LECTURES

ON

LAW FOR WOMEN.

DELIVERED AT THE

University of the City of New York

BY

ISAAC FRANKLIN RUSSELL, D. C. L.

CHAIR ENDOWED BY THE

WOMAN'S LEGAL EDUCATION SOCIETY.

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INTRODUCTORY LECTURE.

POPULAR FALLACIES REGARDING LAW AND LAWYERS.

OF all the words in common use, law is, perhaps, the most susceptible to vague and elastic definition.

What is law? No one seems to know. Or, rather, everybody seems to know; and each defines the term to suit himself, and then wonders why others do not agree with him.

To the physicist, law appears simply as the definition of a constant relation. By this he means that certain sequences and relations have been observed in the phenomena of nature; and the rule expressing those sequences or relations he styles a law. Given certain facts of force and environment, the formula which states the invariable consequence is a law.

So the physicist knows no exception to the rule of continuity. He discovers no wandering from the beaten path. In an innumerable mass of incidents, brought under scientific observation, he finds a sure and unvarying rule. He formulates it and calls it a law. To the physicist, law is inexorable. It excludes all moral elements. It admits of no exceptions.

To the philosopher, whose field is all knowledge, law presents itself under an aspect still different. Not dealing with definite and ascertainable phenomena, but ranging through the fields of empty abstraction, the philosopher suits himself and indulges his own caprices and fancies while he discourses and dogmatizes about nature and her laws. So the literature of the law of nature presents a mass of muddy speculation.

In different bodies of literature we find law variously conceived as:—

1. A rule of action.

2. An expression of a constant relation in the inorganic world.

3. A rule of right conduct.

4. A rule addressed to all mankind by nature.

5. A regulation of civil conduct imposed by political authority.

6. Further, law is conceived by some thinkers vaguely as force and energy; and

7. By others yet as the "Infinite and Eternal Energy from which all things proceed," or God himself.

Hardly is any other word or conception confounded in the speculations of philosophers with the personality of the Creator.

Whatever in national customs and institutions could not be referred to any other source, the Romans ascribed to Romulus, and the English to King Alfred. The Wall Street gambler refers whatever mystifies him to the dark and malign policy of Jay Gould; and our modern philosophers save themselves the fatigue of clear thinking and exact writing by referring every puzzling phenomenon to the vague influence of what they call law. Law, they tell us, is a rule of action: it is the principle of life: it is force: it is God.

The uncritical public does not, it is to be feared, properly locate the sources of the law.

Whence comes the law? The crude and simple notion of the superficial observer is that it emanates from some legislative hall. It is created, a perfect and finished product, and imposed on man by some external authority.

A little study in historical jurisprudence is all that is necessary to show that law is the product of development—of evolution. It results from the slow and gradual unfolding of

national life. It has its origin in the necessities of mankind: it first manifests itself in rude neighborhood customs; its first promulgation is by some kind of judicial authority; sanction is given to it by a court of justice; and, when its change and development have ceased, it takes on the final form of a statutory enactment.

Much of the misconception on this point comes from the strange fancies generally prevalent regarding the world's great legislators. The Mosaic, Solonian and Decemviral codes are crudely supposed to be the products of single legislative acts. The *Corpus Juris Civilis* and the French codes are vainly imagined to be the original works of Tribonian and Napoleon. Study, however, discloses the fact that national bodies of law have never been constructed out of entirely new materials, but have been invariably formed out of the tissue of pre-existing rules and institutions. And so it happens that, not only in democracies, but under every form of government, each individual citizen is a law-maker, and is responsible with his fellows for the existing state of legislation.

Law, as viewed by the jurist, is "a rule of civil conduct prescribed by the supreme power in the state, commanding what is right and prohibiting what is wrong."

Positive law, which is the province of jurisprudence, is a rule addressed to an intelligent human being by an intelligent human being in a relation of authority in an independent political society. Law must have coercive power or sanction to secure its enforcement. It must, therefore, reflect the moral judgment of the bulk of the people in the sovereign state where it is promulgated.

This sanction, or coercive power, is of the very essence of law. Law without a sanction is a misnomer. The jurist recognizes the moral element in law. Of this the physicist takes no account. Physical law is self-enforcing. It carries its sanction with it.

The sovereign body enacting law must, therefore, have the power to compel obedience by visiting punishment on transgressors. And not only must it have the power thus to vindicate its commands, but it must have the disposition to do so. Otherwise, the so-called law will be a dead letter, of which there are many examples on the statute-book of nearly every religious and ecclesiastical organization.

A candidate for membership in the Church agrees to be governed by rules which he knows there is no disposition to enforce. To him they are not law; they lack sanction. They are as nothing, and do not act as a stumbling-block to the practically wise man. The law, then, is in a condition of constant flux and change, in accordance with the development and dislodgment of those convictions which prompt to the enforcement or the ignoring of written rules.

The practicing lawyer is held by some superficial thinkers to be responsible for the crime and maladministration in the community. With equal propriety, we suppose, the clergy might be held accountable for the infidelity of the age, and physicians for the epidemics which occasionally appear.

It is seriously urged that no lawyer has a right to represent a client or a cause that may happen to be in the wrong. But how is the lawyer to know that his client is a scoundrel or that his suit is hopeless? Who can tell the end from the beginning? Shall he reach his conclusion from a one-sided inquiry?

Audi alteram partem is the rule which limits the procedure of the court. Shall the attorney be less impartial in his investigation?

But he ought to know his client is a liar! True, so far as it goes. But, after seeing and hearing his opponent, he may, perhaps, conclude that the latter is a more confirmed liar than his own client.

But he should know the law so as not to undertake a case

that is bound to fail. True; but who does know the law? Not all the judges of the United States Supreme Court. For dissenting opinions appear in about one-third of the reported cases.

Truth can only be ascertained by sincere and fearless inquiry. It cannot suffer from the honest zeal of the advocate. And these propositions apply as well to questions of fact as to questions of law.

Why ask an attorney to prejudge a case and decide his own client to be in the wrong without hearing the other side?

Why hold him responsible for a miscarriage of justice, as if he were the only officer of the court, and as if there were no judge and no jury? Shall he usurp their functions? The public has called him to no such responsibility.

The whole body of the people is responsible for the state of the law and its administration; the people which elects judges and prosecuting attorneys; which supplies the grand and petit jurors and chooses the officers who select these jurors. The whole body of citizens can force a reform in judicial methods, in answer to the demand of public sentiment expressed at the ballot-box.

There is also much prevalent misconception on the subject of legislation as a remedy.

Enthusiastic moral reformers, in blissful ignorance of the origin, development and application of law, and in calm reliance on the almighty arm of the state, solve all social questions by providing what seems to them to be suitable statutory enactments. Extending the domain of written legislation is all they deem necessary in order to cure the ills of humanity. The unsoundness of these ideas, so far as the United States is concerned, becomes manifest at once to any careful student of our practical politics. For some great purposes, such as diplomacy and coining money, the United States is one nation—one sovereign body politic: for other purposes, such

as the regulation of marriage and divorce, each individual State may legislate independently of the Federal authority and of the sister States.

In general, it is true that one uniform rule of municipal law prevails over the whole territory of a single State. One central authority in the commonwealth is charged with the responsibility of *enacting* law; but, for the purposes of *enforcing* law, the territorial unit is not the State, but the county. And this feature is characteristic of Anglo-Saxon civilization. In New England the town, in Louisiana the parish, and in New York the county, has an autonomy in administering justice, which is of the very essence of local self-government, or home-rule. The people of the county elect their own judicial and executive officers—the district attorney or other public prosecutor, the sheriff, county clerk and county judge. These officers select, summon and advise the jurors, both grand and petit, in criminal as well as in civil procedure. And this autonomy of the county is one of the most fondly-cherished of all our American institutions. Nor do the signs of the times indicate any popular distrust of these agencies, or any purpose on the part of our people to substitute for them a system of State or Federal superintendence.

While jurors continue to come from the body of the county, while public prosecutors are elected by the citizens of each district locality, while the constabulary force is appointed on the principle of home-rule, just so long will the enforcement of written statutes be as rigid or as loose as the discretion of each district body politic demands and approves.

Our space permits reference to but one more of these popular fallacies. Proof in courts of justice is often conceived as demonstration. Now, demonstration can be reached only in mathematics and physics. In ordinary judicial investigations we can get no nearer to truth than a moral probability. This is the necessary result of the available means of proof,

viz.: documents which may be forged and witnesses whose memories are always infirm, and who have been known to lie on great occasions.

We note, then, the following misconceptions of law quite generally entertained:—

That it is an expression of ultimate right; that it has its origin in a legislative enactment; that it can be enforced in a community notwithstanding public sentiment may be against it; that it can create capital, fix the rate of wages, limit the hours of toil, and suspend the operation of the law of supply and demand; that it is the antecedent and cause of public opinion, instead of being the last thing to yield to the pressure of advancing civilization.

As against these mistaken notions, we sum up the results of our present studies, as follows:—

Law is a rule of civil action defined and enforced by public authority. It is a product of the gradual unfolding of national life and character; first appearing in mercantile and neighborhood customs; first announced by judicial authority; and taking on its final form in statutory enactment. Without the power and the disposition to enforce it, law loses its character as such and becomes a mere moral precept or a dead letter. Legislation is ordinarily powerless as a cure for social ills. The practical lawyer is necessarily a partisan, and fortunately so for the cause of justice. Maladministration in public affairs is not solely attributable to the rascality of attorneys, but is necessarily incidental to the whole mass of social corruption to which all classes contribute. Courts of justice have to deal with the weakness and wickedness of humanity, and hence judicial proof never attains to mathematical demonstration, nor reaches a higher degree of certainty than moral probability.

LECTURE II.

THE NATURE OF LAW IN GENERAL.

THE origin of law, like the origin of language, is a subject that it is hardly profitable to discuss. Still, no service can be more valuable than dispelling the illusion that law proceeds directly from the creative hand of the parliamentary legislator.

The masterly analysis of Austin cannot safely be applied to the crude systems of archaic jurisprudence, while its substantial accuracy may be at once admitted as regards the politer nations of the Western World. To Austin, law is of the nature of a command enforced by a sanction or penalty directed by the force of public authority. In the far East, as Sir Henry Maine shows, the law's only sanction in many cases is a general public judgment which condemns the transgressor. The Austinian philosophy has no word of explanation for the adoption of one rule of law as against another by any given community: What is law? is a question of fact rather than of reason, a question more of history than of ethics.

The problem of legal classification is one not readily solved in a satisfactory way. The ideal distribution and co-ordination of the various topics of legal doctrine are yet to appear.

Law can be classified with great simplicity with regard to historical origin; and with equal clearness as respects external form; but with considerable difficulty in the more practical point of its subject-matter.

For useful purposes the alphabetical method of classification admits of little improvement: dictionaries and digests make profitable employment of it.

Blackstone's famous work treats the whole body of English law under four heads: rights of persons, rights of things, private wrongs and public wrongs. The absurd title, *rights of things*, resulted from a mistranslation of the Latin word *jura*, which Hale and other predecessors of the great commentator rendered *rights* instead of *laws*. The distinction between public wrongs and private wrongs, however simple it may seem on first examination, becomes more difficult after careful study. No breach of private contract is without its influence on parties not privy to it. Every repudiation of an honest debt, every failure to meet an obligation to one's neighbor fairly and squarely, is a blow at the system of credit which underlies our modern society and business world; and its bad effect, in an infinitesimal degree, perhaps, reaches to every member of that society. In like manner it can be shown that no crime is so far a wrong against the public as not to fall with crushing weight on some one particular individual. New offenses are being added yearly to the catalogue of crimes which it is not pretended are any more distinctly public now than they were formerly.

That useful distinction between the substantive and the adjective law recalls about the only instance where the ponderous and uncouth nomenclature of Bentham has been adopted or even tolerated by later jurists. By substantive law we mean the law of primary rights; while by adjective law we understand the law of remedial justice. The right of private property shall be respected, is a rule of the substantive law; the law that convicts the thief and throws him into a dungeon is the adjective law, the law which defines sanctioning rights.

