is the control of prices, the fact that prices have not been reduced is evidence that the monopoly has not been destroyed. The criticism is a superficial one. Scarcely a year has passed since the principal dissolutions took place, and it can hardly be expected that the results of twenty years of successful monopolization can be undone in less than one year. In the next place, the various companies among which the business of

former combinations has been distributed are not likely to embark on a sharp price-cutting competition unless compelled to. The prices of raw materials have been distinctly affected by the dissolution, and both tobacco leaf and crude oil sell at much higher prices since the unification of substantially all the buyers has been removed, than those which previously prevailed. There has been some advance in the price of a few products of petroleum, such as gasoline, due to the enormous increase in demand for the refined article, and the increase in the price of crude oil. There has been no increase in the price of tobacco products, but there is an enormously increased competition in pushing the sale of different brands of tobacco by means of extensive advertising.

More important than all of these, the unfair methods of competition resorted to in the past have been checked and in large measure destroyed, so that the field is open to fair competition and enterprise to a larger degree, I believe, than for many years past. Of course, this has its disadvantages as well as its advantages. It is impossible in many lines of industry to maintain what the producers consider to be satisfactory prices, and some complaint is made in different trades, because the producers are advised that they cannot lawfully get together and agree upon and maintain prices which will afford them a satisfactory profit. The law is coming to be understood by the community, and substantially the only complaint

heard against it is from those who wish through some form of combination or agreement, to raise prices or restrict competition. When the pending suits against the great combinations are terminated, I believe no abnormally large combinations will be left intact, and the businesses and property now held by them will be distributed among a sufficient number of separate and distinct companies to remove all possible fear of undue influence by them over the business of the country. If their future activities are restricted by injunctive provisions in adequately drawn decrees, and the government law department is vigilant in seeing that they are complied with, it is my hope that no further legislation will be necessary to protect against undue restraints of interstate commerce.

XI

FEDERAL CONTROL OF STOCK AND BOND ISSUES BY INTER-STATE CARRIERS[1]

IN a special message to Congress in January, 1910, the President recommended the enactment of a law regulating the issue of stocks and bonds by railroad companies subject to the Interstate Commerce Act, for any purpose connected with or relating to any part of its business governed by that act. The Republican platform of 1908 had declared in favor of such legislation. The President expressed his opinion that it would be plainly within the jurisdiction of Congress. The bills for the amendment of the Interstate Commerce Act, in accordance with the President's recommendations, introduced into each House of Congress, contained provisions prescribing the conditions under which stocks and bonds should be issued. The necessity of expressing such regulations in negative and restrictive form, because applied to corporations deriving their corporate life and powers from State

[1] An address delivered before the Illinois State Bar Association, at Chicago, June 24, 1910.

laws, resulted in complicated provisions not easily understood by those unfamiliar with the subjects involved. Partly on this account, partly on account of doubts as to the constitutionality of such legislation entertained by most Democrats and by some Republicans, the provisions dealing with that subject were dropped from the bill, but a clause was inserted authorizing the President to appoint a Commission to investigate "questions pertaining to the issuance of stocks and bonds by railroad corporations subject to the provisions of the Act to Regulate Commerce, and the power of Congress to regulate the same."

The first question arising in the consideration of this matter will be, necessarily, the power of Congress to legislate in the premises, and it has therefore seemed to me that a discussion of that subject would be of timely interest.

The authority of Congress over the issue of stocks and bonds by State railroad corporations engaged in interstate commerce must rest upon the provisions of Section 8 of Article I. of the Constitution, granting to the Congress power—

> To regulate commerce with foreign nations, and among the several States, and with the Indian tribes, [and] . . .
>
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . .

This grant vested in the Congress a power in its nature sovereign and exclusive over such commerce,

to be exercised in such manner as Congress in its wisdom should deem fit, provided the means adopted should be in some respect appropriate or adapted to carrying into execution the powers so conferred. But the relationship between the means and the end need not be direct and immediate.[1]

No better definition of this power, and no clearer statement of the principles governing its construction and exercise, ever has been formulated than the opinion of Alexander Hamilton on the constitutionality of a national bank law, rendered February 23, 1791. Thomas Jefferson, then Secretary of State, and Edmund Randolph, the Attorney-General, had united in advising President Washington that Congress was without power to establish a national bank, their objections being founded on a general denial of the authority of the United States to erect corporations. But Hamilton asserted that the national government was empowered to create corporations whenever the Congress deemed such action necessary or proper to carry out more effectually any power conferred by the Constitution; that such power was "inherent in the very definition of government, and essential to every step of the progress to be made by that of the United States."

Every power vested in a government [he maintained] is in its nature sovereign and includes by force

[1] Legal Tender Cases, 12 Wall., 457, 543.

of the term a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society. . . .

The circumstance that the powers of sovereignty are in this country divided between the National and State governments does not afford the distinction which makes this principle inapplicable to the United States.

It does not follow from this, that each of the portion of powers delegated to the one or to the other, is not sovereign *with regard to its proper objects*. It will only *follow* from it, that each has sovereign power as to *certain things*, and not as to *other things*.

He held the power to erect corporations to be unquestionably incident to sovereign power, and consequently to that of the United States "in relation to the objects entrusted to the management of the Government."

The difference is this: where the authority of the Government is general, it can create corporations in all cases; where it is confined to certain branches of legislation it can create corporations only in those cases.

The only question to be considered was whether the means to be employed, or the corporation to be erected, has any natural relation to any acknowledged objects or lawful ends of the government.

If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority.

In the powers to collect taxes, to borrow money, to regulate trade between the States, and to raise and maintain fleets and armies, he found ample basis for the exercise by Congress of its sovereign power in the creation of a banking corporation for the purpose of aiding in the exercise of those enumerated powers.

Based upon this executive interpretation, Washington approved the charter of the first United States Bank. Twenty-eight years later, the soundness of the proposition asserted by the great finance minister was judicially established by the Supreme Court, and Chief Justice Marshall, in expressing the unanimous opinion of the Court,[1] could find no better language in which to formulate the principles of the decision, than a paraphrase of that used by Hamilton.

We admit [he said], as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to

[1] McCulloch *v.* State of Maryland, 4 Wheat., 316.

perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.[1]

The Government of the United States though limited in its powers, is supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "anything in the constitution or laws of any State to the contrary notwithstanding."[2]

He admitted that among the enumerated powers was not to be found that of establishing a bank or creating a corporation, but he pointed out that among the enumerated powers of government were

the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution.[3]

[1] McCulloch *v.* State of Maryland, 4 Wheat., 241.
[2] P. 406. [3] Pp. 407–8.

In Gibbons *v.* Ogden [1] there was sharply presented to the Court a consideration of the nature and extent of the power conferred by the Constitution upon the Federal Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce [said the Chief Justice, in oft-quoted language], and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. . . . Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.

Mr. Justice Johnson somewhat elaborated this definition:—

Commerce, in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent and their various operations, become the objects of commercial regulation. Ship-building, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity that the nation which could not legislate over these subjects, would not possess power to regulate commerce.

[1] 9 Wheat., 1.

This power to regulate, the Chief Justice pointed out, was the power—

to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

In passing upon the constitutionality of the Employer's Liability Act of June 11, 1906 (32 Stat., 232), Mr. Justice White cited this definition of Chief Justice Marshall's as one which is and always has been accepted by the Supreme Court; and applied it to sustain the proposition that Congress, under the grant of power to regulate commerce, may lawfully regulate the relation of master and servant in conducting that commerce.[1]

"It cannot at the present day be doubted," said Justice Bradley, in delivering the unanimous opinion of the Court in California *v.* Pacific Railroad Co.,[2] "that Congress, under the power to regulate commerce among the several States, as

[1] The Employer's Liability Cases, 207 U. S., 463.
[2] 127 U. S., 1–127.

well as to provide for postal accommodations and military exigencies, had authority to pass these laws"—referring to the Pacific Railroad Acts:

The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject.

In 1887, Congress enacted the Interstate Commerce Act by which it required rates for the transportation of freight and passengers in interstate commerce to be just and reasonable, forbade unjust discrimination, and created a commission to determine when any rate was in violation of this statutory rule, and otherwise to exercise a certain

control over interstate carriers. While the construction of various provisions of the act has been submitted to the courts in a number of cases, the constitutionality of the act has never been seriously questioned.

In Mo. Pacific Ry. Co. *v.* Kansas,[1] the Court quoted from the opinion in Atlantic Coast Line *v.* North Carolina Corporation Commission,[2] that—

> The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their State business, to State regulation, which may be exerted either directly by the legislative authority, or by administrative bodies endowed with the power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine,

and said,

> The Coast line case was concerned with the exertion of State power over a matter of State concern. But the same doctrines had been often previously expounded in reference to the power of the United States in dealing with a matter subject to the control of that Government.

In Louisville & Nashville R. R. *v.* Kentucky[3] it was said:

> While there is no general reservation clause in the charter of the L. & N. Co., we think for the reasons

[1] 216 U. S., 262. [2] 206 U. S., 1. [3] 161 U. S., 677.

stated in the *Pearsall* case (161 U. S., 646), that under its police power the people, in their sovereign capacity, or the legislature, as their representatives, may deal with the charter of a railroad corporation, so far as is necessary for the protection of the lives, health or safety of its passengers or the public, or for the security of property or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired.

When the subject involved affects commerce among the States, this power of control for the public good is vested in and can be exercised by Congress. The power extends, not only to *restrictive*, but if in the wisdom of Congress it seem necessary, to *prohibitive* measures, in order to enforce the rules laid down by Congress respecting the conduct of interstate commerce.

That the power to regulate commerce between the States involves the power to *prohibit* such commerce when in the opinion of Congress such prohibition is essential to the public welfare, was recognized and established by the Supreme Court in the Lottery Case.[1] Having asserted that the carrying of lottery tickets from State to State constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution, the Court, speaking by Mr. Justice Harlan, asked:

Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles

[1] 188 U. S., 321.

from State to State is not a fit or appropriate mode for the *regulation* of that particular kind of commerce?

. . . . . .

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from State to State, except the one providing that no person shall be deprived of his liberty without due process of law. . . . [But] it will not be said to be a part of any one's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals.

That regulation may sometimes appropriately take the form of prohibition, the Court illustrated by reference to the acts of Congress with respect

to the transportation of diseased cattle (Act of May 29, 1884, chapter 60); the provisions of the Sherman Anti-Trust Act of July 2, 1890; and the legislation regarding the shipment of intoxicating liquors among the States (Act of August 9, 1890, 26 Stat., chapters 313, 328). The Pure Food Law of June 30, 1906, is a later example of the same character of legislation.

The decision in the Lottery Case was followed in Buttfield *v.* Stranahan[1] which affirmed the constitutionality of the Act of March 2, 1897 (29 Stat., 604), for the prevention of the importation of impure and unwholesome tea.

In the Commodities Clause Cases[2] the Supreme Court construed the provision contained in the Hepburn Act of June 29, 1906 (34 Stat., 584)—commonly called the commodities clause—to mean that a railway company was thereby prohibited from moving in interstate commerce commodities owned by it, or in which it had a direct interest, and from transporting commodities in such commerce under the following circumstances and conditions: (*a*) When the commodity has been manufactured, mined, or produced by a railway company or under its authority, and at the time of transportation the railway company has not in good faith, before the act of transportation, parted with its interest in such commodity; (*b*) when the railway company owns the commodity to be transported in whole or in part; (*c*) when

[1] 192 U. S., 470.

[2] 213 U. S., 366.

the railway company at the time of transportation has an interest direct or indirect, in a legal sense, in the commodity—which last prohibition does not apply to commodities manufactured, mined, produced, owned, etc., by a corporation in which the railway company is merely a stockholder—and, as thus construed, declared that the clause was a regulation of commerce inherently within the power of Congress to enact. Reference was made by Mr. Justice White, in writing the unanimous opinion of the Court, to the case of New Haven Railroad *v.* Interstate Commerce Commission,[1] in which, to use his own language:

> After much consideration, it was held that the prohibitions of the Interstate Commerce Act as to uniformity of rates and against rebates, operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render practically impossible the buying and selling by an interstate carrier of a commodity transported by it.

This case he cited as an authority to demonstrate that the statute, as construed by the Court, was inherently within the power of Congress to enact as a regulation of commerce.