When we come to consider the form of the law we are confronted with the great question of codification, a question

on which both jurists and practical lawyers are hopelessly divided. What advantage has the statute over the law of judicial decision? It may be admitted that the statute is plain, distinct and certain; that it acts prospectively; and, when in the form of a code, is easily promulgated. In all these respects it is obviously superior to judge-made law, which is vague and uncertain, acts retrospectively, and, owing to the prolixity of judicial opinions and the great number of books of reports, must always remain a dead letter to the public at large.

On the other hand, it is claimed that in a progressive community law must always take on the form of adjudged cases. Law is really created by adjudication. Judges deliberately legislate and enact new rules. Constitutions cannot restrain them, for those very constitutions are subject to judicial examination and construction. So, in an exact sense, the Constitution of the United States is as really unwritten as is the English Constitution. Continuity in the development of a legal system necessitates a reliance on the power of judicial legislation. Codes cannot sepersede the necessity of frequent appeals to the courts. All history shows that comprehensive enactments of statute law are apt to be followed by a flood of judicial decisions expounding and limiting them.

We are living in an era of code-making. The New York Code of Procedure has practically been adopted in a majority of the States and territories of the Union. The Revised Statutes of this State have also been extensively copied in the West. Civil codes are in force in several Southern and Western States. The English have commenced to revise their statutes and to test the value of codes by trying them first on their Indian subjects.

The most historic of ancient codes, if we except the pentateuchal jurisprudence, are the Twelve Tables of Rome (about 450 B. C.) and the *Corpus Juris Civilis* (about 530 A. D.).

Of modern codes the most famous are the Code Napoleon, dating from the first years of this century, and the Code of Louisiana, which is practically a republication of that celebrated work. In our own day the labors of Mr. Justice Stephen, author of the Indian Evidence Act, deserves mention; and the name of our fellow-townsman, Mr. David Dudley Field, is justly celebrated the world over for his valuable work in codifying the law of New York and in reducing the whole body of international law to statutory form.

It is to be regretted that there is no substantial agreement between writers as to the scope of certain departments of legal science, such, for example, as the law of contracts. We find no authoritative nomenclature, and the most frequently recurring words and phrases are used in an almost infinite variety of signification. This makes classification under the head of subject-matter a very difficult task.

Law can well be classed as political and private. Political law treats of the structure and function of government and governing agents, and private law includes the rest of municipal jurisprudence, which may be subdivided into the law of persons (*status*) and the law of property, obligations and procedure.

Particular care should be used to discriminate between the different uses of the phrase civil law. This term is used in contradistinction to ecclesiastical law; it also signifies the non-military law, and the non-criminal law; and, lastly, it is the classic designation of old Roman law.

Select sentences from well-recognized authorities in definition and characterization of law are collected in the appended note.

NOTE.

LAW.—"Her seat is the bosom of God; her voice is the harmony of the world; all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempt from her power."—*Hooker.*

"*Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere.*"—Inst. I., i. 3.

"*Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est vocaturque jus civile, quasi jus proprium ipsius civitatis.*"—Inst. I., ii. 1.

"*Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.*"—Inst. I., i. 1.

Municipal law is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."—*Blackstone's Commentaries, Introduction*, p. 44.

"The matter of jurisprudence is positive law: law strictly so called—that is, law set by political superiors to political inferiors."

"A law, in the literal and proper sense of the word, may be defined as a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."

"Every positive law, or every law strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme."—*Austin.*

"*Les lois, dans la signification la plus étendue, sont les rapports nécessaires qui dérivent de la nature des choses; et dans ce sens tous les êtres ont leur lois; la Divinité a ses lois; le monde matériel a ses lois; les intelligences supérieures a l'homme ont leurs lois; les bêtes ont leurs lois; l'homme a ses lois.*"—Montesquieu, L'Esprit des Lois I., 1.

Municipal law is "the body of rules by which the supreme power in a state is guided in its governing action."—*Pomeroy, Municipal Law*, § 17.

LECTURE III.

THE PUBLIC LAW OF NATIONS.

THE public law of nations is not older than the *De Jure Belli ac Pacis* of Hugo Grotius. Since that time it has received a wonderful development and expansion. It is even now in process of change. The forces that have effected this evolution have been variously conceived and stated by publicists. Most assuredly the leading influence has been the Christian spirit of our age. For more exactly, perhaps, than any other department of legal doctrine, international law is a truly Christian code. Second only to Christianity as a force modifying the existing body of doctrine affecting the rights and obligations of independent sovereign states we would place influences of a politico-economical character. A careful survey of the reforms in international law that have been wrought during the last two generations will reveal the fact that they have all been planned and executed in the interest of trade, and we may safely say in the interest of a greater freedom of international trade.

Exclusive dominion of the high seas, so long asserted by England and other great states, has been universally relinquished. Tidal streams and navigable rivers have been opened up to the commerce of the world. Points of strategic interest, like the Danish Straits and the Bosphorus, have been subjected to the united regulation of the great powers. Diplomatic and consular stations have been set up among all the mercantile nations. International congresses have sought to bring about the most accommodating adjustments of the dif-

ferent currencies. And the conscience of mankind has been aroused to the necessity of finding a solvent of international disputes elsewhere than in the appeal to brute force.

Considered in the light of John Austin's analysis, this body of doctrine is not law, and principally because it has no sanction. If we look carefully for some sanction we may find it in war. But war as a penalty is not inflicted on a transgressor as a judgment of an impartial tribunal: it is rather a means of self-redress. Our pious ancestors may have regarded it as an appeal to the God of battles. In these days of unfaith, however, the greatest nations of the world seem to agree with Napoleon, that God is on the side of the heaviest artillery. Some philosophers may see in the moral judgment of mankind, and the self-respect of individual states, a sufficient sanction to the rules of international law. But all history goes to prove the essential accuracy of the truth illustrated at such length by Mr. Herbert Spencer, that the moral sense of an organized society is not more acute than that of the average of its citizenship. In fact, it is impossible to read the history of diplomatic intrigue, bluster and finesse and not to note the fact that the greatest of states often manifest the petty jealousies and indignation that distinguish a school-girl's treatment of her first love adventure.

If the lack of sanction degrades this body of doctrine beneath the level of jurisprudence, it at the same time exalts it to the plane of ethics. Ethics, then, it is; and Christian ethics too; for heathen nations are strangers to this enlightened code, whose domain is the Western World.

By a state or nation we signify an independent, sovereign political society. Some writers add that the society must be organized to establish justice—a definition which would exclude the Barbary and other piratical states from the privileges of sovereignty. Such a limitation would necessitate our ignoring *de facto* political conditions and withdrawing our

recognition of equal sovereignty as residing in states whose politics we could not approve.

Other authorities qualify the definition of a state or nation by confining it to some limited territory. No inconvenience results in the study of modern politics from this qualification, for men now unite in political action under the bond of local contiguity. But ancient law knows nothing of territorial sovereignty, a doctrine which did not fully appear till the times of feudalism. The bond of early societies was not territorial propinquity, but kinship in the flesh. This kinship was real in many cases, or was simulated when it was deemed wise to extend the body politic by including new recruits. Thus the nomadic Abraham, with his household and kinsmen, making treaties and levying war on kings, presents a picture of Oriental sovereignty without definite geographical bounds. And in our own country the aboriginal red men, with whom we make treaties and against whom we wage war, illustrate nationality under the bond of blood-relationship and without the territorial tie.

The attributes of statehood may be summed up in the word sovereignty, which includes independence and equality. Sovereignty may be defined in the harsh phrase of Austin as follows: "If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent" (*Province of Jurisprudence, Lecture VI.*). In any such sense as this sovereignty is incapable of legal limitation. Wherever, then, we find legal limitation on the exercise of political powers there cannot be sovereignty. The most prominent and commanding characteristics of an independent political society are the power to make war and conclude treaties. The different States in the American Union, never having had and never having exercised the power, are not sovereign in an exact

sense of the word. The people of the United States, enacting constitutions, securing independence and equality by the sword, and negotiating international conventions, are thus shown to be the depositaries of sovereign power.

Even under the much despised Articles of Confederation the distribution of the powers of government was such as to negative the idea of State sovereignty. The single redeeming feature of that form of government was that, in terms of law, at least, the whole business of diplomatic and foreign relations was given over to the central authority, and the several commonwealths were expressly excluded from membership in the sisterhood of States.

In an ethnological sense the United States is not one people, is not a nation. For we lack homogeneity in language, in religion, manners and institutions. We have no common race origin, and have had no continuity of race life.

When we consider a sovereign state as a moral agent, and international law as a code of usage voluntarily adopted by civilized communities to govern them in their mutual intercourse, we can well understand that no more important study in political science can well engage the attention and thought of man. The incalculable sacrifice of life and treasure in war, and the general acceptance in the Western World of the Christian doctrine of the Fatherhood of God and the Brotherhood of Man, have led many to contemplate the possibility of perpetual peace, the condition of which the late laureate sang in the greater "Locksley Hall":—

> "Till the war-drum throbbed no longer, and the battle-flags were furled
> In the Parliament of man, the Federation of the world."

Perpetual peace has not been simply a poet's dream. Statesmen and philosophers have endeavored to secure it through arbitration and international congresses and courts. Henry IV., St. Pierre, Jeremy Bentham and David Dudley Field have all labored with this end in view. The successful appeal

to arbitration for the settlement of disputes between Great Britain and the United States has wonderfully stimulated thought in this direction. Of the various plans proposed for obviating an appeal to arms, it may be remarked that they all proceed without interruption to one point, the point of adjudication. The defect in international law resulting from the lack of an authoritative exponent of its principles is overcome by special agreement and common consent in a given case. All the different constitutions of international tribunals are lacking in the enforcing power. If a state that has submitted a controversy to such a court will not accept its judgment the only recourse is war. True, no one nation is powerful enough to withstand the world; but universal war looks like a poor start towards perpetual peace. Not all issues between states are susceptible of solution through arbitration. So in private law, a dispute over accounts or a boundary line might well be referred to the arbitrament of a third party, while the justice of an assault or a libel would admit of no such adjudication. Both nations and individuals must vindicate their own claim to dignity and respectability. Otherwise they will be without influence for good, and will soon become the victims of the violence and greed of powerful rivals. Admit all we hear said in these days about the horror of war and its awful cost, the truths remain that in the evolution of human societies great empires have issued from sanguinary conflicts; that political subordination is an indispensable condition of material and economic progress; that centralized national authority always results from both civil and international strife; and that war stimulates the cultivation of personal bravery and contempt for bodily pain which make a hero of a gladiator and a popular idol of the champion of the prize-ring. In the words of the Rev. Dr. Theo. D. Woolsey: "War has sometimes been the restorer of national virtue, which had nearly perished under the influence of selfish, luxurious peace" (*International Law*, § 116).

LECTURE IV.

INTERNATIONAL LAW IN TIME OF PEACE.

THE law of nations may be considered as public and as private. Public international law treats of the relation of state to state in peaceful negotiation, and in armed dispute. The legal relations of a private individual, as determined by different bodies of national law, form the subject-matter of private international law. This title of the subject seems as poorly selected as two others, which have also acquired recognition—namely, intermunicipal law, and the conflict of laws. This interesting body of rules is of special value to an American, for two reasons. First, our unique political constitution, with dual sovereignty lodged in Federal and State authorities, presents to us commonwealths foreign to one another for many purposes. Secondly, the tide of immigration, set so strongly towards our shores, brings to us annually hundreds of thousands of foreigners who are strangers to our law, and the protection of whose interests demands an acquaintance on the part of some members of the profession with the English and Continental codes.

The law of place concerns itself with such questions as this: Which of two or more conflicting systems of national legislation is to be applied to the determination of a pending issue? Thus we have to deal with the law of the place of the contract, the law of the domicile, the law of the forum, and the law of the place where the property under consideration is situated.

The law of the domicile settles all questions of *status*. By *status* we mean the aggregate of all the rights and duties of an individual. Questions of legitimate birth, of lawful wedlock, of full age, of legal capacity, are questions of *status*, or of the rights of persons. The devolution of the personal effects of a decedent is determined by the law of decedent's domicile. Savigny defines domicile as the centre of one's jural relations, a definition that has the merit of elasticity. Hardly any single test will determine domicile in all cases. The most generally received rule demands actual residence, *animo manendi*. An American minister, resident abroad, does not lose his domicile by accepting a post in the diplomatic service. Nor does a private citizen by traveling abroad. Nor does the President of the United States by taking up his abode in the White House.

The law of the place of the contract, in general, determines the construction to be put upon it by the courts. In some States it is held that the place where a contract is made is the *locus contractus*. In New York the better rule is that it is the place where the contract is to be enforced.

The *lex fori* controls as to all matters of legal remedy and practice. All such questions as the issue of attachment, injunction, or other provisional remedy; the term of court at which trial can be had; the limitation of time for the commencement of a civil action, are determined by the law of the place where the court sits.

Personal property has no *situs*, but follows the person of its owner. Debts on contract, loans, etc., are available to the creditor wherever he can find the debtor. But real property is governed, as to alienation, by deed or will, and as to descent, under the laws of intestate succession, by the laws of the place where the real property is situated. The Supreme Court of the United States often asserts a rule of general commercial law which is in sharp contrast with the decisions of State

courts in the place where the contract was made, or the obligation incurred. But as to realty it defers to the law of the place where the property in litigation is situated.

Agreements between nations are called treaties or conventions. The earliest of modern treaties were written in Latin, the common tongue of Christendom. French is now the language of diplomacy. Treaties may regulate permanent conditions, such as international boundaries, or may treat of specific interests, such as trade-reciprocity, for a brief period. The Constitution of the United States gives the treaty-making power to the President, who is to act by and with the advice and consent of two-thirds of the Senate (*Art. II.*, § 2). The latter body, not having any organs of communication with foreign powers, cannot take the initiative in negotiating an international compact. It can only act on the finished work of the President, by confirming or rejecting it. It should be noted that there is no limitation of the treaty-making power, or restriction of it, to any class or classes of treaties. The reasonable inference is that all treaties known to diplomatic history are within the range of this power, including reciprocity treaties, of which we have now several illustrations. Not long ago the constitutionality of a reciprocity treaty was gravely questioned, on the ground that it necessarily limits the powers of the House of Representatives to find ways and means of providing revenue. Under the treaty-making power Florida was purchased of Spain in a manner the constitutionality of which has been sustained by the Supreme Court (*American Insurance Co.* v. *Canter*, 1 *Pet.*, 511).

A most interesting question for speculation arises from a consideration of the unlimited range of the treaty-making power. It relates to a possible wide expansion of the domain of Federal jurisprudence through the exercise of this power. The field of national legislation is limited by the grant of

power to Congress, which is quite specific and confined to certain subjects mentioned in the Constitution. The extent of the judicial authority is also determined by the constitutional grant of jurisdiction in certain cases named. But in the matter of concluding binding treaties, which become the supreme law of the land, we find no qualification of the authority of the President and the Senate.

The agents of diplomatic intercourse are styled ambassadors or ministers. The United States does not send an ambassador, the diplomatic officer of highest rank, inasmuch as the ambassador represents the person of his sovereign, and no person is sovereign in this country. The style and title of our representative at the Court of St. James is envoy extraordinary and minister plenipotentiary. However, European countries cheerfully concede to our republic equal rank with the most powerful monarchies. Diplomatic officers enjoy many privileges which may be summed up under the heads of *inviolability* and *exterritoriality*. The mission of the foreign minister is to maintain the peace and happiness of nations. To qualify him for this high duty he must be free from all fear and constraint. He is, therefore, not subject to the civil or criminal law of the place where he resides. This immunity extends to his family and his official staff, his secretary, chaplain and other servants. Exterritoriality is a fiction of law under which a minister's official residence is regarded as the very soil and territory of his fatherland.

The literary style of diplomatic dispatches should be polite and deferential. Diplomatic language, according to Talleyrand, is often designed to conceal thought. But not always. It is interesting to recall the advice of the Bourbon King to his ambassadors: "If they lie to you, lie still more to them."

In the United States the authority to receive and send ambassadors and other public ministers and consuls is lodged with the President.

Consuls represent not the sovereignty of the nation by whom they are commissioned, but rather its commercial interests. Their business is with the affairs of individuals, shipmasters, and traders. They need not be citizens of the country that they represent. A consul's authority to act comes from the government of the country where he resides, and is called an *exequatur*. A recent extension has been given to consular authority through treaties establishing courts in heathen and Mohammedan countries for the cognizance of suits to which Christians may be parties.

The diplomacy of to-day is much concerned about the balance of power. All the great powers are interested in maintaining the present equilibrium and repose of European governments. Non-European communities, except Turkey in Asia, are not affected by this principle. It is immaterial in what way the dangerous aggrandizement of a state is brought about, whether by conquest in arms, success in diplomacy, or by legitimate inheritance under legal rules; in all cases the peace of Europe is threatened, and demands a restoration of the pre-existing condition. It is not proposed to restrict that growing influence which is the necessary result of commercial supremacy. The rule is rather aimed at territorial dismemberments and acquisitions, and at dynastic intrigues which may unsettle the established equipoise of European powers.

We can here find a convenient place for the discussion of the Monroe Doctrine. The law of the balance of power, we have seen, is restricted in its application to European countries. It aims at securing the independence of existing states by humbling the arrogant and defeating the designs of the ambitious and the self-asserting. It is really an illustration of the universal right of self-preservation. So on this continent Americans, having established popular government at great cost, are prepared to assert that this country is the home of

civil liberty, and self-protection demands that any further attempts of European powers to colonize here, or to introduce monarchical and aristocratic absolutism, will be regarded as acts hostile and unfriendly to the United States. Although this doctrine, first formulated by Mr. Adams, the Secretary of State under President Monroe, has never been officially adopted as the avowed policy of our government, it has, nevertheless, been in accord with the spirit that nourished our sympathy with the rebels against Spanish despotism, and rebuked the insolence of Louis Napoleon in setting up a Hapsburg prince as Emperor of Mexico.

LECTURE V.

INTERNATIONAL LAW IN TIME OF WAR.

PEACE is the normal state of society and war is a disturbance of that condition. Such is the useful assumption of the publicist. But war has been so far the main staple of popular history, which consists of hardly anything but the dates of battles and the succession of kings. The sociologist, too, finds militant activities persistent in the development of dominant races, and industrialism only as the very latest outcome of high civilization. From the earliest recorded history of the race to our own day, in all nations and communities, war has been the one pursuit which most dignifies man, and the avenue of approach to the most exalted station among one's fellows.

Will the nations of the earth learn war no more? Will reason ever take the place of the sword in the solution of national disputes? What are the present indications and tendencies?

The nations of Europe are maintaining armies and building navies on a larger scale than ever before. The customs and usages of war are undergoing change, so that its hardships are being mitigated, its asperities softened, and its spirit Christianized. War is being ennobled as the politest art that can engage the attention of man. Old barbarities are being abolished, and we have reached the point where opposing generals in the field display the utmost extravagance of chivalry and all the elegance of manner that distinguishes a

Parisian salon. Hospitals and ambulances are exempted from hostile attack; libraries, museums and cathedrals are preserved from bombardment; chain-shot, bar-shot, and all missiles and explosives which cut, bruise and disfigure without doing more effective execution, are discarded.

Now, what is the certain issue of all this effort in the direction of ameliorating warlike conditions? Is it not to make war a still more dignified and truly Christian means of determining international differences? Was not war less congenial to the taste of man when it was waged with all its barbaric horrors?

Two theories have been propounded with reference to war and its conditions, viz.: *first*, that war is merely a state of non-intercourse commercially; and, *secondly*, that war sets the hand of every subject of each belligerent against the hand of every subject of the other belligerent. It is hard to reconcile existing usages of the most civilized people with either of these theories. Unquestionably, the better view is that war is a condition of non-intercourse between the citizens of one state and the citizens of the other belligerent; that the actual conduct of hostilities in the field is limited to combatants, and that non-combatants (with certain exceptions) are exempted from the stress of arms. But the *levée en masse*, where the whole population turns out in self-defense; and the rule which subjects the merchandise of a non-combatant trader to seizure and sale, seem reconcilable with the second theory only.

The rule of strict neutrality commands non-intervention in the quarrels and internal revolutions of other states. Still there are exceptions to this rule, and interference may be justified to protect the balance of power or to suppress barbarous practices on Christian subjects. Considering the condition of chronic revolution in the Latin-American states, and the struggle there for larger liberty which necessarily enlists our sympathy, it is interesting to note the law that limits our

intervention in such cases. Belligerent rights of revolted subjects can lawfully be recognized when the movements against the government reach the proportions of actual war. Absolute independence and political sovereignty should not be conceded till the mother country has ceased all efforts to subdue her rebellious subjects.

While on land private property, not contraband of war, belonging to a non-combatant citizen of a belligerent country is free from hostile attack, on the sea all the merchandise of peaceful commerce is lawful prize. This is because the profits of trade provide the sinews of war. Another reason for the rule is sometimes urged—namely, that while on land the visit of a hostile army might strip a citizen of his every means of subsistence, the confiscation of his ship simply deprives him of his luxuries. Since wheat, petroleum, dressed meats and live stock are the objects of foreign commerce, there seems to be less force in this suggestion now than formerly. The long prevalence of piratical practices, dating from the beginning of shipping and continuing till our own times, may explain the difference of view taken by publicists on the subject of larceny on land and larceny by sea.

The development of international law has followed out the course of economic necessity. Public law, as well as private law, imposes on disputants the obligation of conducting their quarrels so as not to damage innocent third parties. "So use your own as not to injure another," says the old common law maxim. In like manner the law of nations seeks to give to belligerents as large a freedom as possible in destroying the property of one another, but requires that the commerce of an innocent third party, a neutral, shall be protected as well as may be. The extent and limit of this immunity of neutral property from hostile invasion have been the subject of much learned disputation for many generations. From the beginning, two conflicting principles have contended for recognition:

First, the fiction of exterritoriality which fastens on a ship and cargo the nationality of the vessel's flag: if the flag be neutral, the ship and cargo are free. Without further qualification, this fiction would lead us to *free ships, free goods*, and permit belligerents to carry their goods in neutral bottoms in order to evade capture. The second principle is that, third parties being out of the conflict, each belligerent may prey upon the commerce of the other belligerent and capture his property whatsoever and wheresoever. This rule would not protect a neutral vessel from search for hostile goods. In process of time both these principles have received important modification. The tendencies of our day are towards a universal acceptance of the maxim, *free ships, free goods*. Dr. Woolsey characterizes this as "a gain for humanity and a waiver of justice" (*International Law*, § 187).

At the close of the Crimean War, the great powers, at the Peace of Paris in 1856, issued declarations in substance as follows:—

1. Privateering is abolished.

2. The neutral flag covers enemies' goods, with the exception of contraband.

3. Neutral goods, except contraband, are not liable to capture under an enemy's flag.

4. Blockades in order to be binding must be effective.

The United States did not accede to these declarations. When asked to do so, we declined to surrender the right of privateering, but expressed our willingness to join the great powers in their declaration of principles if they would exempt all peaceful commerce of non-combatants from capture at sea. Our true policy is, doubtless, not to relinquish the right of privateering. A privateer is a vessel owned by a private citizen who secures from his government in time of war letters of marque and reprisal by which he is commissioned to prey upon the merchantmen of the other belligerent, to capture

them upon the high seas, and to have them condemned by the courts as lawful prize for his own profit. It is objectionable as stimulating the passion for plunder and as not conducive to effective discipline. The true American foreign policy is to avoid entangling alliances and diplomatic complications with European states, thereby rendering unnecessary the maintenance of large armies and navies. A standing army is justly regarded by republicans as a menace to civil liberty. The meagre proportions of our Federal military and naval establishments ought rather to be a source of pride than of humiliation to every patriotic American. With a sea-coast of thousands of miles to police in time of war, the navies of the world would be wholly insufficient.

Contraband signifies any objects of wealth suitable for use in war. Neutrals have no right to convey contraband in their ships. Their merchant vessels are, therefore, liable to search in time of war to ascertain whether there has been any wrong of this kind done.