> We do not say this [said the learned Justice] upon the assumption that by the grant of power to regulate

[1] 200 U. S., 361.

commerce the authority of the Government of the United States has been unduly limited on the one hand and inordinately extended on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the States of lawful commodities, or to destroy the governmental power of the States as to subjects within their jurisdiction, however remotely and indirectly the exercise of such power may touch interstate commerce. On the contrary, putting these considerations entirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all preëxisting rights of the railroad companies were subordinated.[1]

The case of McCulloch *v.* Maryland[2] settled the power of Congress to create a corporation, whenever that was an appropriate means to carrying out a power given to the Congress in the Constitution. In the exercise of the power to regulate commerce among the States, Congress passed acts incorporating the Union Pacific Railway Company, in 1862 (12 Stat., 489); the Northern Pacific Railroad Company, in 1864 (13 Stat., 365); the Atlantic and Pacific Railway Company, in 1866 (14 Stat., 292); and the Texas Pacific Railway Company, in 1871 (16 Stat., 473), and the Supreme Court held all of these acts to be valid

[1] Citing Armour Packing Co. *v.* United States, 209 U. S., 56.
[2] 4 Wheat., 316.

and constitutional exercises of power.[1] In Luxton *v.* North River Bridge Co.,[2] the constitutionality of an act of Congress incorporating a company to build a bridge across a navigable river between two States was affirmed.

Prior to the sixties, Congress had enacted much more legislation concerning commerce by water and the instruments of that commerce than respecting commerce by land. The power of Congress over water commerce is no greater than that over land commerce. Both depend upon the same clause in the Constitution:

> Up to a recent date [said Mr. Justice Brewer in In re Debs[3]] commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the Courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fulness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

[1] See Pacific R.R. removal cases, 115 U. S., 2; Ames *v.* Kansas, 111 U. S., 449; California *v.* Pacific Railroad Co., 127 U. S., 1; Reagan *v.* Mercantile Trust Co., 154 U. S., 413; Central Pacific Railroad Co. *v.* California, 162 U. S., 91; United States *v.* Union Pacific R.R. Co., 160 U. S., 1; United States *v.* Union Pacific R.R. Co., 98 U. S., 569.

[2] 153 U. S., 525.

[3] 158 U. S., 564, 591.

In some respects, congressional legislation has dealt far more minutely with the subject of water commerce than with that by railroad.

The navigation laws of the United States provide that only vessels registered pursuant to act of Congress shall be deemed vessels of the United States and entitled to the benefits and privileges appertaining to such vessels, and that they shall enjoy such benefits and privileges only so long as they shall continue to be owned by a citizen of the United States or a corporation of a State, and shall be commanded by a citizen of the United States (U. S. R. S., Sec. 413): That, with certain exceptions, only vessels built within the United States and belonging wholly to citizens thereof may be lawfully registered (R. S., Sec. 4132): That no bill of sale, mortgage, hypothecation, or conveyance of any vessel or part of a vessel of the United States shall be valid as against any person other than the grantor or mortgagor, his heirs and devisees and persons having actual notice thereof, unless recorded in the office of the Collector of Customs where such vessel is enrolled (R. S., Sec. 492).

By Section 4283, Revised Statutes, the liability of an owner of any vessel for loss, injury, or destruction of property shipped in it is limited to the amount of the value of the interest of such owner in the vessel and her freight. The constitutionality of this enactment was upheld by the Supreme Court,[1] even as applied to a vessel engaged in ply-

[1] Lord *v.* Steamship Co., 102 U. S., 541.

ing on the Pacific Ocean between two ports of the State of California.

It seems strange, that although such comprehensive control over interstate and foreign commerce by water, including the regulation of the agencies of such commerce, the citizenship of the owners of such agencies, the method of transferring and incumbering such ownership, and the limit of the liability of the owners, had been exercised by Congress from an early date, yet when a bill was introduced in Congress in 1864 to declare the Raritan Delaware Bay Railroad of New Jersey a lawful structure and a military and post road, so as to enable it to compete for through traffic between Philadelphia and New York with the Camden & Amboy Railway monopoly, it was defeated. New Jersey had in 1832 granted to the last-named company a monopoly in railroad construction and maintenance through that State, between New York and Philadelphia, as complete as that which the State of New York had granted to Robert Fulton and Robert Livingston in steamboat traffic in the waters of New York, which had been declared contrary to the Federal Constitution in Gibbons *v.* Ogden. Yet the bill in favor of breaking the monopoly was successfully opposed upon the ground that—

there is no warrant in the Constitution of the United States that will allow Congress through her representatives from other states of this Union to interfere with

the local railway system of any individual State which it has incorporated merely for the purpose of doing business within its limits.

Nor were there wanting members of Congress to contend that railroad transportation did not fall under the term "commerce." The same opposition was successfully made to an effort to break the Pennsylvania Railroad monopoly during the following session, and not until June 15, 1866, was the bill passed which gave to a railroad corporation of one State the right to carry on interstate commerce in other States.[1] This act (14 Stats., 66) is brief but comprehensive:

Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies: Therefore:

Be it enacted by the Senate and House of Representatives of the United States, etc., That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination.

[1] See *A Congressional History of Railways in the United States*, by Lewis H. Haney, vol. ii., pp. 214–230.

This law (subsequently carried into the Revised Statutes as Section 5258) has been followed by a large number of acts of Congress regulating interstate commerce in various particulars. Many of those statutes are enumerated in Mr. Justice Brewer's opinion in the Debs case,[1] and all operation by State railroad companies as agencies of interstate commerce since 1866, has been carried on under the authority granted by that act, and the subsequent acts regulating interstate commerce. Obviously, as Mr. Justice Brewer said in the Debs case:

these powers given to the national government over interstate commerce and in respect to the transportation of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in the full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control had been again and again presented to this Court for consideration. It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this Court the question presented was of the validity of State legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce.

[1] In re Debs, 158 U. S., 564, 580.

In the light of these authorities, it would seem clear that the right of a corporation—certainly of a railroad corporation—of one State to carry on business in interstate commerce, depends upon the will of Congress.

It is contended however that the right to carry on commerce between the States is not one *created* by the Federal Constitution, but a right which the Constitution found in existence and which it gave Congress power to regulate. This is perfectly true as to individuals, but not as to corporations. Until Congress legislated on the subject, the States, under the rulings of the Supreme Court, enjoyed in unrestrained right to legislate regarding the instrumentalities of commerce.

For, as was pointed out in Louisville & Nashville Railroad Co. *v.* Kentucky,[1] while the police power of a State cannot be directly exercised by imposing a restriction or burden upon *commerce* itself, this is not true with respect to the *instruments* of such commerce; and with respect to legislation respecting the instrumentalities of commerce it was said in Chicago, Milwaukee, etc., Railway Co. *v.* Solan[2]:

> So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits.

[1] 161 U. S., 677. [2] 69 U. S., 133.

In Sherlock et al *v.* Alling,[1] Mr. Justice Field said:

It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and inter-State commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital, and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety, and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life.

The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern.

[1] 93 U. S., 99.

It is recognized and implied in all of such statements that when Congress does legislate on any of these incidental subjects, "*touching the rights and liabilities of persons engaged in commerce,*" its legislation becomes "the supreme law of the land, anything in the constitution or laws of any State notwithstanding."

So in Crutcher *v.* Kentucky,[1] the Supreme Court held an act of the Legislature of Kentucky requiring the agent of a foreign express company to take out a license on certain specified conditions before carrying on express business between that State and others, to be a regulation of interstate commerce, and to that extent repugnant to the Constitution.

Congress [said Mr. Justice Bradley] would undoubtedly have the right to exact from associations of that kind any guarantees it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard.

. . . . . .

To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right,

[1] 141 U. S., 47.

unless Congress should see fit to interpose some contrary regulation on the subject.

And [he adds] it has frequently been laid down by this Court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce.

This statement of the law is cited with approval in the prevailing opinion of the Supreme Court in the recent cases of Western Union Telegraph Co. *v.* Kansas,[1] and International Text-book Co. *v.* Pigg.[2]

The right of a corporation organized under the laws of any State to engage in interstate commerce therefore depends, first, upon the powers given to it by the State of its creation, and second, upon the will of Congress. In the absence of any expression by Congress of that will, it may conduct its business in a State other than that of its creation, in accordance with the comity extended to foreign corporations of its class by such State, either impliedly or by express legislation; and if there be such legislation, then on compliance with its requirements, provided such requirements do not amount to creating a burden upon interstate commerce, or conflict with any Federal regulation of interstate commerce, or other rights secured by the Federal Constitution.

The authorities on the subject of the right of corporations to carry on business outside of the State creating them, without interference from State authorities, have been the subject of too much

[1] 216 U. S., 1, 19. [2] 217 U. S., 91, 108.

well-known discussion to need more than passing reference here to the decision in Bank of Augusta *v.* Earle,[1] and the very recent cases of Western Union Telegraph Co. *v.* Kansas,[2] Pullman Car Co. *v.* Kansas,[3] and International Text-book Co. *v.* Pigg.[4]

In Paul *v.* Virginia[5] where the power of a State to exclude foreign insurance companies from doing business within its limits, except upon conditions prescribed by it, was under discussion, the Court said:

> It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals.
>
> . . . . . .
>
> This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations and corporations.

But in that case it was held that issuing a policy of insurance was not a transaction of commerce, and that such contracts were not articles of commerce in the proper meaning of the word, although

[1] 13 Peters, 519, 589. [2] 216 U. S., 1.
[3] 216 U. S., 56. [4] 217 U. S., 91. [5] 8 Wall., 168.

the parties to such contracts were domiciled in different States. These paragraphs from the opinion in Paul *v.* Virginia were cited with approval in Western Union Telegraph Co. *v.* Kansas.[1]

The control of Congress being therefore sovereign and plenary over commerce among the States, and the instrumentalities of such commerce, its power to create national corporations to conduct such commerce being established, its right to prohibit such commerce when essential to the public welfare being adjudged, even to the extent of forbidding a State railroad corporation to carry in interstate commerce a commodity in which it has any legal interest, direct or indirect, although the effect of such prohibition would be substantially to render buying and selling by an interstate carrier of a commodity which it transports practically impossible; how can it be doubted that Congress might repeal the act of 1866 and forbid any railroad company to transport goods in interstate commerce unless incorporated by Congress?

But Congress has not seen fit to legislate in that way. While in certain cases creating corporations to build and operate railroads and bridges, it has in general specifically empowered corporations of States to transport passengers and property in interstate commerce subject to rules and regulations which it has from time to time prescribed.

[1] 216 U. S., 134.

In Cherokee Nation *v.* Kansas Railway Co.,[1] it was expressly held that in the execution of the power to regulate commerce, Congress may employ as instrumentalities corporations created by it or by the States.

Congress had granted to the defendant in that case, a corporation organized under the laws of Kansas, the right to construct a railroad through the Indian territory. Justice Harlan, writing the opinion of the Court, said:

> It is true that the company authorized to construct and maintain is a corporation created by the laws of a State, but it is none the less a fit instrumentality to accomplish the public objects contemplated by the Act of 1884. Other means might have been employed, but those designated in that act, although not indispensably necessary to accomplish the end in view, are appropriate and conducive to that end, and therefore within the power of Congress to adopt. The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and, therefore, subject to governmental control and regulation.

A State corporation availing of the powers conferred by acts of Congress becomes thereby subject, in those respects in which Congress has legislated, to all the conditions and limitations imposed by Congress on the exercise of those pow-

[1] 135 U. S., 641, 657.

ers, as completely as though they were written into the charter of such corporation.

This was made clear in Hale *v.* Henkel,[1] where the right of an officer or employee of a State corporation, summoned before a grand jury as a witness, to refuse to produce the books and documents of such corporation, upon the ground that they would tend to incriminate the corporation itself, was under discussion. The Court discriminated between the rights of the witness, as an individual, and the rights of the corporation, a mere creature of the State, presumed to be incorporated for the benefit of the public, receiving certain privileges and franchises and holding them subject to the laws of the State and the limitations of its charter; and held, that while an individual might lawfully refuse to answer incriminating questions, unless protected by a statute, it did not follow that a corporation vested with special privileges and franchises could refuse to show its hand when charged with an abuse of such privileges. So far as the right of such corporation to carry on interstate commerce was involved, the Court treated that as a franchise derived from the Federal government which entailed a corresponding responsibility to it.

Mr. Justice Brown, writing the opinion of the Court, said:

> It is true that the corporation in this case was chartered under the laws of New Jersey, and that it

[1] 201 U. S., 43.

receives its franchise from the legislature of that State; but such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this, the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty, the General Government possesses the same right to see that its own laws are respected as the State would have with respect to the special franchises vested in it by the laws of the State. *The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress.*

In the light of these authorities, it may be confidently asserted that while Congress may itself create corporations for the purpose of carrying on interstate commerce, it may also prescribe rules and regulations under which a corporation created by the laws of a State may conduct such commerce, and that when it does so, such State corporation may only engage in such commerce upon conformity with the rules and regulations so laid down by Congress; and these rules may have reference, to use the language of Justice Johnson in Gibbons *v.* Ogden, not only to the exchange of goods and commodities, but to the subject, the vehicle, and the agent of such commerce, and their various operations.

Now, economists and courts alike have con-

demned the reckless issue of stock and bonds by railroad companies without adequate consideration, which has come to be generally regarded as an evil, certainly as demoralizing in its effect upon the public as the carriage of lottery tickets from one State to another. The twenty years period of railroad receiverships and foreclosures, the records of which fill many volumes of reports of decisions of the Federal courts, testifies eloquently to the practical effect of such unwarranted issues of securities upon the ability of railroad companies to properly perform their functions as instrumentalities of interstate commerce; while the utterance of stock for inadequate or fictitious consideration, has furnished the opportunity for the most irresponsible and speculative control of these highways of commerce, and has resulted in the injury which always follows a control of property by those who have no real investment in it. Such control, all experience demonstrates, will not generally be exercised in the interest of the road, and in such manner as to insure the safe, conservative management necessary to meet the requirements of the public and the proper discharge of the obligations imposed upon the carrier by law. On the contrary, it is almost inevitable that such control be employed for purely speculative purposes and to secure immediate profit to those in temporary control. It is this public aspect which lends force to the conviction that "watered" and "bonus stock" is one of the greatest abuses con-

nected with the management of corporations[1]; and it is this effect upon the fitness of the carriers to perform their duties under national legislation which is relied upon to require and justify Federal supervision and control of the subject.

Of course, the Federal government cannot confer upon a State corporation *power* to borrow money and issue obligations therefor, nor to *create* and *issue* shares of stock. Only the power which erected the corporation can vest it with authority for those purposes. But under all the rules and analogies, to which reference has been made, Congress assuredly may regulate and restrain the State corporation in the exercise of these, as well as of other, corporate powers, and may prohibit it from issuing obligations or stock for any purpose relating to interstate or foreign commerce, except in accordance with rules and restrictions prescribed by it for the purpose of preventing the evils above referred to. In that respect, the national government, having adopted the State corporation as an agency of interstate commerce, may subject it to the same regulations with respect to the means of raising money for the purpose of carrying on such commerce, as it could impose upon a corporation of its own creation. The end is legitimate, viz., the regulation of interstate commerce; it is within the scope of the Constitution. The means suggested are appro-

[1] Mitchell, J., in Hospes *v.* N. W. Mfg. & Car Co., 48 Minn., 174, 196; see also Handley *v.* Stutz, 139 U. S., 147–28.

priate to correct an evil which has had in the past a very real effect upon the ability of these instrumentalities to carry on commerce among the States in conformity with rules and regulations constitutionally established by Congress; and the means are plainly adapted to that end. On reason, and on authority, therefore, such legislation is within the scope of the constitutional power of Congress.

Again, the amount of stock which a carrier corporation may issue, and the extent of the obligations which it may incur, have a direct effect upon the determination of the reasonableness of rates of interstate transportation.

It is a principle of the common law that a common carrier must charge reasonable rates for his services, and this is now the express mandate of the Federal statute under which the power of fixing the maximum rate to be charged is devolved upon the Interstate Commerce Commission. It is, however, well settled that in the exercise of this power—as in the exercise of similar powers conferred by State laws upon the State commissions—the carrier may not be deprived of a reasonable return upon its invested capital, because this would be, in effect, the confiscation of private property for public use; or, in case of State action, would tend to deprive the corporation—a person within the meaning of the Fourteenth Amendment—of property without due process of law.[1]

[1] Railroad Commission cases, 116 U. S., 307; Smyth *v.* Ames, 169 U. S., 466, 522.

In Chicago, Milwaukee, & St. Paul Railway Company *v.* Minnesota[1] the Court said:

If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, *while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.*

In Reagan *v.* Farmers Loan & Trust Company,[2] which involved the question of the validity of railroad rates established by the State Board of Railroad Commissioners in Texas, the Court, in determining the question whether or not the rates prescribed were so unjust and unreasonable as to work a practical destruction to rights of property of the company affected thereby, entered upon an examination of the amount of stocks and bonds of the company outstanding which "were issued for and represent value." As a result of such inquiry, the Court found that the rates were "not sufficient to enable the company to pay all the interest on the bonds;" that the bonds and stock outstanding represented money invested in the construction of this road;

[1] 134 U. S., 418. [2] 154 U. S., 362.

that the owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates were insufficient to pay the operating expenses and the interest on the bonds . . .

and that the operation of the tariff sought to be enjoined so reduced the receipts as to be unjust and unreasonable. The defendants therefore were enjoined from enforcing the rates established by them.

In Smyth *v.* Ames[1] the Court in determining the validity of rates prescribed by the Railroad Commission of the State of Nebraska, said:

If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged.

Again:

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a

[1] 169 U. S., 466.

corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case.

This necessarily elaborate and tedious inquiry concerning the consideration for outstanding bonds and stock, which is always a subject pressed for consideration in such cases, would be entirely obviated, and the work of the Interstate Commerce Commission greatly facilitated, if before stock and bonds were issued the consideration were ascertained by the Commission to be full and adequate.

In Knoxville *v.* Water Company,[1] in determining the validity of an ordinance of a city fixing the maximum rates to be charged for water by the defendant company, counsel for the company urged "rather faintly," says Justice Moody in writing the opinion, that the capitalization of the company ought to have some influence in the case in determining the value of the property. But the

[1] 212 U. S., 1.

Court said that it was a sufficient answer to the contention—

that the capitalization is shown to be considerably in excess of any valuation testified to by any witness, or which can be arrived at by any process of reasoning. The cause for the large variation between the real value of the property and the capitalization in bonds and preferred common stock is apparent from the testimony. All, or substantially all, the preferred and common stock was issued to contractors for the construction of the plant, and the nominal amount of the stock issued was greatly in excess of the true value of the property furnished by the contractors.

The fact is, that while the amount of the issued stock and bonds is not controlling upon the Court in determining the effect of the establishment of rates by a body delegated with legislative power over the subject, yet it is always a factor of greater or less importance, and is always the subject of inquiry when the reasonableness of an order relating to rates is under consideration.

The enactment of a law regulating the issue of stocks and bonds by railroad companies is not nearly so radical a step as was the enactment of the permissive act of 1866, or the Interstate Commerce Act of 1887. It certainly goes no further than the acts regulating the ownership and devolution of interests in ships employed in interstate or foreign commerce, and involves no principle so new and startling as the acts regulating the hours

of labor of employees, the relations between the railroad companies and their employees, or of the act of Congress prohibiting a railroad company to carry from one State to another pursuant to power vested in it by the State of its creation, a commodity which it has produced and owns.

The growing strength of the National Government in the United States [says Mr. Bryce] is largely due to sentimental forces that were weak a century ago, and to a development of internal communications which was then undreamt of.[1]

In the debates in 1865 over the bill to authorize the Cleveland and Mahoning Railroad Co., an Ohio corporation, to construct its railroad from the village of Youngstown, Ohio, to and into the State of Pennsylvania to the city of Pittsburg, to establish it as a military, postal, and commercial railway of the United States, and to guarantee its rights, Representative Bland argued against the measure lest it should prove a stepping-stone to the formation of great congressional corporations, strike down the rights of the States, and be the entering wedge of centralized government. Similar opposition has been made to every progressive measure of commerce regulation. But the centralizing tendency steadily has gone on, and the control of Congress over interstate railroad companies has been exercised in an increasingly comprehensive manner. Such progress is insep-

[1] *The American Commonwealth*, i., p. 358, 3d ed.

arable from growth. The great arteries of communication between different parts of the country and the instrumentalities which control their operation can only be properly regulated in the public interest by the central national power; a power which is sovereign, which is exclusive when exercised; and which should be exercised to correct every evil of a public character which experience demonstrates to be susceptible of correction only by national legislation.

XII

NEW STATES AND CONSTITUTIONS[1]

CURRENT discussion in and out of Congress concerning the admission as States of the Territories of Arizona and New Mexico has taken a wide range, and has involved much debate concerning the nature and effect of many of the provisions contained in the constitutions proposed by the new States respectively, not only as applicable to them, but as institutional features which may be applied to other communities.

That a frequent recurrence to fundamental principles is necessary to preserve the blessings of liberty and keep government free, is recognized and declared in the constitutions of more than one of the States.[2]

It is a fortunate circumstance, therefore, that the nature of these proposed constitutions should have been so prominently brought before the

[1] Address before the Law School of Yale University, June 19, 1911.

[2] See, *e. g.*, constitution of Vermont, 1777, Chap. I., par. XVI.; Virginia Bill of Rights, 1776, Sec. 15; New Hampshire constitution of 1792, Part I., Art. 38; Pennsylvania constitution of 1776, Declaration of Rights, Sec. XIV.

people as to provoke discussion, not only of their provisions, but of the fundamental principles upon which our system of government is founded and maintained, and of the nature and effect upon them of the conceptions underlying the organization of one at least of these proposed new States, and which, to a certain extent, already have been adopted in some of the admitted States.[1]

While a free, enterprising, and progressive people will not reject improvements simply because they are new or untried, yet thoughtful Americans must ever consider any radical changes proposed in their government, state or national, in the light of Washington's warning to resist with care the spirit of innovation upon the principles of the institutions established by the Constitution of the United States, lest alterations in the forms of our fundamental structures of government "impair the energy of the system and undermine what cannot be directly overthrown."

The Constitution of the United States established a union of thirteen States, each of which had been separately organized under a government republican in form; that is to say, a government in which it was recognized that the ultimate sovereignty resided in the adult male people—with some exceptions, differing in different States, dependent upon color, race, condition of servitude, or property qualifications. This sovereignty was

[1] Constitution of Michigan, 1909, Art. XVII; Constitution of Oklahoma, Art V.; Oregon, Laws of 1903, p. 244.

exercised by means of a general scheme of government under which (1) a constitution or fundamental law was formulated by delegates chosen from among the qualified voters, in some cases empowered to ordain and establish the constitution as binding upon all the people, and in others merely to submit it, when formulated, for popular approval, under conditions making the same binding upon all, if affirmatively approved by the votes of a specified percentage of the qualified male voters; and (2) within the limitations prescribed in such constitutions, laws were made by representatives periodically chosen for such purpose, generally distributed between two legislative bodies having different tenures and qualifications; all laws to be executed by governors and other executive officials chosen for limited periods by popular vote, or appointed by those so chosen; the laws to be interpreted and applied by judges, generally appointed to hold office during good behavior, but subject to removal on joint address of both branches of the legislature, or in proceedings for impeachment.

Differing in many details, the governments of all the thirteen States in their general outlines were conformable to the foregoing description, and were all denominated republican.

The Constitution provided in Section 3 of Article IV.:

> New States may be admitted by the Congress into this Union; but no new States shall be formed or

erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress.

By Section 4:

The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence.

The general purpose of the provisions in Section 4 was indicated in the debate over them in the Constitutional Convention. Mr. Randolph said they had two objects: (1) to secure republican government, (2) to suppress domestic commotions. He urged the necessity of both these provisions. Mr. Madison moved to substitute "that the Constitutional authority of the States shall be guaranteed to them respectively agst. domestic as well as foreign violence." But other delegates objected to this as perpetuating the existing constitutions of the States, some of which Mr. Houston thought were very bad and ought to be revised and amended. In reply to a suggestion that the States should be left to suppress their own rebellions, Mr. Gorham thought it would be very strange were a rebellion known to exist and the general government restrained from subduing it.

At this rate [he said], an enterprising Citizen might erect the standard of Monarchy in a particular State, might gather together partizans from all quarters, might extend his views from State to State, and threaten to establish a tyranny over the whole, & the Genl. Govt. be compelled to remain an inactive witness of its own destruction. With regard to different parties in a State [he humorously added], as long as they confine their disputes to words they will be harmless to the Genl. Govt. & to each other.[1]

Chief Justice Taney, in delivering the opinion in Luther *v.* Borden,[2] said that under the above quoted provision of the Constitution—

it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal.

"The guaranty," said Chief Justice Waite in a later case[3]—

[1] *Records of the Federal Convention*, Farrand, vol. ii., p. 48.
[2] 7 Howard, 1–42.
[3] Minor *v.* Happersett, 21 Wall., 162, 175.

is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all, the people participated to some extent, through their representatives, elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.

The general scheme of government running through the constitutions of all the eleven States which had adopted constitutions at the time of the adoption of the Federal Constitution, the salient outlines of which have been indicated, and even that embodied in or established under the charters of Connecticut and Rhode Island, constituted the American system of republican government which Chief Justice Fuller in In Re Duncan[1] said was that whose distinguishing feature—

is the right of the people to choose their own officers for governmental administration and pass their own

[1] 139 U. S., 449, 461.

laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.

The nature of the governments established in the States is therefore a matter of necessary concern to Congress, for it must guarantee to each State a republican form of government, and as the national government must also protect every State against domestic violence, common prudence requires a careful scrutiny of the qualifications of a new applicant for admission to the family of States, in order to determine whether or not its electorate is properly qualified to maintain stable and peaceable conditions under the particular form of republican government which it proposes to adopt.