A blockade signifies an interruption of maritime commerce in certain ports. During the Napoleonic wars Europe had an era of paper blockades, which were merely declarations of cabinets to the effect that a blockade had been established. The Berlin and Milan decrees of the Emperor, answered by the English orders in council, affected to put all Europe in a state of blockade. Such abuses of power in war led up to the later doctrine that only effective blockades should be regarded as lawful. An effective blockade is one sustained by the presence of a navy sufficiently powerful to prevent entrance to and exit from the blockaded port.

During the late war for the Union, certain Confederate officers, Mason and Slidell, took passage on an English packet vessel, the *Trent*, on their way to Europe to negotiate a loan. They were forcibly removed from the *Trent* by the commander of a United States gun-boat. This was defended on

the ground that the men were dispatches—living dispatches. International law recognizes no such doctrine. The United States was entirely in the wrong; but the affair was useful in committing England to the advocacy of neutral rights.

All mankind is interested in the establishment of justice and in the punishment of crime. The territoriality of crime is now recognized in the codes of all modern nations. In ancient law crime was a corporate or family act, and its punishment involved not only the principal offender, but his wife and household. No body of law prevails, otherwise than by courtesy, outside the territorial limits of the sovereign power that enacted such law. The extradition of criminals rests, then, entirely on international comity, or on the stipulations of treaties. The United States has made many such treaties. Political offenses are not included among crimes for which extradition is allowed. Only the more heinous wrongs, recognized as such by the universal conscience of man, admit of this remedy, such as murder, rape, forgery, arson, and the more malignant type of felonies.

The Treaty of Washington, in 1871, between Great Britain and the United States marks an epoch in diplomatic history, and in the history of the world as well. Three questions were disputed between the two countries. The Alabama Claims were referred to the Geneva Tribunal, which made an award of $15,500,000 in gold to the United States. These claims arose out of England's disregard of the obligations of a neutral during the war for the Union in allowing gun-boats for the Confederate service to be built, equipped, and provided with excessive hospitalities in British ports. The Halifax Commission decided the fisheries dispute against the United States and awarded England $5,500,000. Emperor William of Germany determined the San Juan boundary controversy in favor of the United States. Anglo-Saxons have thus set a precedent in favor of referring international disputes to the arbitrament of reason rather than resorting to an appeal to the sword.

LECTURE VI.

EQUALITY BEFORE THE LAW.

THE Constitution of the United States is a fetich; so is the Declaration of Independence. Both have been idealized by a loving people. Much good has come from this and but little harm. They are the great charters of American liberty. They are the symbols of the spirit of liberty which still pervades all institutions truly American, whatever cynical philosophers may say to the contrary.

They are not alike, but in some respects are radically different. The Constitution contains little sentiment, and the Declaration contains much. The Constitution is a business-like document, and herein is its great merit. It makes no mention of God. Neither does a promissory note nor a bank draft. Some good Christians refuse to vote till this omission has been supplied, and verbal mention is made of the Deity in the fundamental law. How this is to be accomplished, unless voting is done by somebody, is too profound a problem for their simple minds. God is practically recognized in the preamble, which states that the Constitution was ordained to establish justice and to secure the blessings of liberty.

It was not mere literature that saved this continent from English misrule and wrought out the liberties of a free people; else we would give the glory to Jefferson and Morris. The letter was but the formal expression of a mighty and universal purpose. Liberty cannot be achieved by a paper constitution. Law, unsustained by public sentiment, is a misnomer: it is a literary curiosity, that is all. Hence the powerlessness of law

as a remedy for social ills, and the disheartening spectacle of law defied and nullified by local sentiment.

America is supposed, by the average schoolboy, to have been settled by fugitives from religious persecution, by those who sought the inhospitable shores of New England for the purpose of worshiping God according to the dictates of conscience. Little allowance is made for the convicts transported to America as a penal colony, and for adventurers coming from the lower orders of European society.

In like manner the fathers of the republic have been idealized by posterity. This is particularly true of Washington, whose record as soldier, statesman and political writer is not critically studied by the masses. The public will not be content with an honest picture of the Father of his Country. The Washington of popular fancy is a pure myth.

It is a simple thing for us, who are Christians and who approve the work of our Revolutionary ancestors, to think of them too as Christians; and Christians, perhaps, they were, in the largest and best sense of the word; but many of them were Christians outside the church. Such a man was Franklin; such a man was Jefferson; such a man was Thomas Paine. All were profound believers in God: all were skeptics as to Christianity.

The theories of Jefferson as to natural and inalienable rights—the right to life, liberty and the pursuit of happiness—are French in their origin. Jefferson and Paine found these ideas in the writings of Rousseau. Rousseau had taken them from the speculations of the Greek stoics, who contemplated the state of nature as that best adapted to human society. This state of nature was conceived as having existed at the dawn of civilization, and was regarded as the starting-point rather than the goal of humanity. Perfection, then, was to be reached, not by evolution, but by revolution.

This theory of society can never stand the light of histor-

ical investigation. What are natural rights? Who gives them? Who enforces them? Who defines them? Against whom are they asserted? Are duties correlative with rights? If so, are not the natural rights of others important limitations of our own liberty? If the world owes a man a living, who is the world? Are not we—that is, all of us—the people? And must we not, after working hard to support our own families, continue on in our fatigue and work for our neighbor and his family? But the state should guarantee every man a living. Well, who is the state? Simply all of us. The public treasury may pay the cost. But whence come these funds? Every cent comes out of our own pockets, and at heavy cost too, for the tax-gatherer has to be paid for his services. Say, if you will, that every man has a God-given right to life, liberty and the pursuit of happiness: but understand well that the world owes no man a living, and that God's law prescribing a struggle for existence and the survival of the fittest is still unrepealed.

It is also said that all men are created free and equal. Aristocratic rank and kingly authority by right of birth alone are as clearly a departure from God's revealed law of pure equality as ever slavery was. What is this equality? Simply equality before the law. Shall we divide universal wealth among the units of the human race? Equality would not subsist during the minute of time devoted to the division. Before midnight some Esau would have sold his birthright for a mess of pottage, and some gambler would have staked his last dollar on the turn of a wheel or the cast of a die. On the morrow the new tenant of the cradle would grasp for his brother's share and the silent occupant of the grave would have left his wealth to his kindred.

Equality can never be secured by human law, for human nature presents every shade and variety of intellectual and moral character. Political equality simply means the equality

of all before the law—that is, in theory of law, but not necessarily in a court of justice. In the court of justice the poor man issues a summons to his rich neighbor to answer for a wrong done. The poor man, in simple ignorance, pleads his own cause; the rich defendant retains the leader of the bar as his representative. The poor man cannot secure expert witnesses; the man of wealth knows well that such testimony can be had in the market under the law of demand and supply. The man of poverty looks upon a jury-box filled with his creditors. His rich opponent finds those same men, and the judge, too, perhaps, his dependents, his pensioners, his debtors. What are the chances? Where is justice? What a mockery is the angel-figure, blindfolded and holding the scales at even balance! While the great Creator may have made all men equal, it is incontestable that in this evil world, wealth and intelligence have a legal and moral power of which no dogma of political philosophy can strip them.

Americans believe in progress in most things. But, somewhat singularly, in the domain of politics they seem to think they have struck out a perfect thing. The rule of the people has been established, they think, forever. Representative government, based on more or less frequent elections, they regard as the *summum bonum*. No American questions the perpetuity of our constitutional institutions. The English, he thinks, are bound to come to them in another generation; and monarchy will surely vanish, as it did in Brazil, without a struggle.

The Czar will stop persecuting the Jews, the Kaiser will disband his army, the English Church will be disestablished, the Irish will have home rule. All this is sure to come, but not now. Nor will it come because some politician writes the law in a book, but because the voice of the people will some day demand it. For all government rests on the consent of

the governed, and the majority wield the brute force of the nation. There is no such thing as absolute monarchy. When Ahab wanted to secure Naboth's vineyard he had to resort to subterfuge and chicane. When David coveted Uriah's wife he was put to much pains to get rid of his rival. Then there is the dread of assassination. How many Czars have died a natural death during the last two hundred years? In the meantime those who know not liberty will despise it, and kings and emperors will continue to reign over supine and down-trodden peoples.

We are not one people in an ethnological or historical sense. We have no common race origin, although the foundations of our government were laid by Anglo-Saxons. We have as yet no common tongue, although the Seven Years' War secured the dominance of the English language on this continent.

We are one people because we are a liberty-loving people. Love of liberty is the centripetal force in this land. And if danger threatens our republic it will be because of a decline in this sentiment.

It is fashionable, nowadays, to find in the immense immigration of foreigners to this country a menace to our free institutions. Is there not a greater danger in the ignorance of law and the contempt for law too often displayed by native Americans? They are ignorant of law, its source, definition and sanction who ascribe all public iniquity to the derelictions of courts and legislatures. They have a contempt for law and a disregard of civil liberty who commit crimes against the ballot by suppressing the votes of lawful citizens, or by falsifying the returns of elections. They have a contempt for law who place Judge Lynch in the seat of the constitutionally appointed magistrate, or who expedite the determinations of lawful tribunals by the bullet of the assassin in open court.

Not to philosophers, then, do we look for the constitution

of an ideal state, for the republics of the Grecian dreamers were full of slaves and destitute of homes, and More's Utopia and the pretentious Constitutions of Carolina only exhibit the folly of mankind for the instruction of posterity; nor yet to the givers of law and the draftsmen of constitutions, for law, without a sanction based on the sense of right prevalent in the community, becomes a by-word and a reproach; but to a liberty-loving people, a people who are not the creatures but the creators of constitutions and laws, not servants in a despotism, but masters in a constitutional republic.

LECTURE VII.

LEADING DOCTRINES OF CIVIL POLITY

THE science of politics is not an exact science: it is a moral science. It deals with subtle and variable phenomena not always obvious to a superficial view. Some enthusiastic students of political philosophy claim that the structure of an ideal commonwealth can be reared by the learned and patriotic. Doctrinarianism in politics stands for the principle of an ultimate philosophy of government which may guide us to the best possible regulation of public affairs. These advanced thinkers would at once drive all tyrants from their thrones, scatter all lords of parliament, disendow all state churches, liberalize the elective franchise to the point of a universal and unfettered suffrage, and inaugurate the era of popular government among all the nations of the earth.

The opportunist, as distinguished from the abstractionist, deals with the problems of his own day, leaving the constitution of an ideal republic to the dawn of the millennium. Is there a benignant monarch, and a contented, prosperous and progressive people? Opportunism leaves the king upon his throne. Are there classes in society, brutalized by centuries of serfdom, ignorant and vicious? The opportunist hands them no ballot.

The abstractionist aims at ideal conditions: the opportunist at the best possible now. The abstractionist will not listen to compromise, while the opportunist recognizes in compromise the key to most all political problems not solved by revolution. The history of American politics is the story of compromise. The Constitution is a standing monument of the most historic compromises. It was framed by statesmen, acting for all time because they lived for their own day and generation. A strong Federal government could never have been established except by the spirit of compromise which induced the States that had western lands to cede them to the Union to pay the debt of the war; which induced the greater States to concede to the smaller States equal suffrage in the Senate; and which induced the North to bear with the slave-trade for twenty years, to provide for the return of fugitives from labor, and for a representation based in part on servile population. Whatever occasion there may be now to deplore the tendencies towards centralization of power, there was none in 1788, when treaties were ignored, the public creditor unpaid, currency degraded so as to become a by-word, the Congress without a quorum, the treasury without a dollar, trade without life, law without a sanction.

Elementary school-books classify governments as monarchies, oligarchies and democracies. This is simple but worthless, inasmuch as the only test of discrimination employed is the number of those who rule, whether one, a few, or all. Another and a more important question is, *How* are the people ruled?

John Stuart Mill, answering his own question, says that the best kind of government is a representative government. Assuming that he speaks of the most highly developed and freest people of the Western World, who can appreciate good government and can sustain the burdens and responsibilities of citizenship, we must all agree with Mill. Such a representative government may be a constitutional monarchy like England, or a democratic republic like the United States.