The Council of Safety, meeting at Halifax, North Carolina, on August 9, 1776, recommended to the people of that "now Independent State" the election of delegates to represent them in Congress, and that the greatest attention be paid to such election, particularly in view of this important consideration:

That it will be the Business of the Delegates then Chosen not only to make Laws for the good government of, but also to form a constitution for, this State; that this last, as it is the Corner Stone of all Law, so it ought to be fixed and Permanent, and that according as it is well or ill Ordered, it must tend in the first degree to promote the happiness or Misery of the State.[1]

[1] Lobingier, *The People's Law*, p. 152.

Among the principles which the political experience of the colonists had supplied was "the idea of a constitution superior to legislative enactments, and of certain natural rights secured by such a constitution."[1]

"Unquestionably," says Professor George Elliott Howard in his introduction to Judge Lobingier's interesting work entitled *The People's Law, or Popular Participation in Law-Making*,—"Unquestionably the American people have made three great contributions to the political organism and to political science: the constitutional convention, the written constitution, and constitutional law." He further points out that while each of these institutions has an earlier history more or less distinct, yet that

> as a distinct political organ, with a special function to perform—an organ to be compared to a court, an executive, or a legislature—the constitutional convention was born and developed in America. As a representative body, created according to definite principles to discharge a single special function, that of enacting organic as opposed to mere statute law, it first made its appearance, fully differentiated, in the Massachusetts convention of 1780 (the type of subsequent state constitutional conventions) and in the national convention of 1787. Since then it has gained its own law and its own literature, and it has taken its proper place in the *Staatsrecht* of the world.

[1] Dodd, *The Revision and Amendment of State Constitutions*, p. 2.

In like manner, he says, while in English and Colonial history there were forerunners of constitutions—

Nevertheless, the written constitution as an actuality, as a recognized and permanent form of organic law, is essentially the product of American political evolution.

Hence Professor Stimson says:

The Constitution is the permanent will of the people; a law is but the temporary act of their representatives, who have only such power as the people choose to give them.[1]

It was in the light of these principles that the constitution of Massachusetts was framed in 1780 —that constitution which has been described as "the most perfect expression of the American theory as understood at the close of the Revolution," and which has not only remained as the fundamental law of the great Commonwealth of Massachusetts to this day, but which has also served as a model for many others. It has called forth the highest encomiums from even the advocates of latter-day democracy[2] and must ever remain a monument to the patriotism, sagacity, and statesmanship of the illustrious men who framed it.

With even greater patience, skill, and foresight the delegates to the National Convention of 1787 wrought out a Constitution for the union of States.

[1] *The American Constitution* p. 7.

[2] See Lobingier, pp. 171, 177–9.

They sought to construct a fundamental law for the Union with the same view to permanence and stability as that with which the Massachusetts constitution was framed; in order to secure the blessings of liberty and good government, not only to themselves, but to their posterity. Justice Story said of it:

> The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen, what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests should require.[1]

In providing in the Constitution for the admission of new States, it was specified that they might

[1] Martin *v.* Hunter, 1 Wheat., 304–26.

be admitted as States "into this Union." There was to be no discrimination between them and the original thirteen States. This was the deliberate conclusion of the Convention. Various propositions looking to a different result were submitted.[1] Gouverneur Morris suggested that "the rule of representation ought to be so fixed as to secure to the Atlantic States a prevalence in the national councils." Elbridge Gerry expressed a like view.[2] It was proposed by another to apportion representation among the States "upon the principles of their wealth and number of inhabitants." But the contrary view prevailed.

What Congress understood this constitutional provision to mean, was shown when Vermont and Kentucky, the first two States to be admitted, were, by acts of Congress passed respectively March 4, 1791, and June 1, 1792, each, "received and admitted into this Union as a new and entire member of the United States of America." Tennessee was admitted in 1796 as "one of the United States of America," "on an equal footing with the original States in all respects whatsoever;" and substantially the same language was employed with respect to all the States subsequently admitted.

It is the almost universal judgment of our people that the convention decided wisely in providing for the admission of States without discrimination

[1] Elliott's *Debates*, vol. v., pp. 155–6, 128, 228.

[2] *Ibid.*, pp. 279, 310.

between the original and the later ones, but it is interesting to note in passing that the fundamental laws for the creation of the three other great federations of English-speaking states—those of British North America, Australasia, and South Africa—all contain provisions authorizing the federal parliament to admit new states upon such conditions as it may deem expedient to impose, and to discriminate as between the original members of the union and those subsequently admitted.[1]

No uniformity of procedure to be observed in the admission of States was established by the Constitution, nor has resulted from common practice. A constitution was adopted by the Legisla-

[1] Commonwealth of Australia Constitution Act, July 9, 1900, Chap. VI.—

> "*121.* The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of Parliament, as it thinks fit."

Modern Constitutions, by W. F. Dodd, vol. i., p. 65. *The Constitution of Australia*, by W. H. Moore, Melbourne, 1910.

The British North America Act (March 29, 1867), Section 146—

> ". . . on such terms and conditions in each case as are in the addresses expressed and as the queen thinks fit to approve, subject to the provisions of this act."

The British North America Act, 1871. The British North America Act, 1886. *Modern Constitutions*, pp. 220, 221, 224.

South Africa Act, 1909, Secs. 149–150— "on such terms and conditions as to representation and otherwise in each case as are expressed in the addresses and approved by the King. . . ." Brand, *The Union of South Africa*, Oxford, 1909.

ture of Vermont in March, 1787, which, after reciting that—

it is absolutely necessary, for the welfare and safety of the inhabitants of this State, that it should be henceforth a free and independent State, and that a just, permanent, and proper form of government should exist in it, derived from and founded on the authority of the people only, agreeable to the direction of the honourable American Congress,

declared that—

We, the Representatives of the freemen of Vermont, in General Convention met, . . . do, by virtue of authority vested in us by our constituents, ordain, declare and establish the following Declaration of Rights and Frame of Government, to be the Constitution of this Commonwealth, and to remain in force therein forever unaltered, except in such articles as shall hereafter on experience be found to require improvement, and which shall, by the same authority of the people, fairly delegated, as this Frame of Government directs, be amended or improved, for the more effectual obtaining and securing the great end and design of all government hereinbefore mentioned.[1]

The act of Congress approved February 18, 1791, merely recites that the State of Vermont has petitioned Congress "to be admitted a member of the United States," and enacts that on March 4, 1791, the said State "be received and

[1] Thorpe's *American Charters*, etc., vol. vi., p. 3751.

admitted into this Union as a new and entire member of the United States of America."

The act admitting Kentucky into the Union, passed February 4, 1791,[1] recited that the Commonwealth of Virginia had consented that the District of Kentucky, within its jurisdiction, should be formed into a new State, and that a convention of delegates, chosen by the people of the district, had petitioned Congress to consent, and it was thereupon enacted that the said district be formed into a new State, separate from and independent of Virginia, and be received and admitted into the Union "as a new and entire member of the United States of America."

The act of June 1, 1796, declared that

> The whole of the territory ceded to the United States by the State of North Carolina shall be one State, and the same is hereby declared to be one of the United States of America, on an equal footing with the original States in all respects whatever, by the name and title of the State of Tennessee.[2]

A constitution had been adopted for that State in February, 1796, but no reference to it is contained in the act admitting the State into the Union.

The first enabling act of Congress, or act specifically authorizing the inhabitants of a portion of territory to form for themselves a constitution and State government upon which to be admitted into

[1] Poore, *Charters and Constitutions*, vol. i., p. 647. [2] *Id.* vol ii., 1676.

the Union, was that providing for the admission of the State of Ohio, approved April 30, 1802.[1] It authorized:

All male citizens of the United States, who shall have arrived at full age, and resided within the said territory at least one year previous to the day of election, and shall have paid a territorial or county tax, and all persons having in other respects the legal qualifications to vote for representatives in the general assembly of the territory,

to choose representatives to form a convention, to first determine by a majority of the whole number elected whether it be expedient to form a constitution and State government, and if so, by ordinance to provide for electing representatives to form a constitution or frame of government, "provided the same shall be republican and not repugnant to" the Ordinance for the government of the Northwestern Territory. The convention so authorized met and framed a constitution, which was not submitted to the people,[2] but Congress, by act approved February 19, 1803, declared that the State of Ohio had become one of the United States of America.[3, 4]

[1] Poore, *Charters and Constitutions*, vol. ii., p. 1453. [2] *Id.*, 1455.
[3] *Id.*, 1464.
[4] The Ordinance of 1787 for the government of the Northwestern Territory provided in Article V. for the formation of States and their admission into the Union, and that whenever any of said States should have sixty thousand free inhabitants therein, they should be at liberty to form a permanent constitution and State government, "Provided, the Constitution and government so to be formed shall be republican, and in conformity to the principles contained in these articles. . . ."

The first effort to bind a new State to terms and conditions other than those to which it would be subject in like manner as all other States under and by force of the provisions in the Constitution of the United States was expressed in the Enabling Act for Louisiana, passed February 20, 1811.[1]

That act authorized

all free white male citizens of the United States, who shall have arrived at the age of twenty-one years, and resided within

the territory described in the act

at least one year previous to the day of election, and shall have paid a territorial, county, district or parish tax: and all persons having in other respects the legal qualifications to vote for representatives in the general assembly of the said territory,

to choose representatives to form a convention to frame a constitution and State government for the people within the territory, and by Section 3 that if it be determined to be expedient so to do, then the convention might

in like manner declare, in behalf of the people of the said territory, that it adopts the constitution of the United States; whereupon the said convention shall be, and hereby is, authorized to form a constitution and state government, for the people of the said territory: *Provided*, the constitution to be formed, in virtue of the authority herein given, shall be republi-

[1] 2 Stat., 641.

can, and consistent with the constitution of the United States; that it shall contain the fundamental principles of civil and religious liberty; . . . [1]

besides certain other specified provisions.

It was further provided that if such constitution should be adopted by the State, it should be transmitted to Congress, and if it were not disapproved by Congress at its next session after receipt thereof, the said State should be admitted into the Union upon the same footing with the original States. A constitution was adopted by the convention in conformity with the provisions of the Enabling Act, and, on April 8, 1812, Congress passed an act reciting compliance with the previous requirements and declaring that the said State was admitted into the Union,

on an equal footing with the original states, in all respects whatever, by the name and title of the State of Louisiana: *Provided*, That it shall be taken as a condition upon which the said state is incorporated in the Union, that . . . all . . . conditions and terms contained in the third section of the act, the title whereof is hereinbefore recited, shall be considered, deemed and taken, fundamental conditions and terms, upon which the said state is incorporated in the Union.[2]

In the case of Permoli *v.* First Municipality [3] it was sought to have it adjudged that an ordinance of the First Municipality of the City of New

[1] 2 Stats. at L., 642. [2] *Id.*, 703. [3] Howard, 588.

Orleans prohibiting the carrying to or exposing in any of the Catholic churches of that municipality any corpse, or the celebration by any priest of a funeral at such churches, and requiring all funeral rites to be performed in a designated obituary chapel, was void, as being in violation of the provisions of the above-mentioned Enabling Act, as well as of the act admitting the State into the Union upon condition that its constitution should contain the fundamental principles of civil and religious liberty. But the Court pointed out that the Constitution of the United States makes no provision for protecting the citizens of the respective States in their religious liberties, leaving that subject entirely to the State constitutions and laws; that all that Congress intended by the Enabling Acts was to declare in advance, to the people of the territories, the basic principles their constitutions should contain:

. . . this was every way proper under the circumstances [said Mr. Justice Catron]; the instrument having been duly formed and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did, or reject it if it did not. Having accepted the constitution and admitted the state, "on an equal footing with the original states in all respects whatever," in express terms, by the act of 1812, Congress was concluded from assuming that the instructions contained in the act of 1811 had not been complied with. No fundamental principles could be added by way of

amendment, as this would have been making part of the state constitution; if Congress could make it in part, it might, in the form of amendment, make it entire. The conditions and terms referred to in the act of 1812, could only relate to the stipulations contained in the second proviso of the act of 1811 involving rights of property and navigation; and in our opinion were not otherwise intended.

A similar question arose in the case of Pollard's Lessee *v.* Hagan,[1] where it was held that a declaration contained in the compact entered into between the United States and Alabama, when the latter State was admitted into the Union, as a condition to her admission, would be void if inconsistent with the Constitution of the United States.

It was pointed out by the Court that all constitutional laws are binding on the people in the new States and the old ones, whether they consent to be bound by them or not.

Every constitutional act of Congress [said Mr. Justice McKinley] is passed by the will of the people of the United States, expressed through their representatives, on the subject-matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject-matter in whatever state or territory it may happen to be.