Constitutions are limitations on the power of the majority; they are enacted for the protection and security of minority rights, for the majority are often heedless of constitutional

restrictions. Our government is not a pure democracy, where nothing can prevent the immediate realization of the will of the popular majority. And well it is for us that it is not such a democracy, for a more intolerable despotism can hardly be conceived than the despotism of a mob. With us constitutional institutions stand out against a fickle populace and thwart its purposes. Among such institutions we may mention the Senate, the Presidential veto, and the United States Supreme Court, all of them being essentially non-democratic. Constitutionalism may not be sententiously defined, but it may be accurately described as a form of government which rests ultimately on the will of the people expressed at frequent intervals through elections. The scholar in politics, or rather the student of political books, would introduce constitutionalism into Russia and other despotically-governed countries—and this without sufficient inquiry as to whether recently emancipated slaves can appreciate the rights of citizenship or meet its responsibilities. A ballot in the hands of a man who cannot read it is a menace to civil liberty.

Modern constitutional governments recognize the importance of the tripartite division of political power, and the exclusive exercise of legislative, judicial and executive functions by distinct and independent departments. This distribution of governmental powers was noted in the political works of Aristotle, but it attracted no large degree of attention until expounded and illustrated with great fullness by Montesquieu in the *Spirit of the Laws*. This work, while a collection of valuable sociological facts gathered with great industry from all portions of the world, and a most important contribution to the literature of comparative and historical jurisprudence, was practically written in eulogy of the English Constitution. The distinguishing feature of the Roman imperial system was that the emperor had himself elected to all the republican offices, and under the title of *princeps* had all political powers

concentered in his own person. Oriental despotisms are similarly characterized. Free political conditions are approximated to the extent that the separation of legislative, judicial and executive powers becomes more perfect and complete. Of the three departments the legislative may be said to be the most important, inasmuch as it holds the initiative, and law must be enacted before it can be interpreted and enforced: the executive is the most strikingly prominent, on account of the unity in the office and the higher dignity associated with it: while, in America, the judiciary enjoys the unique advantage of a life-tenure, and exercises the transcendent power of declaring legislative and executive acts null and void in case they are unconstitutional.

The separation is more apparent than real. In England, the Lord Chancellor has primarily judicial authority in equity; but he presides in the Chamber of Peers, and is a member of the cabinet, coming in and going out with the party to which he belongs. The British ministry is brought to office by a majority of the House of Commons, and is dismissed from office by an adverse vote in that house; it has been characterized as an executive committee of the Commons. Every member of the cabinet sits in Parliament, and the most important legislation debated every session is that proposed by the government. The Crown, too, is a part of Parliament, and has an absolute veto on all legislation: this power of royal veto has not been exercised since the time of Queen Anne, and inasmuch as the Queen rules by a responsible ministry that is in favor with the House of Commons, whatever measure passes that body has the royal assent. The House of Lords is, in appearance, a legislative body. Three of their lordships, out of a body of about six-hundred and fifty peers, constitute a quorum. The lords spiritual (bishops and archbishops) have seats in the upper house by virtue of their office, and form about the most conservative element in English politics. Im-

peachments of civil officers made by the lower house are tried by the Lords, sitting in a judicial capacity. The House of Lords is also the court of last resort. In the United States impeachments are also found by the lower and tried by the upper house. In New York, prior to the Constitution of 1846, the State Senate was a part of the old court of errors, the tribunal of highest competence. The executive has quasi-legislative functions in the authority to communicate to the legislature from time to time and to recommend measures for passage. It has judicial functions in the exercise of the pardoning power. Then, in a large sense of the term, the judiciary has the power of legislation. The larger part of our law is judge-made law. This power of judicial legislation was contemplated from the beginning. It is interesting to note that the whole subject of maritime and admiralty law was given over by the Constitution of the United States to the Federal authority, as represented, not in the legislative department, but in the judicial department (*Art. III.*, § 2).

In America the judiciary holds a higher rank than it does in England or on the European continent. As England has no written constitution, it is not always easy to distinguish an act of Parliament which is a constitutional law from an ordinary act of routine legislation. So the deliberate setting aside of a statutory enactment by judicial authority is something foreign to European ideas. In Germany much of public administration which we entrust to the judiciary is assigned to the army. The judiciary is conceived by German jurists as an adjunct to the executive. In fact, the distinction between executive and judicial duty seems bolder on superficial view than it does on profound investigation.

Another institution of representative governments which has found almost universal favor is the bicameral system, or the organization of the legislature into two houses. This was taken from the model of the English Parliament, and has been

introduced into every State in the American Union: even some municipal councils are similarly organized. The upper house is the more conservative and dignified; the members are generally elected for longer terms, are of greater age, represent larger constituencies, and are consequently fewer in number. All bills are required to pass both houses. The lower house holds the purse-strings of the nation, and bills providing ways and means for raising revenue must originate in that house. The American Senate is the monument of a compromise between the great States and the small States. Under the Articles of Confederation there was no Senate, no President, no Supreme Court. Each State had one vote. While representation in the lower house was based on population, it was provided that each State should have two senators, and that while the Constitution might be otherwise amended, no State should be deprived of its equal suffrage in the Senate without its own consent (*Art. V.*, § 1).

Some judicious writers, such as John Stuart Mill, have opposed the bicameral system. Benjamin Franklin also disliked the idea of an upper house, and his ascendency in Pennsylvania long maintained a legislature of but a single chamber in that commonwealth. Historically, the upper house is the older, the knights of the shire not appearing in Parliament till the time of Simon de Montfort, and the present organization not having been lawfully recognized till 1295. From the very beginning of the king's council we find the barons and the ecclesiastics in attendance.

The English House of Lords is doubtless a moribund body. Had the Peerage Bill of two centuries ago been adopted by the Commons, and the royal prerogative of creating new peers been abolished, probably the upper chamber would have disappeared as a factor in politics before this. Its only hope for a long career of useful service lies in the power of the Crown to recruit its members by new creations. It may temporarily

resist the will of the people; but it cannot do so permanently. More than once, the Crown, on the advice of his minister, has swamped the upper chamber with enough newly-created peers to change the balance of power. If the Lords reject a bill passed by the Commons, and Parliament is dissolved, and a new House of Commons is elected on the issue of the rejected measure, and the newly-elected House of Commons passes substantially the same bill, it is no longer constitutional for the peers to interrupt the passage of the act. But to the barons of England, rather than to the lower orders, we are indebted for Magna Charta, for the organization of the House of Commons itself, and for a resolute assertion of English liberties throughout the centuries. To the barons of England we are indebted for the important limitations of royal prerogative which have made England a free country. And to the inactivity of aristocratical influence after the War of the Roses may be attributed the subserviency of Parliament during the period of the Tudor monarchy.

LECTURE VIII.

THE POLITICO-ECONOMICAL FORCE IN CONSTITUTIONAL DEVELOPMENT.

THERE are in the United States two opposed schools of constitutional interpretation. Some of the Jeffersonian Democrats have gone to the extreme point of denying any proper national character to our Federal government and exalting the individual State above the Union in every case of conflict. State sovereignty, nullification and secession are the logical outcome from such theories. The Hamiltonian Federalists, on the other hand, assert the complete sovereignty of the national government, urge a liberal instead of a strict construction of the organic law, and favor national banks and a protective tariff. The several States are regarded by them as in a condition of permanent subordination to the authority of the United States.

It is a trite remark that the capital difference between the British Constitution and the Constitution of the United States is, that the one is traditional and the other written. There is an element of truth in this, as the Constitution of the United States is a certain literary document, beginning with the preamble and ending with the fifteenth amendment. But, in a historical and sociological sense, the American Constitution is something more and something less than the written instrument already referred to: it is a plan of government distinctly the product of evolution, and even now in a process of change.

Many forces have been instrumental in working out such

development, as, for example, foreign war and internal strife, the decay of aristocratic sentiment, and the growth of industrialism. It is impossible to overestimate the influence of the politico-economical force in the evolution of political constitutions. It is a force that acts on all men and in every condition of political environment, in a manner not urgent merely, but imperative.

The Articles of Confederation, however severely they may be condemned as the groundwork of an established government in time of peace, actually met the demands of war and carried the country through the Revolution successfully. This may not have been owing to any excellence in the Articles themselves; still, while they stood the strain of war, they could not meet the exigencies of peace. The first step towards the Constitution was taken in obedience to a call of economic necessity. Trade languished under diverse fiscal regulations and competing schedules of customs-taxes. The call to the convention at Annapolis was specifically for the purpose of taking into consideration the state of trade. And in the Philadelphia convention, however hotly other points were controverted, all agreed in the wisdom of a policy which gave to the Federal authority the power to regulate foreign and interstate commerce, and to lay and collect customs, duties, imposts and excises.

The economic doctrine of protective taxation has been attacked as unconstitutional. Certainly there is no word in the organic law which seems to justify legislation in the interest of one class as against another; of manufacturers, for instance, as against agriculturists. All revenue raised by taxation must be applied "to pay the debts, and provide for the common defense and general welfare of the United States" (*Art. I.*, § 8, 1). But the power to lay and collect duties is given in the most general and unrestricted language. Clearly, it is a fair argument that the framers of the Constitution meant

to include in duties all systems of customs-taxation known to the fiscal policy of the most enlightened nations of the world at that time. While Hamilton, to whom the first tariff act is to be credited, was a pronounced Federalist, the leaders of the Democratic-Republican party for many years, including Jefferson and Jackson, were avowed protectionists. The Supreme Court of the United States has repeatedly sustained the constitutionality of protective legislation.

The Constitution says nothing about a national bank; nor does it in distinct terms grant any authority to Congress to create a bank or other corporation. But Congress, in response to the call of economic necessity, has chartered by special acts two United States banks, and in these later years has provided by general law for hundreds of national banking associations. Banks have been found in England and elsewhere to be useful fiscal agents, enabling governments to borrow money, pay debts, and collect taxes. The constitutionality of such enactments was sustained by the Supreme Court in *McCulloch* vs. *Maryland*, 4 *Wheaton*, 316.

The purchase of Louisiana was condemned as without warrant in the Constitution. Mr. Jefferson himself favored such constitutional amendment as would validate his irregular proceedings. The New England Federalists opposed the President's policy, fearing lest the admission of new States would threaten their ascendency in the national councils. Hamilton was statesman and patriot enough to see that the purchase of Louisiana was a matter of vital importance. The favorable moment afforded by Bonaparte's distress might never have returned if allowed to pass unimproved. The Supreme Court has rested the legality of the purchase on the unrestricted treaty-making power of the Federal government (*Insurance Co.* vs. *Canter*, 1 *Peters*, 542).

Our present point is that, whether constitutional or not, the acquisition of Louisiana was necessary to our progress, if

not to our continued existence as a nation, and this because of economic forces that asserted themselves in an irresistible way. In 1789 the United States was only a slender column of States situated on the coast. Later discoveries attracted settlers to the rich soil of the Mississippi valley. Agricultural produce could not be carted over the mountains to the seaports. A highway to the ocean was needed. The Mississippi River system offered such an outlet to the sea. But a foreigner held the mouth of the river. To the burden of customs-exactions the danger of a blockade in time of war was added. So the purchase of Louisiana was an act of statesmanship of the highest order. In such a crisis, what is a paper constitution? What is the national flag? What are traditions, symbols, and sentimentalities when wealth, comfort, and happiness are at stake? (*See Draper's History of the Civil War, Vol. I.*, p. 205).

The War for the Union unquestionably involved dogmas of political philosophy: but the purely economic doctrines of slavery and the perpetuation of slavery as a legally recognized institution were also referred to the arbitrament of arms. Vice-President Stephens saw this, and in his speech of March 21, 1861, labored to show that the Constitution of the United States was built on sand, inasmuch as it assumes an equality of races, and takes the ground that slavery is wrong. The chief corner-stone in the new edifice of Southern Confederacy was the great physical and moral truth that slave-subordination of the negro was his natural and God-established condition (*McPherson's Political History of the United States*, p. 103).

The Southern clergy fully sympathized with the slave barons, and bent all their learning to justify slavery by means of Scripture quotations. Our New England ancestors just as easily found biblical authority for the burning of witches and the hanging of Quakers: Mormon polygamy is even now defended as an Abrahamic and divinely established institution.

In the famous case of *Dred Scott* vs. *Sandford*, 19 *Howard*, 393, the Supreme Court solemnly decided that slavery existed under the recognition of the Constitution, and that property in slaves was protected by the Bill of Rights.