Notwithstanding these decisions, rendered in 1845, and the very clear provisions of the Con-

[1] 3 How., 212.

stitution, Congress has proceeded in many subsequent acts for the admission of new States to prescribe terms and conditions purporting to bind the new State, which conditions the new State was required to accept by ordinance expressed to be "irrevocable without the consent of the people of the State and of the United States." Such conditions were imposed with respect to Missouri in 1821 (3 Stat., 645), Nebraska in 1864 (13 Stat., 47), Colorado in 1875 (18 Stat., 474), North Dakota, South Dakota, Montana, and Washington in 1889 (25 Stat., 676), Utah in 1894 (28 Stat., 107), and Oklahoma in 1906 (34 Stat., 267).

The Enabling Act of the State of Oklahoma, passed June 16, 1906 (34 Stat. 267), provided that the constitution to be adopted for the new State

> shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

The capital of the State, it was enacted, shall be temporarily at Guthrie, and shall not be changed therefrom previous to 1913, but shall after that year be located by the electors of said State at an election to be provided for by the Legislature.

The act further required the convention to provide in the constitution so to be adopted:

FIRST. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship, and that polygamous or plural marriages are forever prohibited.

SECOND. That the manufacture, sale, barter, giving away, or otherwise furnishing . . . intoxicating liquors within those parts of said State, now known as the Indian Territory and the Osage Indian Reservation, and within any other parts of said State which existed as Indian reservations . . . [shall be prohibited.]

. . . . . .

SIXTH. That said State shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude.

And finally,

That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act.

The convention was held, a constitution and an "ordinance irrevocable" adopted, and thereupon Oklahoma was admitted to the Union by proclamation of President Roosevelt, November 16, 1907. Three years later, on December 29, 1910, its Legislature passed an act providing for the removal of the capital from Guthrie to Oklahoma City, notwithstanding its covenant with the United States not to so remove prior to 1913. Whatever

might be said of the ethics of this act, the Supreme Court of the United States in the very recent case of Coyle *v.* Smith, decided May 29, 1911,[1] held that the power to locate its own seat of government and to determine when and how it should be changed from one place to another was essentially and peculiarly a State power, which was acquired by Oklahoma when it was admitted into the Union on an equality with the other States, and that Congress might not, as a condition to the admission of a new State, constitutionally restrict its authority or impose upon it any limitations not common to the other States of the Union. "It may well happen," said Mr. Justice Lurton, in delivering the opinion of the Court,

> that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States or with Indian tribes situated within the limits of such new State, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress.

[1] 221 U. S., 559.

An interesting variation from the rules observed with respect to the admission of all other States is furnished by the case of the State of Utah. It is familiar history that the especial problem with which the national government had to grapple during the territorial days of Utah, was the institution of polygamy, or plural marriages, a problem which led to the drastic legislation of Congress repealing the charter of the "Church of Jesus Christ of Latter Day Saints," commonly known as the Mormon Church, the appointment of a receiver of its property and the application of it on principles of *cy près*—all of which were sustained by the Supreme Court of the United States in the case of Mormon Church *v.* United States.[1] When, therefore, Congress came to deal with the establishment of a government for Utah, upon its admission as a State into the Union, it provided for the formation of a constitution and State government for the proposed State which should be "republican in form and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not to be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." The Enabling Act further required the constitutional convention to provide by ordinance, irrevocable without the consent of the United States, and the people of said State, among other things,

[1] 136 U. S., 1.

That perfect toleration of religious sentiment shall be secured and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship: *Provided*, That polygamous or plural marriages are forever prohibited.

The constitutional convention thereupon framed and the people adopted a constitution, which contained in itself, as Article 3 thereof, the above-mentioned required provisions, and declared that such provisions "shall be irrevocable without the consent of the United States and the people of this State." Nevertheless, by the twenty-third article of the constitution, provision was made for the adoption of any amendment to the constitution without exception, by the vote of two thirds of the members of each house of the Legislature, and of a majority of the electors of the State voting thereon. So that this so-called *irrevocable* ordinance thus stipulated in one part of the constitution to be beyond change without the consent of the United States and the people of the State, under the subsequent articles may be modified or repealed at any time by the vote of a majority of each house of the Legislature of the State, confirmed by that of a majority of the qualified electors voting thereon. Perfect toleration of religious sentiment, and the prohibition of polygamous or plural marriages, sought to be accomplished by Congress, therefore rest for their continuance, not upon any binding compact between the State and the general government,

but solely upon the continued willingness of a majority of the qualified electors of the State to retain such provisions as a part of its fundamental law.

It is well to keep clearly in mind the precise conditions under which new States are admitted into the Union, and the powers and privileges which they will possess after such admission, in determining whether or not a particular applicant shall be received into full fellowship in the nation.

Prior to the admission of the State of Oklahoma no radical departure in the general scheme of State government from the recognized common standard was proposed by the constitution of any new State. Every one of them, judged by the principles above referred to, and tested by the general schemes embodied in the constitutions of the original States, could be fairly said to be republican in character, and to contain nothing inconsistent with the principles of the Federal Constitution. Every one presented a government which in general conformed to the type which has become recognized as the American representative republican form of government.

The constitution of Oklahoma presented new considerations, and was the occasion of much discussion and considerable hesitation over its approval.

The special census of Oklahoma and Indian Territory which were combined into the State of Oklahoma, taken as of July 1, 1897, showed a

total population of 1,414,042. Of this number, 334,035 were white males upwards of twenty-one years of age. The vote on the adoption of the Constitution was, for its adoption, 180,333; against it, 75,059; total, 253,392. The total vote was therefore upwards of seventy-five per cent. of the entire number of adult white males, and the total vote on the constitution was nearly nineteen per cent. of the entire population. It obviously met with the approval of the general body of the people of the State. By proclamation dated November 16, 1907, President Roosevelt declared that—

> The said constitution and government of the proposed State of Oklahoma are republican in form, and that the said constitution makes no distinction in civil or political rights on account of race or color and is not repugnant to the Constitution of the United States or to the principles of the Declaration of Independence, and that it contains all of the six provisions expressly required by Section 3 of the said act to be therein contained[1] . . .

and declared it to be admitted as a State into the Union.

Mr. Bryce, in *The American Commonwealth*, notes that the chief of the tendencies revealed by the constitutions of the last forty years is for the constitutions to grow longer. This, he says, is an absolutely universal rule.[2] Woodrow Wil-

[1] 35 Stat., Part 2, p. 2161.

[2] Vol. i,, p. 454 (3d ed.).

son says in his work, *The State*: "The danger is that constitution making will become with us only a cumbrous mode of legislation."[1] In the constitution of Oklahoma it has become so. That constitution is of inordinate length. It is divided into 24 articles and 312 sections, and it fills 70 closely printed octavo pages. A large part of its provisions are matters which may be the proper subjects of legislation, but which have no place in the fundamental law, tested by established American standards. While providing for a bicameral Legislature, it reserves to the people powers of initiative and referendum respecting legislation. *Eight* per cent. of the entire number of qualified voters are given the right to propose laws, and *fifteen* per cent. amendments to the constitution. The referendum of any law passed by the Legislature may be ordered by petition signed by *five* per cent. of the qualified voters. Percentages are to be based on the total number of votes cast at the last preceding general election for the State officer receiving the highest number of votes cast at such election. A measure rejected on referendum cannot again be proposed within three years, except on petition of *twenty-five* per cent. of the qualified voters. The constitution may be amended in any particular, if agreed to by a majority of the members elected to each house, and then voted for by a majority of all the electors voting upon the proposition. But it is provided

[1] Ed. of 1899, p. 475.

that no convention shall be called by the Legislature to propose alterations, revisions, or amendments to the constitution, or to propose a new constitution, unless the law for it be first approved by the people, on a referendum vote. The question of such proposed convention *must* be submitted to the people at least once in twenty years. These provisions, however, are not to impair the right of the people to amend by vote on an intitiative proposition.

The Oklahoma Enabling Act also provided for submitting to the people of the Territories of Arizona and New Mexico the question whether or not they should become one State, and, if so, then for a convention to frame a constitution for such State and to provide for its admission into the Union. A vote was had on this proposition and the decision was in the negative.

Subsequently, on June 20, 1910, an act was passed providing for the admission of the Territories as separate States.[1] This act authorized the election of delegates in each Territory to a convention empowered to form a constitution and provide a government for the proposed State, which constitution "shall be republican in form and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

The convention was further required to provide

[1] 36 Stats., 557.

"by an ordinance irrevocable without the consent of the United States and the people of said State—" a number of provisions. The constitution, when formed, was to be submitted for the approval of the qualified voters of the Territory at a convention to be held to consider the same, and

when said constitution and such provisions thereof as have been separately submitted shall have been duly ratified by the people of New Mexico as aforesaid a certified copy of the same shall be submitted to the President of the United States and to Congress for approval, together with a statement of the votes cast thereon and upon any provisions thereof which were separately submitted to and voted upon by the people. And if Congress and the President approve said constitution and the said separate provisions thereof, or, if the President approves the same and Congress fails to disapprove the same during the next regular session thereof, then and in that event the President shall certify said facts to the Governor of New Mexico, who shall, within thirty days after the receipt of said notification from the President of the United States, issue his proclamation for the election of the state and county officers, etc.

A similar provision was made as to Arizona.

When the result of the election should be certified to the President, he was required immediately to issue his proclamation announcing the result of said election so ascertained.

And upon the issuance of said proclamation by the President of the United States, the proposed state of

New Mexico shall be deemed admitted by Congress into the Union, by virtue of this Act, on an equal footing with the other States—[1]

and in like manner as to Arizona.

There has been some discussion as to the precise function of the President under these provisions, and the *criteria* governing his action in approving or disapproving the constitution to be submitted pursuant thereto. It is quite clear that Congress may not delegate to the President its power to determine whether or not a State shall be admitted into the Union. Article 4, Section 4, of the Constitution declares "New States may be admitted *by the Congress* into this Union." But that Congress may exercise a legislative power to take effect upon the ascertainment by the President of a specified fact, is well established. In such case the President is not exercising a delegated legislative power, but is the mere agent of the law-making department to ascertain and declare the event upon which its expressed will is to take effect.[2] While therefore Congress may not empower the President to admit a Territory as a State whenever it shall present to him a constitution which meets with his individual approval, it may provide for the admission of a State whenever it shall adopt a constitution which shall be republican in form, and make no distinction in

[1] 36 Stat., 561.

[2] See Field *v.* Clark, 143 U. S., 649, 692; Buttfield *v.* Stranahan, 192 U. S., 470, 476.

civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence; and empower the President to ascertain and determine whether a particular constitution meets that description. If, therefore, the President should act pursuant to the provisions of the above-mentioned act, it would be presumably upon the ascertainment that the constitution presented met the requirements specified by Congress; no other consideration being submitted for his determination. But Congress is not bound to approve the constitution and admit a State, even though it do conform with the conditions specified in the Enabling Act. Congress may, because of the general nature of the institutions provided in the proposed constitution; because of the conditions under which the constitution was adopted; because of the character or number of the electorate upon whose vote it was adopted; or because of any other reason which it may deem sufficient, or without *any* reason, reject a proposed constitution *in toto*, or require it to be modified in any given particular as a condition to admitting the State.

To be sure, except in so far as it might conflict with some provision of the Federal Constitution, the new State might immediately after its admission into the Union amend its constitution or adopt a new one,[1] and Congress would be powerless

[1] As Arizona did with respect to provisions for the recall of judges, after the admission to statehood.

to prevent. Its only protection against such an act would be to require it to embody provisions so regulating the means of amendment as to ensure against hasty or ill-considered changes. Thus, *e. g.*, it might require the constitution to provide that it should only be amended with the consent of at least a majority of all the qualified voters of the State.

The constitution of New Mexico was adopted by the convention and submitted to the people of that Territory. The returns of the Thirteenth Census gave New Mexico, in 1910, a total population of 327,301, of which 76,233 were native-born males over twenty-one years of age, and 4269 naturalized foreign-born males over twenty-one years of age, making an apparent total voting population of 80,502. There were cast for the constitution 31,742 votes; against it 13,399 votes, or a total of 45,141 on the question of its adoption, —being about fifty-six per cent. of the total number of the qualified voters, and slightly less than fourteen per cent. of the total population.

The constitution so adopted, while exhibiting the tendency to undue length and minutiæ above noted, yet compares favorably in that respect with the constitution of Oklahoma. It contains 22 articles divided into 257 sections, and fills 38 ordinary printed octavo pages.

Legislative power is vested in a Legislature divided into two chambers and there is a provision reserving to the people the power to disapprove,

suspend, and annul any law enacted by the Legislature except appropriation and health laws, etc.