That slave labor is inefficient and uneconomical is readily proved. It is always reluctantly rendered, owing to the slave's lack of economical impulse; slaves must, therefore, be watched and worked in gangs in order to economize the expense of supervision; labor in gangs is only possible in a few agricultural industries; slave labor is hence lacking in versatility, and consequently in skill; slave labor, not admitting of rotation in crops, exhausts the soil; new virgin soil must be continually added to the slave-cultivated area, or the system itself must perish.

The Emancipation Proclamation, issued by President Lincoln as a necessary and fit war measure, is an excellent illustration of our present point, viz., that law yields with everything else to the hard economic necessities of every changing hour.

Hardly has a more serious question in economic science ever been addressed to a legislative or judicial mind than that presented by the legal-tender acts. Many think that the greenbacks saved the country in time of war: others are convinced that the legal-tender feature of the treasury notes hurt the national credit and reduced the purchasing power of the paper money. The United States Supreme Court in *Hepburn* vs. *Griswold*, 8 *Wallace*, 603, decided that the legal-tender acts were unconstitutional. Within the short space of one year the same tribunal sustained the constitutionality of these acts in *Knox* vs. *Lee*, 12 *Wallace*, 457. The vote was four to three in *Hepburn* vs. *Griswold*, and five to four in *Knox* vs. *Lee*. The composition of the court had in the meantime been altered by the appointment of two new justices, whose views regarding legal tender were known to the Presi-

dent and the Senate before the appointment was made. It was deemed necessary to save the greenbacks at any sacrifice of constitutional principle: and this is what was done. Professional students of economic science generally agree that the principle underlying the legal-tender acts is fallacious. But we have here to deal, not with that economic fallacy, but with the juristic truth, illustrated by the history of this legislation, that the sense of right and necessity prevalent in the whole community must always determine the direction of legal development. (*See also Juilliard* vs. *Greenman*, 110 *U. S.*, 421).

We have already seen that the whole subject of admiralty and maritime law is reserved by the Constitution to the Federal judiciary. This law is to receive a progressive development, of course; but not at the hands of the legislature. The courts alone have the power to direct and limit that development. The maritime law is cosmopolitan, not English. It is older than the common law, older than the major part of the Roman civil law, many of its rules originating in the Mediterranean ports centuries before the Christian era, and remaining substantially unaltered to this day. In England the jurisdiction of the admiralty is limited to tide waters. This limitation was early recognized by our Supreme Court in the case of the *Thomas Jefferson;* but in the later case of *The Genessee Chief*, 12 *Howard*, 454, the former ruling was reversed, and navigability rather than the tidal character of water was accepted as the test of admiralty jurisdiction. Here we have an illustration of both heredity and environment as factors in the evolution of law. In England all navigable waters are tidal: in America the great lakes and the extensive river system of the Mississippi are not tidal, while they are navigable. The English rule, thus unadapted to our territory, was wisely broken down.

Another illustration of the progressive unfolding of public

law, even under a written constitution, is afforded by that large mass of adjudications by the Supreme Court on the subject of the power of Congress to regulate commerce (*Art. I.*, § 8, 3). The commerce subject to such regulation is foreign, interstate, or with the Indian tribes. The views of the court of last resort have undergone many changes during the generations of its existence. No one can reconcile all the deliverances of the Supreme Court on this subject. The most liberal construction has been given to the clause under consideration. Commerce has been held to include all traffic and transportation, and to comprehend persons as well as property among its objects. In order to regulate commerce, Congress can lawfully build light-houses, make a coast-survey, or equip an expedition to view a transit of Venus or to explore the region of the Dead Sea.

When we say that constitutional development is influenced by economic forces, we do not mean that the text of the written law is necessarily altered. Public law, in this country no less than in England, is the product of steady development. Congressional legislation, the principles and maxims of executive policy, and judicial decision have all been with us potent instrumentalities for effecting reforms in political jurisprudence.

LECTURE IX.

STUDIES IN CONSTITUTIONAL AND POLITICAL HISTORY.

THE constitutional and political history of the United States is continuous with that of Great Britain. It dates back of the Declaration of Independence; back of the *May-flower;* back of the English Revolution; back, even, of Magna Charta. The United States as a nation is older than the Constitution; older than the Articles of Confederation; older than the Continental Congress. Our national existence dates back to the first appeal to arms in the long series of events which culminated in the treaty of 1783. The spirit of liberty was unquestionably brought to American shores by the Puritans, who represented the noblest and most patriotic of the Englishmen of their day. The era of the great revolution in England is, perhaps, the most interesting period in the world's history to the student of free political institutions. In these movements the Puritans were leaders. Many remained in England to solve the problem of free government there; others came to this country to establish civil liberty on a new continent. The regicides found a refuge in Judges' Cave, near New Haven, the avenues of which city bear the names of the men who slew Charles I. Even Cromwell actually embarked for America, and only accident prevented his expatriation. The early law of colonial New England is pervaded throughout with the puritanical spirit. Englishmen, then, set up English government in America; a system of government

already highly developed, and even then in process of change through revolution. The best in English politics we kept; the useless we discarded. We were fortunate in having no traditions and but little to forget. For kings and lords and established church we had no place. The English parliamentary system, like the English language and the common law, was our just heritage. Our ancestors had lived under it, had aided in its development, and were now appointed to give it a new career under the most favorable circumstances.

The Revolutionary War resulted in political centralization. All war, both foreign and internal, has that effect. In fact, hardly anything but war could have kept the colonies together under such a form of government as the Articles of Confederation.

Our second war with Great Britain had a similar issue. Prior to 1812, the right of secession, as a legitimate constitutional proceeding, was universally recognized in the United States. The Mexican War was waged by the Federal power in the interest of the extension of slavery, and resulted in the consolidation of the power of the slaveocracy at Washington. The story of this war forms the darkest chapter in American history. In brief, certain freebooters, led by desperate adventurers, started out from Louisiana and formed a colony on Mexican territory, where they inaugurated a series of political intrigues and military expeditions in the interest of precipitating war between Mexico and her revolted subjects, and in the further interest of invoking the intervention of the United States and securing the ultimate annexation of Texas to the Union. The object was to promote the extension of the slave-cultivated area and provide the way for the introduction of at least four new States into the Union, whose eight representatives in the upper house of the national legislature would maintain the influence of the slave barons in American politics. Political centralization was also the result of this struggle.

The war of the Rebellion successfully established the doctrine that the Union can coerce an individual State. During the long period of reconstruction the party in power, in full control of all departments of the government, was not hampered in its policy by any considerations of a constitutional character. President Lincoln, at least, openly avowed his purpose in case of necessity to transcend the limits of the presidential authority as defined by the fundamental law.

It is fashionable now to speak of the New South; to recall the fact that the war is over; to apologize for the action of the North; to defend the policy of the Confederate leaders and to assert that self-interest would necessarily have prompted the best of men to do exactly as they did. The present is regarded as an era of good feeling and of fraternization between the lately belligerent sections. A republican form of government is conceived to mean the absence of all Federal supervision of State politics, even including the election of President and Congressmen. At the same time the South exhibits its interest in fraternization by the open suppression of the negro vote and by passing laws making the birthday of Jefferson Davis a legal holiday.

Other than sentimental considerations are involved in this great history. In the first place, nature is inexorable and has presented us with a territory so configured by mountain chains and river systems as to render the selection of Mason and Dixon's line or any other parallel of latitude as an international boundary a thing utterly impossible. Had the South secured its independence, lines of fortresses along the frontier, vast standing armies, complex fiscal arrangements and customs-service would have entailed such frightful expense and provoked such necessary conflict as to render another war and a new conquest of the South inevitable.

Making all allowance which Christian charity can prompt, giving all possible credit to the Confederates for patriotic

sentiment and military valor, the fact remains that slavery is a ruinous system of labor from the politico-economical view; that it can never compete with free labor in any line of industry, and that it can never be applied with success to mercantile and manufacturing employments. The war was fought on the distinct issue of the perpetuation of the system of slave labor. Further, it remains true that the Confederates undertook to destroy the fairest and freest form of government that in the providence of God has ever risen among men, and to establish in its place a constitutional system which contained the elements of its own destruction. The Confederacy was a rope of sand. Almost any form of government, however weak, can cohere during the stress of war; but although the principle of State sovereignty was distinctly asserted and the right of the Confederacy to coerce a State was distinctly negatived, the South was compelled to resort to a conscription which barely spared both the cradle and the grave. Settlement of these economical and political questions, as we hope forever, makes the war for the Union worth all it cost.

Ultra patriots are apt to take an inaccurate view of these important struggles. In the Revolutionary War the king's forces had little difficulty in holding the most important cities on the coast, and in particular Boston, Philadelphia and New York. The royal troops, though in large part mercenaries, were well equipped and disciplined. It is questionable whether more than once the patriot army ever stood before the fire of the British regulars. About every one of the long successions of brilliant American victories chronicled by patriotic historians was followed by a retreat. The conquering cohorts of General Washington fell back steadily from Long Island to Yorktown. Two great disasters befell the cause of the king's arms. Burgoyne at Saratoga, cut off from the base of his supplies, surrendered to General Gates without a struggle, preferring captivity to starvation; Cornwallis at

Yorktown, similarly circumstanced by the adroit manœuvres in which the French admiral participated, gave up his sword rather than continue the fruitless effort to conduct a war in European style on a barren and unsettled continent. Nature, by the very configuration of the territory, had rendered the aggressive movement of the European army impossible in America. In the War of 1812 the most important battle, to which the fame of General Jackson is due, was fought after the war was over. The English army, like a bird of prey, swooped down upon the coast, and finding nothing to steal, and no one to do battle, burned the Capitol at Washington and sailed for home.

Too little credit has been given to Thomas Paine for his services to his adopted country during the Revolutionary period. Paine is principally remembered in these days for his infidel publications, consisting chiefly of an absurd work called *The Age of Reason*, a book of shocking irreverence and exhibiting on the part of its author an ignorance which is lamentable and astounding. Similar themes were treated by Paine in his *Rights of Man*, a book published in answer to Burke's *Reflections on the French Revolution*. Orthodox Christians mention the name of Paine with horror and loathing, and lament the fact that Washington and Jefferson were intimate in their relationship to such a character. Being the first of the deistical school to appear as a pamphleteer in America, he came to be regarded as the arch-infidel of his era, so much so that it was considered a pious and praiseworthy task to falsify his history in the interest, as it was vainly supposed, of the Church. This prejudice against Paine accounts in large part for the indifference that has been manifested towards his contributions to political literature. These latter works, consisting of a series of articles published in the newspapers of the day and extending from the outbreak of the Revolutionary quarrel to 1783, under the *nom de plume* of "Common

Sense," were of transcendent importance in their day and are likely to remain permanently valuable. Paine was born in England, where he was never fully appreciated, and on arriving in America he began to pay off several old scores which he owed to the English. He posed before the American public as the champion of liberty; this may have been largely because he loved liberty, but it was also because he hated Britain. His literary style is a marvel of vigor and clearness. He was a born agitator. His persistence and staying power won him an audience; his theme was American independence, and his exhortation was to achieve it immediately. Nor did he abate the energy of his labors until the treaty of peace by which England recognized the independence of the United States. Paine had a constitutional aptitude for political agitation. He went to France at the time of the great Revolution and became a member of the Constituent Assembly which framed the first constitution of the Republic. Paine was a firm believer in God. Bishop Watson, in his *Apology for the Bible*, written in answer to the *Age of Reason*, says: "There is a philosophical sublimity in some of your ideas when speaking of the Creator of the Universe."

The most famous of all works dealing with American political history have been written by foreigners. The first of these in order of time is *Democracy in America*, by De Tocqueville. The author visited America about sixty years ago and travelled extensively throughout the country. He was much interested in studying the condition of the blacks, and his forecast of the political events which wrought out their emancipation and their ultimate enfranchisement has given De Tocqueville the reputation of a prophet. What interested him most was the New England town, with its autonomy in local administration. Having no better French word by which to translate "town," he employed the term *commun*. His eulogy of the township system resulted in the formation of a school of

French political writers called *Communists*, who are not to be confounded with the reactionary and anarchistic elements of modern European society; they were merely the champions of the policy of local self-government. The great power exercised by the American judiciary filled De Tocqueville with amazement.

The Constitutional History of the United States, by Von Holst, in six volumes, has just been finished. It is a characteristically German work. The author is beyond doubt more learned in American political literature than any other man. His book is a work of immense labor and exhaustive research. Von Holst discerns two eras in our political history: first, the era of state sovereignty and slavery; second, the era of nationality and freedom. He attaches great importance to the proceedings which led up to the Mexican War and the annexation of Texas.

The American Commonwealth, by Professor James Bryce, now a member of the English ministry, is the last of the three important works on American political institutions written by foreigners. Professor Bryce has made several visits to the United States, and has travelled more extensively throughout the country than any member of Congress or any man in political life, with the exception, possibly, of General Grant. His work is in no sense a history, but rather a series of essays, short and intensely interesting and following no definite order. A cynical critic might think that the book was written for the market, so many complimentary things does the author say about Americans and their institutions. If it were so written it was certainly a great success. The author is not pleased with our exclusion of cabinet officers from the halls of the legislature. Among the most striking differences between English and American politics, he refers to our lack of a capital. Washington is certainly no metropolis, nor is New York a capital in the sense of being a political centre like

London, or even Paris. Were the Federal capital located in New York, and the rule requiring residence in the State one represents abrogated, there might be secured to the public the services of some of the most eminent of the lawyers, journalists, bankers and merchants, who naturally congregate in metropolitan centres. *The American Commonwealth* is a sympathetic, hopeful and inspiring work.

LECTURE X.

THE RIGHT OF SUFFRAGE: THE STATUS OF THE INDIANS.

THE tendencies of the times all point toward universal suffrage. The franchise has been wonderfully liberalized in England in our own day. Before the great Reform Bill of 1832, the House of Commons was a representative body only in name. Representation in England is based in part on municipal franchise. American politics presents nothing analogous to this. A charter by which a borough is organized contains provision for the return to Parliament of one or more persons from that corporation. As the voting was not by ballot, but was *viva voce*, the electors were few, comprising only a small fraction of the total population. The great Reform Bill of 1832 has been justly styled a bloodless revolution. By it the House of Commons was made a more truly representative body, a body for the first time substantially representative of the English people. The "rotten boroughs," so called, were disfranchised. By this term is meant municipalities wholly in the control, or in the pocket, as the phrase went, of some great nobleman who always secured the return of his own nominees. Several great peers of England had the nomination of dozens of members of Parliament. The Reform Bill extended representation to the great manufacturing cities, for which there had been most inadequate representation, or no representation at all. The representation by county constituencies in England is like the system with which we are familiar in the United States. A member of Parliament need not, however, reside in the district that he represents. He may be returned by several constituencies, and must then make a choice of one, and a new election is held to fill the vacancy. For example, if Mr. Gladstone is returned by both Middlesex and Midlothian, and decides to sit for Midlothian, a new election is held for Middlesex. With us, Congressmen must reside in the State, but not necessarily in the district that they represent. The English system secures to public life the services of distinguished men who would otherwise be left without seats in the legislature.

One of the hardest problems in practical politics is that of minority representation. Whom does a member of the legislature represent? Certainly all those who voted for him; just as certainly all those who voted against him, besides those who did not vote at all. The minority may not be satisfied with the representation of their interests. How can fair representation be secured? One plan proposed is to aggregate the minorities in various districts and apportion a proper number of representatives for such an aggregate. Another method of securing minority representation is to require each individual elector to vote for a less number than all of the candidates to be chosen; thus, when three officers, for example, inspectors of election, are to be chosen, if each voter can name but two, the minority will not be unrepresented.

As population increases and shifts to new centres, it becomes important periodically to re-apportion the legislative districts. This is done by constitutional direction immediately after the census, which is taken every decennium. Of course, such an apportionment should be fairly made in a non-partisan and statesmanlike spirit. This is, however, seldom done. An effort is made in almost every case to secure some partisan advantage by the political party charged with the task of re-apportionment. An American statesman named Gerry so distinguished himself in a legislative effort of this kind that

his name is used as a very synonym for such wicked and unpatriotic practices. Gerrymandering proceeds on the principle of making the districts of one's political opponents practically unanimous, and so arranging the doubtful districts as to leave a majority, small but decisive, in the interest of the party framing the bill. The following will illustrate the methods of two parties in the work of re-apportionment: Let us take an area exactly circular, containing one hundred thousand inhabitants, of whom forty-nine thousand we will assume to be Republicans and fifty-one thousand we will assume to be Democrats. Let us further assume that the population is spread evenly over the entire surface, and further let us assume that in a smaller circle round the centre are contained ten thousand Democrats to the entire exclusion of Republicans. The task is to divide the area contained in the larger circle into ten election districts. On every principle of fairness the Republicans are entitled to five districts and the Democrats are entitled to five. By the process of gerrymandering, the Republicans can secure nine out of the ten districts; and the Democrats can secure the whole ten. If the gerrymandering act were drawn by Republicans, the Democrats would be given one district at the centre of the area; lines would then be drawn at equal intervals from the outer circumference to the inner circle so as to make nine additional districts. These nine districts would be Republican; the district comprised in the inner circle would be Democratic. Were the gerrymandering act framed by the Democrats, lines would be drawn from the centre of the circle to its circumference so as to make ten districts, every one of which would be Democratic.

The Constitution does not undertake to establish any uniform rule respecting qualifications of voters for Congressmen and for President. It leaves this matter entirely to the various States. Those who in the several States are authorized by State law to vote for a member of the more popular branch

of the State legislature are competent under the constitutional rule to vote for President. In our early history the right of suffrage was limited by religious, educational and property qualifications. At present it is fairly unrestricted. Educational tests linger in Connecticut, and have been recently established in Mississippi. Rhode Island, until within a few years, restricted the ballot to a very few citizens by means of property qualifications. It is thus left to each individual State to determine, in accordance with its own views, who shall vote for President and for Congressmen. Conviction of felony involves the loss of civic privileges in most of the States. Ignorance, crime, poverty, sex, religion and alien birth may be made the basis of exclusion from the right of suffrage. Not all citizens of the United States can vote for President; inhabitants of the territories and the District of Columbia have no such vote. Some who are not citizens of the United States, but who have declared their intention under the naturalization laws, are allowed in several of the States to vote for members of the legislature, thus becoming qualified under the Constitution as voters for Presidential Electors.

The right of suffrage is not a natural right; it is an artificial privilege granted directly by the sovereign power on principles of expediency to those who can most safely be trusted with the exercise of so important a prerogative. In New York women are allowed to vote for school commissioners and to serve as trustees and as members of boards of education. In many Western States women are allowed to vote at all charter elections and are eligible to municipal offices. In Wyoming and in Washington, at least until lately, women have an absolutely unrestricted right of suffrage and enjoy to the fullest extent all political privileges existing under the law.

Woman has no natural right according to the United States Supreme Court to practice law or vote at elections. She is destined by God and nature, according to recent deliverances

of that august tribunal, to the holy and benign office of wife and mother. Women have been admitted to the practice of law in various States of the Union. On the application of Mrs. Bradwell for admission to the bar of the United States Supreme Court, it was decided that in the absence of Congressional legislation the motion must be denied (*Bradwell* vs. *State*, 16 *Wallace*, 130). Such legislation has since been passed, and several women have argued cases in the Supreme Court of the United States with great ability and satisfactory results. Long before any adjudication on this question, Myra Clark Gaines, daughter of General Gaines of New Orleans, a lady who spent a long lifetime in litigation over her inheritance, argued a case in the Supreme Court against Daniel Webster, and actually won an important triumph over that world-famed advocate. It has been distinctly decided by the Supreme Court "that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship." This doctrine was announced in the case of *Minor* vs. *Appersett*, 21 *Wallace*, 162. The question in the case was, Is a woman, being a citizen of the United States and of Missouri, entitled to vote in that State, whose laws confined the right of suffrage to man?

The status of the Indians involves many perplexing questions. The United States asserts jurisdiction and full political sovereignty over all its territory, including Indian reservations. It has assumed to remove whole tribes of Indians bodily from place to place westward across the continent. It regards the Indians as the wards of the nation and as in a condition of perpetual tutelage. They are fed and clothed at national expense; blankets and cattle are provided for them; and, too frequently, it is to be feared, firearms and intoxicating liquors, notwithstanding strict statutory prohibition. Schools for the education of the Indians are maintained at enormous expense, the annual outlay for this purpose reaching hundreds

of thousands of dollars. In these schools the practical arts of trade and manufacture are taught, in addition to the ordinary subjects of a common school education. Notwithstanding the Indian is treated in many respects as a person *non compos mentis*, in other ways we acknowledge his capacity as a person *sui juris*, and accord him the full power of distinct political sovereignty. The fullness of political sovereignty is best recognized by declaring war and making treaties. In both these ways has the United States recognized the political sovereignty and equality of Indian tribes (*The Cherokee Trust Funds*, 117 *U. S.*, 288).

The North American Indian is fast perishing from the earth He has no capacity for enlarged civilization. There are innumerable instances of Indian youths who have learned the literature and arts of Christian society lapsing again into barbarism and savagery. They are discontented and heart-broken as they see the boundaries of their ancestral domains retreating and narrowing. They have no sympathy with the spirit of Christian civilization; they cannot appreciate the dignity of labor. This noble doctrine, on which Western civilization is founded, is to them a chimera. The Indian lives for sport, and only the Indian's wife for toil; and even she fails to understand that equity knows no distinction of sex. If the present policy of the United States is designed to save the Indian to the civilization of the future, it is a failure. Sociologists who have studied the history of civilization, well understand that humanity cannot step at one stride from the savage occupations of hunting and fishing to the civilized pursuits of trade and agriculture. The Indians are undergoing a process of self-extermination. They stubbornly refuse to summon children into the world who shall be destined to the hard fate of their fathers. Unlike the negroes of the South, who readily adjust themselves to the social, industrial and climatic conditions which surround them, the Indians

stubbornly refuse to take any place in the civilization of the nineteenth century. As a sociological experiment, might not the Indian be made a herdsman on the ranches of the West, perhaps for a long series of generations, before the effort is renewed to interest him in the pursuits of agriculture and manufacture? Such is the policy urged with much force by Professor Sumner of Yale College.

LECTURE XI.

THE FEDERAL JUDICIARY.

THE judiciary has a wider range of power in the United States than anywhere else. It is placed by constitutional provision beyond the reach of legislative or executive interference. The tenure of the Federal judge is for life. Judges can be removed only by impeachment. Their compensation cannot be reduced during their term of office. "The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish" (*U. S. Constitution, Art. III.*, § 1). The Supreme Court is thus created by the Constitution, and cannot be abolished by Congress; but it is organized by Congress, which means that the number of justices is determined by that body. The number of justices has varied from time to time. It is now nine. The salary of the chief justice is ten thousand five hundred dollars; the salary of each associate justice is ten thousand dollars. There is no point of judicial superannuation under Federal law, but any justice of the Supreme Court, after ten years of service on the bench, may, on arriving at the age of seventy, retire on full pay for life. No chief justice has been appointed to that post by promotion from associate justiceship. The Judiciary Act, passed in 1789, immediately after the adoption of the Constitution, organized the Supreme Court and the Circuit and District Courts of the United States. This act also defined the appellate jurisdiction of the Supreme Court, and section twenty-five of that act allowed the review of a determination

of the court of last resort in a State whenever such a decision involved a question arising under the Constitution, the laws, or treaties of the United States. The original jurisdiction of the Supreme Court is limited to cases where a State is a party, and cases involving an ambassador or other public minister. The number of such cases is insignificant; practically, the whole labor of the Supreme Court is spent in the hearing of appeals. Each justice of the Supreme Court is assigned to a circuit, which he is to visit at least once in two years. He is known in the Circuit Court as the Circuit Justice, being distinguished from the Circuit Judge on whom the burden of jurisdiction mostly falls. Each State and Territory has at least one District Court; several have two; New York has three, known respectively as the Northern, Eastern and Southern Districts of New York. The judicial power of the United States extends also over the Territories, the District of Columbia, and various places in the several States that have been ceded to the United States as sites for forts, dock-yards, hospitals and institutions of learning.