This right must be exercised by petition signed by not less than ten per cent. of the qualified electors in each of three fourths of the counties, and in the aggregate by not less than ten per cent. of the qualified electors of the State, as shown by the total number of votes cast at the last preceding general election. The question of the approval or rejection of such laws must be submitted to the electorate at the next general election; and if a majority of the legal votes cast thereon, *and not less than forty per cent. of the total number of such votes*, be cast at such general election for the rejection of such law, it shall be annulled and thereby repealed, with the same effect as if the Legislature had then repealed it. If such petitions be signed by not less than twenty-five per cent. of the qualified electors under each of the foregoing conditions, and filed with the secretary of state within ninety days after the adjournment of the session of the Legislature at which the law was enacted, the operation of the law shall be thereby suspended and the question of its approval or rejection shall be likewise submitted to a general vote at the next ensuing general election. If a majority of the votes cast thereon, being not less than forty per cent. of the total number of votes cast at such general election be cast for the rejection of such law, it shall be thereby annulled; otherwise it shall go into effect. In the matter of

amending the constitution, there is a marked reaction towards earlier standards. The framers of this proposed constitution evidently propose that any changes in it shall be supported by an active public demand. They have therefore provided that the constitution may be amended by the vote of two thirds of all members elected to each of the two houses of the Legislature, voting separately, and submitted to the electors of the State for their approval or rejection. But the proposal must be ratified by a majority of the electors voting thereon and by an affirmative vote equal to at least forty per cent. of all the votes cast at said election in the State in at least one half of the counties thereof. In that event, and not otherwise, such amendment shall become a part of the constitution. Not more than three amendments may be submitted at one election, and if two or more amendments are proposed they shall be so submitted as to enable the electors to vote on each of them separately. Provision is also made for a constitutional convention to revise or amend the constitution, at any time within twenty-five years by three fourths vote of the members elected to each house, at any time after twenty-five years by two thirds votes of the members of each house; and that in either event the question of calling a convention shall be submitted to the electors at the next general election. If a majority of the electors voting at such election in the State, and in at least one half of the counties thereof,

shall vote in favor of calling a convention, the Legislature shall at the next session provide by law for calling the same. The compact with the United States required by the Enabling Act is embodied in the twenty-first article of the constitution, which is declared to be irrevocable without consent of the United States and the people of the State; and that no change or abrogation of its provisions in whole or in part shall be made by any constitutional amendment without the consent of Congress.

This constitution has received the formal approval of the President and is now before the Congress.[1]

In very marked contrast with the constitution of New Mexico, both as to the number of votes cast for its adoption, the percentage of the whole population voting with respect to it, and the provisions of the constitution itself, is the constitution of Arizona, which was adopted by the people of that Territory on February 9, 1911. The returns of the Thirteenth Census give Arizona in 1910 a total population of 204,354, of which 155,-

[1] By joint resolution of Congress approved Aug. 21, 1911, the admission of New Mexico and Arizona respectively was provided for, conditioned upon the modification in specified particulars of the tentative constitutions theretofore adopted by them (37 Stats. at L., 39), and by proclamations dated respectively Jan. 6, 1912, and Feb. 14, 1912, President Taft declared that these conditions had been complied with, and that New Mexico and Arizona respectively were admitted into the Union on the same footing as the other States (37 Stats. at L., vol. ii., pp. 1723, 1728).

550 are native born, and 48,804 foreign born. Of this population, 118,576 are males, and 85,778 are females. The total number of white males over twenty-one years of age is 65,133, of which number 39,427 are native born and 5896 naturalized citizens, so that the total voting population is, apparently, 45,323. There were cast for the constitution 12,187 votes, against it 3822 votes, or a total of 16,009 on the question of its adoption, being about *thirty-five* per cent. of the total number of qualified voters, and slightly less than *eight* per cent. of the total population. The vote for the constitution was by less than *twenty-seven* per cent. of the voting population, and about *six* per cent. of the total population.

Congress may well consider whether or not a Territory in which only thirty-five per cent. of the qualified electors exhibit sufficient interest to vote upon the adoption of the fundamental law on which it seeks admission to the Union, gives evidence of that capacity for self-government which is so essential to the maintenance of free institutions.

The constitution thus adopted by the vote of this small percentage of the people of Arizona contains provisions without precedent in any constitution ever submitted to Congress for approval by an applicant for admission to statehood. While declaring generally that the powers of the government shall be divided into three separate departments, the legislative, the executive, and the judicial, and vesting the legislative authority in a Legisla-

ture consisting of a senate and house of representatives, provision is made for the exercise of legislative power by small percentages of the qualified electors. Under the power to initiate legislation, *ten* per cent. of the qualified electors are authorized to propose any measure, and *fifteen* per cent. to propose any amendment to the constitution. Under the referendum power, *five* per cent. of the qualified electors may order the submission to the people at the polls of any measure, or of any item, section, or part of any measure enacted by the Legislature, except public health laws, etc.; and no act passed by the Legislature shall become operative for ninety days after the close of its session, in order to allow opportunity for referendum petitions to be filed. Any measure referred to a vote of the qualified electors under the initiative or referendum shall become a law when approved by a simple majority of the votes cast thereon; and the veto power of the governor shall not extend to initiative or referendum measures approved by a majority of the qualified voters. The total number of all votes cast for all candidates for governor at the last preceding general election, is made the basis on which the number of qualified electors required to sign the petition shall be computed. These rights of initiative and referendum are also reserved to the qualified electors of every incorporated city, town, and county, as to all local, city, town, or county matters on which such incorporated cities, towns,

or counties shall be empowered by general laws to legislate. Under the power of the initiative, *fifteen* per cent. of the qualified electors may propose measures on such matters, and *ten* per cent. may propose the referendum on legislation enacted by or within such city, town, or county. If two or more conflicting measures or amendments to the constitution shall be approved by the people at the same election, the measure or amendment receiving the highest number of votes shall prevail in all particulars as to which there is conflict.

It will be observed that there is no requirement respecting the minimum number of votes which must be cast, in order that an act of the legislature may be overruled, or a law directly enacted upon the initiative, or the constitution amended in any particular. All that is required is that the measure shall be proposed, or the machinery set in motion by the above-mentioned small percentages of the qualified electors who voted for governor at the previous election, and then, if a majority of the votes cast at the popular election is in favor of the proposed action or measure, it becomes effective, no matter how small a proportion of the total electorate of the State may be the vote, and without the slightest regard to its territorial distribution. Thus, if we should assume that the total of the vote cast for all candidates for governor at the last preceding election was that cast upon the proposition to adopt this proposed constitution, viz., 16,009, then the constitution could be amended

on the proposal of fifteen per cent. of that number, or 2402 votes—that is less than one and two tenths per cent. of the whole population, or about five and one fourth per cent. of the whole body of qualified electors of the State,—and carried by a majority of the 16,009 votes cast, that is, by 8,005 votes,—or, indeed, for that matter, by any smaller number which might constitute a majority of the votes cast on the proposition to amend.

The end of the institution, maintenance and administration of government [runs the preamble to the constitution of Massachusetts] is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquillity, their natural rights and the blessings of life. . . . It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them.[1]

The uncertain sands of shifting popular inclination, upon which the security of life, liberty, and property depend under the constitution of Arizona, are far remote from the conceptions of the framers of either the Massachusetts constitution of 1780 or the Constitution of the United States.

But this is not all. Every public officer in the State of Arizona holding a public office, either by

[1] Poore's *Charters and Constitutions*, p. 956.

election or appointment, whether it be executive, legislative, or judicial, is made subject to recall by qualified electors for the district for which he is elected to such office, which district may include the whole State. Electors to the number of *twenty-five* per cent. of the vote cast at the last preceding general election for all of the candidates for the office held by such officer, may, by petition, demand his recall. This petition must contain a general statement in not more than two hundred words of the grounds of such demand, and unless the officer against whom it is directed shall offer his resignation within five days after it is filed, a special election must be ordered, to be held not less than *twenty* nor more than *thirty* days after such order, to determine whether he shall be recalled. On the ballots at said election shall be printed the reasons as set forth in the petition for demanding his recall, *and in not more than two hundred words, the officer's justification of his course in office.* Unless he otherwise request, in writing, his name shall be placed as a candidate on the official ballot without nomination. Other candidates for the office may be nominated to be voted for at such election, and the candidate who shall receive the highest number of the votes cast shall be declared to be elected for the remainder of the term; and thereupon, if the incumbent does not receive the highest number of votes cast, he shall be deemed to be removed from office, upon qualification of his successor. Such recall petition

may be circulated against any officer after he has held his office for a period of six months, and against a member of the Legislature at any time after five days from the beginning of the first session after his election.

After one recall petition and election no further recall petition shall be filed against the same officer during the term for which he was elected, unless petitioners signing such petition shall first pay into the public treasury which has paid such election expenses all expenses of the preceding election.

Subject only to this provision, any number of recall petitions may be directed at the same official until his ejection shall have been secured.

Provision is also made for amending the constitution by a vote of a majority of the members elected to each of the two houses of the Legislature, and submission to popular vote. No convention may be called by the Legislature to propose amendments to the constitution, or a new constitution, unless the law providing for such convention shall first be approved by the people on a referendum vote at a regular or special election; and any amendments, alterations, revisions, or new constitution proposed by such convention shall be submitted to the electors at a general or special election, and be approved by the majority of the electors voting thereon before the same shall become effective.

The advocates of the scheme of so-called popular government embodied in the Arizona constitution

have vigorously opposed the approval of that of New Mexico as reactionary, and have as strenuously asserted the republican character of the plan proposed for Arizona. It is an interesting paradox that the whole tendency of modifications in the established forms of republican government advocated as accomplishing a greater popular participation in government, is to confer power upon a small minority of the people to control not only the making of laws, but of constitutions.

The postulate of American political faith is that governments derive their just powers from the consent of the governed. Taken in the literal, etymological sense of the term, no government has ever existed—certainly not on this continent—which was framed with the active conscious agreement of all those who were to be subject to it; while, of course, all government has rested, and must necessarily rest upon the more or less passive acquiescence or *assent* of those governed.

The Massachusetts constitution of 1780 recites that—

> The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State; [and that] the people alone have an incontestable, unalienable and indefeasible right to institute government, and to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it.[1]

[1] Poore's *Charters and Constitutions*, 958.

Yet the right under that constitution to choose representatives to the general assembly is limited to male persons

being twenty-one years of age, and resident in any particular town in this commonwealth, for the space of one year next preceding, having a freehold estate within the same town, of the annual income of three pounds, or any estate of the value of sixty pounds.

The right of suffrage, it was held by the Supreme Court of the United States in Minor *v.* Happersett,[1] is not a necessary incident to citizenship of the United States, and whether women shall be allowed to vote or no is a matter left entirely to the discretion of the State governments. In his opinion in that case, Chief Justice Waite points out that when the Federal Constitution was adopted, in no State were *all* the citizens permitted to vote, and he summarizes[2] the various qualifications required in the different States as a condition to participation in elections. In no instance were women, married or single, given the right of suffrage. They were expressly excluded from suffrage in nearly all the States by the express provision of their constitution and laws. "In all," to quote the language of the Chief Justice, "the people participated to some extent, through their representatives elected in the manner specifically provided."

The fact is, that even government by folkmoot or town meeting, was government by a certain

[1] 21 Wall., 163.

[2] See p. 172 *et seq.*

number of the community, less than all, assuming to represent those who, from motives of policy or tradition, were excluded from participation by those who were strong enough to exclude them. So at an early date, in this country, the unwieldy nature of government by a large assembly of the adult male population, possessing agreed qualifications to entitle them to participate, brought about the plan of choosing a practicable number of delegates to meet and enact "such laws and ordinances as shall be judged to be good and wholesome for the whole."

This plan of the qualified electorate choosing representatives to make laws, naturally led to the formulation of charters or constitutions prescribing the rules and limitations within which such representatives should act, and in nearly all of these constitutions, certain inalienable rights are enumerated which must be preserved, and which lawmakers must not trench upon.

In the framing of the early State constitutions, as indeed in most of the later ones, care was observed to secure their approval by as large a number of the adult male population as was practicable. In general, the delegates were chosen by votes at a special election, and after their work was completed it was submitted to the qualified electors for their assent. The sense of obligation felt by delegates engaged in the high duty of framing the fundamental law is expressed in the address issued by Mr. Bowdoin, the Presi-

dent of the Massachusetts constitutional convention of 1779, enjoining upon the members of the convention the exertion of their best abilities in framing "a new and a good Constitution of Government," and stating that "as the framing it, and its acceptance, when framed, must greatly depend on the collective wisdom of the Convention being had, in the final determination on every part of it, but which cannot be had without a general and constant attendance," he was directed by vote of the convention "to enjoin upon the members, *from its necessity and importance*, A CONSTANT AND GENERAL ATTENDANCE accordingly."[1]

It is not to be wondered that a constitution so framed should have remained to this day, with but little amendment, as the living fundamental law of the great Bay State.

In order to secure the widest possible popular concurrence in the choice of delegates to the Pennsylvania convention of 1777, commissioners were appointed by the assembly

> To go to the house or place of residence of each and every freeman entitled to vote for members of General Assembly within their respective townships, buroughs, wards or districts, or to take some other opportunity of meeting with them,

to secure from every freeman, in writing, his vote or answer to the proposition, which should be

[1] Lobingier, pp. 172–3.

put in a box provided for the purpose and returned to the general assembly.[1]

Unfortunately, the British invasion suspended the carrying out of this rather novel but highly commendable plan; but subsequently, by a more orthodox method, delegates were chosen by popular election who prepared the constitution which remained the fundamental law of Pennsylvania until 1838.

Framed, therefore, by delegates especially chosen for the purpose, with the design of establishing a permanent and stable form of government, until a recent date the constitutions of all the States avoided detail, and laid down merely the general outlines of the frame of government, within whose limits details were to be supplied from time to time by the Legislature constituted according to its terms; and provisions were embodied with respect to amendments, calculated to secure deliberate, matured action, and especially to require the active concurrence in the changes proposed of an actual majority of the qualified electors.

Jefferson's proposed constitution for Virginia contained a provision that none of the fundamental laws and principles of government should be repealed or altered but by the personal consent of the people, at meetings held in the respective counties, the people of two thirds of the counties to give their suffrage for any particular alteration.[2]

[1] Lobingier, p. 151.

[2] *Ibid.*, p. 146.

This Jeffersonian theory of making the alteration of the constitution dependent not only upon a certain percentage of the vote cast, but upon the consent of a specified percentage of the geographical subdivisions of the State, as we have seen, is embodied in the proposed constitution of New Mexico.[1] The first constitution of Georgia required the consent of a majority of the counties to any amendment. The Massachusetts constitution of 1780 was to take effect upon a vote of two thirds of the free whites voting upon it.

In general, the State constitutions prior to the very recent ones, required the vote of at least a majority, sometimes of two thirds of each of the houses of the Legislature in favor of a proposed amendment, sometimes at two successive sessions of the Legislature, to be followed by submission to popular vote and adoption by at least a majority of all votes cast with respect to the proposition; sometimes by a certain proportion of the entire qualified electorate. There would seem to be little use in choosing a convention of delegates to carefully and painstakingly frame a constitution, if, after adoption by popular vote, no stability or degree of permanency is secured, but the fundamental law may be changed as readily as, and perhaps more readily than an ordinary act of the Legislature. The system which was the evolu-

[1] This provision was attacked in Congress with such success that the people of New Mexico were compelled to modify it as a condition to admission into the Union (see 37 Stats., vol. i., p. 39; vol. ii., p. 1723).

tion of American growth and institutions; the distinctively American plan of government under fundamental law, framed with a view to its continuance unless changed with equal solemnity, is absolutely at variance with the new scheme of government by initiative, referendum, and recall embodied in the constitutions of Oklahoma and Arizona: a scheme which, as Mr. Bryce has pointed out in *The American Commonwealth*,[1] first made its appearance in modern Europe as a provision of the French constitution framed by the national convention in 1793, and which has peculiarly flourished as a feature of the government of Switzerland.[2] The real question presented is whether or not all the people shall be governed by representatives chosen for the purpose in an orderly, regular way, acting in accordance with a well-matured fundamental law, adopted by the active concurrence of at least a majority of the adult male population; or by casual minorities acting without direct responsibility, under the haphazard system of initiative or referendum.

By the constitution of Oklahoma, suffrage is restricted to male citizens, except at school district elections or meetings; and by a recent constitutional amendment[3] adopted in deliberate disregard of its solemn compact with the United

[1] Vol. i., p. 465.

[2] 2 Dodd, *Modern Constitutions*, p. 258.

[3] Amendment as section 4A of Article 3 of Constitution Session Laws, 1910, p. 285. See also Atwater *v.* Hassett, 111 Pacific Rep., 812.

States, all negroes have been, in effect, disfranchised; so that out of a total population of 1,414,042 (according to the 1907 census), not exceeding 334,035 white males of the age of twenty-one years and upwards are permitted to vote. Fifteen per cent. of this number, or 50,105 electors, may set in motion a proposition to amend the fundamental law, which will become effective if approved by a majority of those voting on the proposition, no matter how small a percentage of the whole population or of the qualified voting population that number may be.

The proposed constitution of Arizona also restricts the suffrage to male citizens of the United States of the age of twenty-one years or over, who shall have resided in the State one year immediately preceding the election (Art. VII., sec. 2), so that, out of a total population of 204,354, according to the last census, not exceeding 45,323 white males of twenty-one years and upwards are permitted to vote. Fifteen per cent. of this number, or 6799 electors, may set in motion a proposition to amend the fundamental law, which will become operative if approved by a majority of those voting on the proposition,—no matter how small that number might be.

In other words, under the scheme of government proposed in the constitution of Arizona, as in that of Oklahoma, all the fundamental rights of person and property which are not specifically guaranteed and secured by the Constitution of

the United States, but which are left as the subjects of State concern—such as the right of religious toleration—are at the mercy of a small minority of the population. Of course, it may be said that eternal vigilance is the price of liberty, and that citizens who fail to assert their rights and to be vigilant in their protection, cannot complain if they find them undermined, impaired, or destroyed. Professor Lobingier argues that statutes which require the concurrence of a majority of the electors in constitutional changes should be construed so as to require only the consent of a majority of those voting on a proposition—not a majority of all the electors. He says:

> From the standpoint of public policy, however, it would seem that those decisions are soundest which construe the language wherever possible as requiring only a majority of those actually participating in the vote on the submitted proposition. To declare a constitution or amendment rejected by reason merely of the indifference of those who, while in attendance at the polls, are so unmindful of the privilege of popular ratification as to neglect its exercise when opportunity offers, is certainly to impair its benefits and often to impair its employment when not needed.[1]

But if the constitution is the expression of the will of the whole people, is it not rather to be presumed that, if a majority of the people really feel that a change in the fundamental law is

[1] *The People's Laws*, p. 330.

necessary, they will affirmatively so express themselves? Let it be necessary to secure the vote of an actual majority of the qualified votes to a proposed constitutional amendment, and, if the change is really desirable in the interest of all the people, that fact will be made manifest, and the vote will be secured. The anxiety of the advocates of the referendum, initiative, and recall to have them operative at the instance of small minorities of a restricted electorate, furnishes abundant evidence that it is they—not those who oppose these innovations—who do not trust "the people" or even a majority of the people; but that, under the guise of serving the people, they are seeking to lay hands on the power of the people and to arrogate to themselves the popular tribunate.

Bearing in mind the practical workings of everyday life in a busy, prosperous, commercial community, it is apparent that a large number of the community, generally the most productive portion of the community, do not, and cannot, give constant attention to the affairs of government. Under a scheme of government such as that proposed in the Arizona constitution, a small minority of the qualified electors organized to accomplish any particular purpose can mold the laws, and the constitution, to accomplish their purposes before the great majority of the electors are even aware of what is going on. The propositions submitted to the electors under the

scheme of initiative and referendum are fixed, and put before the voters without the advantage of the examination, discussion, and debate which have been, throughout the whole history of English-speaking peoples, the crucible in which legislative projects have been tried out before enactment into law. It is an abuse of language to call such a scheme of government "popular." It is an attempt to create a government *of* all the people, *by* a minority of the people, *for* a small minority of the people. To adopt it, would be to substitute for the institutions which are the growth and evolution of centuries of English and American experience, the devices of French revolution and Swiss socialism.

XIII

THE THEORY OF CONSTITUTIONAL GOVERNMENT IN 1787 AND IN 1912[1]

ON December 12, 1787, by the decisive vote of 46 to 23, Pennsylvania, the second of the States to take such action, solemnly expressed its concurrence in the new charter, which created a nation of what theretofore had been a mere confederation of separate sovereignties. Immediately after the result was known, as the chronicle of the time tells us,

> the convention (accompanied by his excellency the President, the Vice-President, and the members of the Supreme Executive Council; also by several members of Congress, the faculty of the University, the magistrates and militia officers of the City) went in procession to the Court House, where the ratification of the Constitution of the United States was read, amidst the acclamations of a great concourse of citizens. A detachment of the militia train of artillery (in uniform) fired a federal salute, and the bells of Christ Church were rung on this joyful occasion;

[1] Address at the Annual Banquet of the Pennsylvania Society in the city of New York, December 14, 1912.

after this, the Convention returned to the State House and subscribed the two copies of the ratification. At three o'clock they met and dined with the members of the Supreme Executive Council, several members of Congress and a number of citizens, at Mr. Epple's tavern; where the remainder of the day was spent in mutual congratulations upon the happy prospect of enjoying once more, order, justice and good government in the United States.

The lead of Pennsylvania was rapidly followed by the other States, and more than the requisite number having ratified the Constitution, on July 4, 1788, the twelfth anniversary of the Declaration of Independence, the good citizens of Pennsylvania celebrated with joyful hearts the adoption of that Constitution which they believed would "form a more perfect union" than the Confederation of the States had been, and would "establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty" to the people of the United States and their posterity.

The new charter of government was not adopted without opposition. In Pennsylvania, as elsewhere, there was a considerable minority who fought against it until the last moment. Their objections were, in effect, first that the consolidation of powers in the new government would be destructive of the States; second, that the separation of the executive, legislative, and judicial powers

of government was not complete; and, third, and above all, that the Constitution contained no bill of rights. The fifteen amendments proposed in the Pennsylvania convention by Mr. Whitehill contained in substance those which were subsequently formulated and proposed to the legislatures of the several States by the first Congress, and which, having been ratified by the requisite number of States between September, 1789, and December, 1791, became the first ten amendments to the Constitution. Their adoption removed practically every serious objection which had been urged against the Constitution, and left it as the expression of the will of the whole people. With the exception of the 11th Amendment, which became effective January 8, 1798, adopted to relieve the wounded susceptibilities of the States, following the decision in the case of Chisholm against the State of Georgia, that the Federal courts had jurisdiction under the Constitution of suits by citizens against the States; and the 12th Amendment, which took effect September, 1804, modifying the provisions of Article II. so as to provide for specific and separate votes for President and Vice-President in the Electoral College and in the Congress, no amendments to the Constitution were adopted until the 13th, 14th, and 15th Amendments which followed the Civil War, and which embodied the results of a contest respecting slavery, which, admittedly, had been left unsettled by the framers of the Constitution, because then

incapable of solution, and which could only be settled by the arbitrament of war.

Of the government under this Constitution, Daniel Webster said, in 1850:

> We have a great, popular, constitutional government, guarded by law and by judicature, and defended by the affections of the whole people. No monarchical throne presses these States together, no iron chain of military power encircles them; they live and stand under a government popular in its form, representative in its character, founded upon principles of equality, and so constructed, we hope, as to last forever.

It did survive one of the greatest internecine struggles recorded in history. The war amendments to it, perpetuated the removal of slavery from the permissible domestic institutions of the States, and imposed restrictions upon State action concerning individuals, which, in effect, extended as limitations upon the powers of the States, some of the provisions of the Bill of Rights, which the first ten amendments had made restrictive upon the national legislature.

The establishment of this Constitution and the growth and development of the national government under it, for a century commanded the pride of Americans and the admiration of the world. Every new citizen was required by law, as he still is, to declare his attachment to its principles; every officer of the government to swear that he

would support and defend it. The Constitution was the Ark of the American Covenant, and the author of *The American Commonwealth*, writing in 1888, said that reverence for it "is itself one of the most wholesome and hopeful elements in the character of the American people."

The one hundredth anniversary of its adoption was celebrated in 1889, with joyful festivities throughout the United States, and pæans were sung in all parts of the country in praise of the great men whose wisdom and patriotism and prescience had framed for a little confederation of thirteen States, containing but three millions of people, a charter of government adequate to the growing needs of a compact nation of thirty-six States with a population of seventy millions or more.

Perhaps in the very excess of this praise is to be found the first germ of that analysis and criticism which has resulted in a modern school of political thought which finds little in the Constitution to praise, much to criticize, and a great deal to alter. It was because certain Athenians became tired of hearing Aristides called "The Just" that they united in the movement to ostracize him; and the constant and extreme assertions of the excellences of the Constitution perhaps have led men to charge it with responsibility for conditions which might have arisen under any constitution, and, without stopping to consider whether or not those evils had any necessary connection with the mere form and structure of government,

to make it the goat upon which to load responsibility for all the political sins which had become odious to the people.

The author of *The American Commonwealth* was too wise a student of political history to be misled by the chorus of gratulation which Americans were singing when *he* was writing the first edition of that great work, and *they* were celebrating the hundredth anniversary of the adoption of the Constitution.

> I might plead [he wrote] that America changes so fast that every few years a new crop of books is needed to describe the new face which things have put on, the new problems that have appeared, the new ideas germinating among her people, the new and unexpected developments for evil as well as for good of which her established institutions have been found capable.

But I doubt whether even that sagacious observer of our national affairs could have foreseen how rapid would be the change in the attitude of a large part of the American people towards their constitutional institutions which has taken place since 1887. Then, the Constitution was praised because of the nice distribution of the legislative, executive, and judicial powers of government provided for in it; separate in the independence of their functions, but correlated by the participation of the individual representatives of one branch in the exercise of some of the functions of

the others. To-day, a school of thought, numbering many adherents, maintains that all constitutions founded on the separation of powers are weak and ailing, and that, as a matter of fact, the doctrine of the separation of powers of government is the prime cause of the corruption of American politics; that its scheme is not made for, and is not susceptible of, conversion to democratic use.

The Constitution was praised as providing adequate checks and balances to prevent the destructive results of the sudden, uninformed impulse of the people; but the modern doctrine is that the system of checks and balances exists for the purpose of preventing the people's rule; that the impulses of the people are never uninformed, and their actions are always just.

> Democracy [the late E. L. Godkin once wrote] really means a profound belief in the wisdom as well as the power of the majority, not on certain occasions, but at whatever time it is consulted.

The progressive democracy of to-day extends the same principle to casual majorities of those voting on any question, however small a proportion of the whole electorate, and imputes to them impeccable and—temporarily, at least—conclusive wisdom. This is a very recent development of democratic theory. Only twenty-two years ago, Mr. Grover Cleveland, speaking of the framers of the Constitution at the centennial anniversary

of the organization of the Supreme Court of the United States, said:

> Though bitter experience had taught them that the instrumentalities of government might trespass upon freedom, and though they had learned in a hard school the cost of the struggle to wrest liberty from the grasp of power, they refused, in the solemn work they had in hand, to take counsel of undue fear or distracting perturbation, and they calmly and deliberately established as a function of their government a check upon unauthorized freedom and a restraint upon dangerous liberty.

To-day the junior Senator from Oklahoma, perhaps the most prominent exponent of the new so-called Code of the People's Rule, tells us that the system of checks and balances was established by the Federalists for the purpose of putting an end to popular rule, and should be done away with—as it has been under the constitution of his State, and by those of a number of other States adopted during the last dozen years.

The Constitution was long praised for the *representative* character of the government which it established: but the modern theory is that representatives of the people cannot be relied upon to carry out the people's will, and that the people must themselves, therefore, by direct action, make their own laws, and directly control the execution of those laws by the officials of their government.

The constitutional theory of government was,

that the people should choose by popular vote representatives who should be entrusted with ample powers, and given a reasonable time within which to work out the results which should justify themselves to the people when they were thoroughly informed concerning them. The recent "popular" theory is that the representatives be given but little power, their actions be directly circumscribed by minute restrictions, their work be subject at all times to direct interference by popular vote, and themselves subject to summary removal from office at the instance of a small minority of the people, and upon the vote of a bare majority of a perhaps equally small minority.

The objection which weighed most with the people when the Constitution was under consideration, was that it contained no Bill of Rights; and the prompt adoption of the first ten amendments evidenced the jealous determination of the people, by a distinct declaration of limitations upon the power of government over the individual citizen, to protect the humblest as well as the most powerful individual against the abuse of power. These provisions were, however, only limitations upon the powers of the national government itself. After the Civil War, a belief in the necessity of protecting the freedmen and their descendants against invasion of their newly established right to liberty, led to the extension of the same principles against action by the States, through the adoption of the 14th Amendment. But as Judge

Swayze has pointed out in his admirable review of the subject in a recent *Harvard Law Review:*

> The fourteenth amendment does not protect the citizen against alleged cruel and unusual punishment under State authority, nor secure trial by jury in civil or criminal cases, nor the right to bear arms, nor immunity from prosecution except after indictment by a grand jury, nor the right to be confronted by witnesses. In these respects the federal bill of rights restricts the federal tribunals only—

and for protection in those respects the citizen is still wholly dependent upon the institutions of his State.

Bills of Rights were—and still are—common to the organic laws of almost every State. They were made effective—until recently—by provisions against amendment, except by so large a vote as to clearly evidence the change to be the deliberate judgment of the whole people. They, and the Bill of Rights embodied in the Federal Constitution, constitute what Senator Root has so eloquently described as the

> covenant between overwhelming power and every weak and defenseless one, every one who relies upon the protection of his country's laws for security to enjoy the fruits of industry and thrift, every one who would worship God according to his own conscience, however his faith may differ from that of his fellows, every one who asserts his manhood's right of freedom in speech and action—a solemn covenant that between

the weak individual and all the power of the people, and the people's officers, shall forever stand the eternal principles of justice, defined and made practically effective by specific rules in those provisions which we call the limitations of the Constitution.

But the new school rejects as unworthy all such limitations upon the immediate popular exercise of power, and reduces Bills of Rights to mere counsels of perfection. It abandons all ideas of permanency in the fundamental law. The constitution is to be changed as lightly as are codes of legal procedure. In Oregon, for example, its constitution was not changed between 1859 and 1902—a period of forty-three years. Between 1902 and 1910—eight years—it was amended twelve times. This constitution tinkering is the inevitable result of reducing constitutions to the category of statutes. Especially does the new school object to the American principle of judicial determination of whether or not a given legislative act falls within or exceeds the limitations set by the constitution upon legislative power, and seeks instead to submit to the determination of a temporary popular majority the making, the constitutionality, the interpretation, and the enforcement of laws.

To accomplish these ends, constitutions have been adopted in a number of States which introduce those institutions known as the initiative and the referendum in lawmaking, the recall of officials of government by popular vote, the imperative mandate to public bodies and officials, and other

provisions tending to pure democracy, taken largely from the institutions of Switzerland. These new constitutions are become, in effect, elaborate statutes, repealable and alterable by a majority of those voting upon propositions to change them, set in motion by a small percentage of the electorate.

Senator Owen, in his *The Code of the People's Rule*, says:

> Reports of the favorable workings of such a system in Switzerland began to be published in this country in 1891. The following year there were declarations for the system by the American Federation of Labor and the Knights of Labor, while the newly organized People's Party, which had absorbed the Farmers' Alliance, recommended that the subject be studied.

The advantages of the new system to the accomplishment by large, well-organized bodies of particular classes of men, of changes in government sought in the interests of such classes, are apparent, and the organizations referred to quickly saw in this new governmental machinery an opportunity to increase their influence in legislation, and their power to mold governmental action to their own advantage. To the well-directed and systematic efforts of those associations may be attributed, in large measure, the astonishing progress made in the adoption of the new system in many of the States. The system lends itself easily to the establishment of class government.

But that fact alone would not adequately explain the rapid extension of the Swiss institutions in the United States.

The initiative and referendum with respect to legislation, in varying forms, have been adopted in at least seventeen States; the unlimited recall of public officials in six, and movements looking to the profound modification of the fundaments of State government are mooted in others. The independence of the judicial establishment has been destroyed by an elective judiciary with short terms of office and small salaries, subject to summary removal from office by popular vote; and a Senator of the United States has recently proposed an amendment to the Constitution of the United States which would make the correct interpretation of statutes the subject of popular vote, in the face of judicial exposition. These tendencies cannot be ignored, because too many people have given their adherence in some degree to them; and it becomes the patriotic duty of every citizen to analyze carefully the causes of the discontent with existing political and social conditions, which has led to the adoption of these modifications in our constitutional scheme, as remedies necessary to the public welfare in the eyes of those who have espoused them, and to endeavor, if possible, to meet those evils, without destroying a fabric of government which has so long and so well served the needs of American civilization.

Discontent with the existing order of things, as

Mr. Lowell once said, "pervaded the atmosphere wherever the conditions were favorable, long before Columbus, seeking the back door of Asia, found himself knocking at the front door of America." And he added:

> I say wherever the conditions are favorable, for it is certain that the germs of disease do not stick or find a prosperous field for their development and noxious activity unless where the simplest sanitary precautions have been neglected. . . . It is only when the reasonable and practicable are denied that men demand the unreasonable and impracticable; only when the possible is made difficult that they fancy the impossible to be easy.

One of the principal exponents of this new democratic movement ascribes to "machine rule" in politics the cause of all the evil which, in his opinion, can only be cured by the adoption of the scheme of government embodied in the initiative, referendum, recall, imperative mandate, direct election of senators, etc., and he gives to our distinguished guest of this evening, Mr. Bryce, the credit for having first formulated in a word-picture the whole evil institution known as "the Machine," in the first edition of his great work on *The American Commonwealth*—a work which, from the moment of its publication, has been the most complete, the most authoritative, and the most just description of the political and social institutions of this country thus far written. It was the

lifting of the veil in this book, and its widespread sale, Senator Owen says, that, together with other reform literature, "created a mighty reform sentiment, which, combined with startling exposures of the machine-rule system year after year, has produced far-reaching results."

The evils of machine rule, arose largely by reason of the apathy of the individual voter and the dormant condition of the public conscience. It was because reasonable and practicable reforms in party government were denied by those who profited by it, that the extreme changes in our governmental system have been so enthusiastically adopted. The "machine," in its most offensive sense, and the "boss," or political leader who directed its operations, were nourished upon the spoils system, which, to a large extent has been removed, by reforms in the civil service of the Nation and the States, under which the merit system of appointments to public office and a security of tenure have been established. The machine, too, was nourished by the management of large contributions for campaign purposes, made by corporations and representatives of interests seeking undue advantages in legislation and governmental action. But that evil has been greatly restricted by various acts of Congress and of the State legislatures; measures whose enactment was compelled by public sentiment, in most cases without resort to "initiated" or "referred" legislation. It is entirely possible by further

legislation to utterly extirpate it. These concessions however, were made grudgingly and slowly; and the popular determination that they should be permanent, found expression in the adoption of the new institutions held out as furnishing a means of perpetuating the reforms and preventing a recurrence of the evils. Worthy citizens, impatient at the slowness of reform under constitutional restrictions, turned to the new institutions as a patient longing for speedy cure turns from the regular practitioner to a quack doctor.

That the remedy may be worse than the disease is a reasonable apprehension. Nearly a century ago, Chief Justice Marshall pointed out the dangers of putting too many things in a constitution:

> A constitution to contain an accurate detail of all the subdivisions of which its great powers will admit and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the legal mind. It would probably never be understood by the public. Its nature requires, therefore, that only its great outlines should be marked, its more important objects designated, and the minor ingredients which compose these objects be deduced from the nature of the objects themselves.

But the great Chief Justice was speaking of a constitution founded upon confidence that the people as a whole would be vigilant in the exercise

of their political rights and duties, and that they could and would entrust the powers of their government to those whom they trusted, and who would worthily discharge that trust. The modern changes in government are framed in a profound distrust of those who are to exercise the powers of the State; and the vast detail of the new constitutions, the enormous number of elective offices created by them, the shortness of terms, and the uncertainty of tenure, only emphasize the same point of view. No government so founded and so maintained can long exist.

It is, I think, safe to say that every one of the evils of modern politics is susceptible of removal within the limits of our established forms of constitutional government, without destruction of its representative republican character. Party machinery is, of course, wholly unrestricted by the framework of the Constitution. But the needed reforms cannot be accomplished and perpetuated, on the one hand, by any short cut to political happiness, such as reformers eager for popular applause would suggest; nor, on the other hand, without the abandonment by every citizen of that apathy which results, in the face of even a clamorous public campaign, in less than a majority of the electorate voting upon propositions to radically change the fundamental law of a State. Above all, there is no easy way of securing good government. The virtuous citizen who thinks he can secure political Utopia by merely signing a postal

card or a petition, may some day awaken to the discovery that he has lost all that makes for stability in government and the maintenance of a right to life, liberty, and the pursuit of happiness.

In the *Pennsylvania Gazette* for December 26, 1787, is printed a letter from a correspondent answering certain objections which had been made to the new Constitution by Mr. Mason. It concludes with this exhortation:

> I entreat you, my fellow citizens, to read and examine the new Constitution with candor, examine it for yourselves; you are most of you as learned as the objector, and certainly as able to judge of its virtues or vices as he is.

In the same paper is printed a despatch from Boston, announcing the selection of delegates to the constitutional convention from Massachusetts, which closes with the statement that there could be no doubt of the adoption of the new Constitution "provided that a spirit of candor, concession, and an openness to conviction should pervade the minds of the delegates chosen for the Convention."

In like manner I entreat you, my fellow-citizens, to carefully consider the causes for that discontent which has caused so large a number of our fellow-citizens to turn from those institutions of government which are peculiarly American, and which were framed by the most ardent lovers of liberty—liberty regulated under law—who ever lived in any land, in any time. Consider them; and weigh

and examine the advantages and the disadvantages of the proposed remedies; consider whether the evils may not be cured without the destruction of our traditional institutions; examine all this in a spirit of candor, concession, and openness to conviction; and as the writer from whom I have quoted said, in closing his letter in December, 1787:

God grant that prejudice may not make us blind to our best interest.