The Court of Claims is also a tribunal of Federal establishment sitting at Washington. It has exclusive jurisdiction to decide cases against the United States. Judgments rendered in this court are paid at the convenience of Congress, through the ordinary process of an appropriation bill.

The United States Supreme Court has always enjoyed the highest reputation, both at home and abroad, for learning, honor and integrity. Its decisions, particularly on questions involving international law and maritime jurisprudence, are highly regarded by foreign tribunals. It has been most fortunate in the personnel of its members. There can be no mistake in naming John Marshall, chief justice for thirty years, as the jurist who has brought most fame to that high court. John Marshall was a Federalist of the school of Hamilton. When the Federalists lost the Presidency and the Congress,

they retained possession of the Supreme Court, with John Marshall at its head. It is impossible to overestimate the force of this circumstance in the development of our constitutional law. The Court stood like a rock against State invasion of Federal prerogative. The constitutional grants of power to the government were liberally construed. State legislatures were kept in their proper place of strict subordination to the paramount authority of the Union. It was fortunate for the fame of Marshall, and equally for the happiness of the American people, that it fell to him to decide those first great cases in which the powers of the United States and of the several States were carefully discriminated and defined.

Roger B. Taney, who succeeded Marshall as chief justice, illustrates the influence of high office on human nature. While a mere politician he shared the views of his party associates, and was inclined to limit in every constitutional way the exercise of national authority; but when he became chief justice he followed in the footsteps of Marshall, and preserved the dignity and authority of the Court as against every effort to degrade and minimize it.

The Supreme Court has suffered in reputation from three circumstances in our political history. First, the decision in the Dred Scott case, unquestionably right, but rousing the indignation of the Northern Abolitionists, and hurrying on the irrepressible conflict: secondly, by the decision of *Knox* vs. *Lee*, when it was alleged, with too much show of reason, that the Court had been packed to do the bidding of a partisan majority: thirdly, by the decision of the Electoral Commission appointed to decide the Presidential contest of 1876, where it was found that the members of the judiciary were no more free from party bias than the members of the legislature.

"No State shall pass any law impairing the obligation of contracts" (*Art. I., Sec.* 10). This clause has occasioned more

litigation and lengthy adjudication than all the other sections of the Constitution combined. By contract we are to understand an agreement between two or more parties to do or not to do a particular thing. A contract may be executed, as in the case of a grant of land or other property; or it may be executory, where it comtemplates some act to be performed in the future, either by one party to the contract, or by both parties. By the obligation of a contract we understand its binding force as determined by the whole body of law applicable thereto. Executed contracts, as well as executory contracts, are within the protection of the constitutional rule. This doctrine was announced in the famous case of *Dartmouth College* vs. *Woodward*, 4 *Wheaton*, 518. Dartmouth College was chartered by the King of England for the purpose of educating Indians and others. When the relations between the King of England and the people of New Hampshire were broken off forever, the State succeeded to the exercise of the royal prerogative. The legislature of New Hampshire assumed to re-organize the board of trustees of Dartmouth College. Such re-organization was resisted by the old board. Mr. Webster, an eminent graduate of that institution of learning, came to the aid of his Alma Mater, and resisted the new movement and achieved a notable triumph. This is perhaps the most historic and interesting case ever decided by the Supreme Court. It has been cited as authority on many different points thousands of times. While the doctrine at first announced has been importantly modified by later decisions, the case itself has never been distinctly overruled. This decision compels the States to stand by their own bargains. It is a doctrine perhaps dangerous to society, as it may arrest legal and economical development; it has never yet been found sufficient to stop the progress of mankind in any right direction. Charters of corporations are now almost universally granted subject to the right to alter and amend

the same, with or without reason, at the discretion of the legislature. In New York the Constitution of the State provides that all charters granted, either by special act of the legislature or under general laws, may be altered or repealed at any time by the legislature, in its discretion.

Can a State barter away its right to tax? Is not taxation an inherent attribute of sovereignty, and, as such, inalienable? This subject has been exhaustively treated by the Supreme Court in some recent cases, and the doctrine established, not without vigorous dissent, however, that a State is bound by its contract exempting property from taxation. Such a ruling enables one body of legislators to tie up the hands of future legislators, which seems to be against public policy (*McGee* vs. *Mathis*, 4 *Wall*, 143; *New Orleans* vs. *Houston*, 119 *U. S.*, 265).

A municipal or other office is not a contract for the rendering of service in consideration of a stipulated wage. It is rather a public trust which patriotic citizens consent to exercise for a limited period. In theory of law all officers may resign, whereas no one can rescind a contract which he has made without the consent of the other contracting party. So the salary of the mayor of the city can be reduced during his term of office without impairing the obligation of contracts. Nor is the license to sell liquor a contract; it is rather a police regulation justly within the range of State legislation. A charter of a municipal corporation is not a contract within the meaning of the rule announced in the Dartmouth College case. Charters of cities may be amended or repealed by the legislature at any time. The city of Memphis was assisted in its plan of repudiating its municipal debt by an act of the State legislature which abolished the charter. This was held by the Supreme Court not to be an act impairing the obligation of contracts (*Meriweather* vs. *Garrett*, 102 *U. S.*, 472).

What is the meaning of the word "impair"? Whatever

it may mean elsewhere in English, in the Constitution of the United States it practically means "destroy." If several remedies are provided by law for the enforcement of a contract, any one or more of them may lawfully be taken away without impairing the obligation of the contract so long as one efficient remedy is left. State insolvency laws absolutely discharging a debtor from his obligation; exemption of property from seizure and sale under execution on a judgment; changes in the statutes of limitations and in the rules of evidence; the abolishment of imprisonment for debt and of distress for rent, have all been sustained as legitimate measures of State legislation, and as not impairing the obligation of contracts.

The Constitution forbids the passing of *ex post facto* laws, either by Congress or by the State legislatures. This barbarous Latin is best translated by the word "retrospective." However, a narrow meaning has been attached by adjudication to this phrase. All *ex post facto* laws are retrospective, but not all retrospective laws are *ex post facto*. Only penal legislation is prohibited: retrospective civil legislation, unless forbidden by State constitutions, is not objectionable. And only that criminal legislation is void as *ex post facto*, which aggravates the misfortune of the prisoner in some way. This may be, first, by enacting a law making that a crime which was not criminal when committed; secondly, by raising the grade of crime, as, for instance, from misdemeanor to felony, and thereby enhancing the penalty; and thirdly, by changing the rules of evidence so as to make conviction easier. Any penal legislation mitigating the condition of the accused is not void as *ex post facto*. Perhaps the only method of grading criminal offenses is by means of the penalty awarded (*Calder* vs. *Bull*, 3 *Dal.*, 386; *Hartung* vs. *The People*, 22 *N. Y.*, 95).

The Constitution also forbids the passing of bills of attainder. A bill of attainder in English law was a conviction

of crime by act of Parliament without judicial inquiry. It was followed by death. It also involved forfeiture of property, and in the case of treason, corruption of blood, which means the destruction of all inheritable quality. It was a terrible engine of tyranny, which our fathers were very anxious to exclude from our constitutional system. In an interesting class of cases, known as the Test Oath Cases (*Ex parte Garland*, 4 *Wallace*, 333; *Cummings* vs. *Missouri*, 4 *Ib.*, 277), the Supreme Court has given a wonderful extension to this definition, and has pronounced unconstitutional and void acts of legislation which can never be brought within the range of the English bill of attainder.

LECTURE XII.

CONSTITUTIONAL AMENDMENTS.

THE progressive development of political law renders it necessary to recognize some such principle as constitutional amendment, always active, or at least available, in the normal movements of government. Occasionally some great work of legislation is regarded by its author as an ideally perfect code, in which any change must necessarily be for the worse. The master-work of Tribonian was so conceived by the emperor; and all emendation, and even comment, was forbidden in advance. But no sooner had Justinian so decreed, than he began himself to issue new constitutions, forming that part of the *Corpus Juris* which we call the Novels.

Most constitutions make provision for their own amendment. This is true of the Articles of Confederation, the Constitution of the United States and the Constitution of the State of New York. The Articles of Confederation provided that any amendment should require a unanimous vote of the States. The first step towards the Constitution was taken in a movement to amend the Articles: it was found that amendment would be inadequate, and hence the fundamental law was re-written *de novo*. The tendency towards progressive development is recognized in a unique provision of the Constitution of this State, to the effect that every twenty years there shall be submitted to the voters this question: "Shall there be a convention to revise the Constitution and amend the same?" (*Article XIII.*, § 2). There have been several instances where constitutions have been amended in a manner

different from that provided by the constitution itself (*The Constitutional Convention by Judge Jameson*).

There are fifteen amendments to the Constitution of the United States. The first eight constitute the Bill of Rights, so called. The ninth and tenth define the relations of States to the Union. The eleventh amendment, prompted by the decision in *Chisholm* vs. *Georgia*, 2 *Dallas*, 419, forbids a citizen to make a State defendant in a suit at law or in equity. The twelfth amendment changes the method of Presidential election, growing out of the trouble in the election of Jefferson. And the last three amendments sum up the results of the War for the Union.

The adoption of the Constitution was bitterly resisted, particularly in New York. Many of the leading Revolutionary patriots, like Patrick Henry and Luther Martin, were opponents of the Constitution. Its stoutest champions were Hamilton, Madison and Jay, whose newspaper articles, now known as *The Federalist*, have a deserved reputation for political wisdom and practical patriotism. It was objected that there was no Bill of Rights; and accordingly the first eight amendments were immediately adopted. There was and could be no opposition to the enactment of these guaranties of the citizen against governmental and legal oppression. Little attention was paid to the matter, however, and no one seemed to care in the absence of tyranny what provision had been made against it. While the most general language is employed, it remains doubtful whether the limitations securing the liberties of the citizen are addressed to the Federal authority, to the State authority, or to both the Federal and the State. The early case of *Barron* vs. *Baltimore*, 7 *Peters*, 243, announced the doctrine that the prohibitions contained in the Bill of Rights were addressed to the national government only. The fourteenth amendment, in its first section, which has been justly called a new Bill of Rights, may be regarded

as an important modification of the rule set forth in *Barron vs. Baltimore*. But the Supreme Court, in the case of the Chicago anarchists, has re-affirmed the rule that the Bill of Rights limits the Federal power only. The best authorities hold that the fourth, fifth, sixth and seventh amendments do not limit or restrict the legislative powers of a State.

The question, however, is not as practically important as it might seem to be, inasmuch as State constitutions contain similar limitations of the power of government. So that State legislatures are restrained by State constitutions from an invasion of the liberties of free citizens. It is interesting to note what is common to the two Bills of Rights, in the Constitution of the United States and the Constitution of the State of New York. Careful study shows that the two are practically alike, both providing for religious liberty, freedom of speech and the press, the right to petition, the right of trial by jury, and indictment by the grand jury: and both forbidding excessive bail, or cruel and unusual punishments, or deprivation of any rights save by the law of the land (*see Constitution of New York, Art. I.*). The Constitution also forbids the granting of titles of nobility, passing bills of attainder or *ex post facto* laws, or suspending the privilege of the writ of *habeas corpus* (*see Art. I.*, §§ 9 *and* 10).

It is interesting to inquire what is meant by "due process of law" as used in the fourteenth amendment and elsewhere. It may be fairly interpreted as the traditional judicial proceeding under the English common law. This did not always involve trial by jury, because in equity and in admiralty the English practice was to submit both questions of law and questions of fact to the presiding judge. Nor does it forbid summary convictions by a magistrate of misdemeanors and petty offenses. In general, it may be laid down that a proceeding that is essentially judicial is required by the fundamental law. This means that notice should be given to the

defendant of the complaint against him, opportunity should be afforded him to make his defense, and counsel should be heard in his behalf. "By the law of the land," says Webster, "is most clearly intended the general law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." It should ever be remembered that when we adopted the English common law as the basis of American jurisprudence we appropriated not only the substantive law defining primary rights, but the adjective law as well providing for remedial justice (*Constitution of New York, Art. I.*, § 17). The rules of pleading, evidence and procedure, and the law of parliamentary practice as well, are our birthright and inheritance as much as trial by jury and *habeas corpus* (*Code Civil Procedure*, § 217).

A State law absolutely prohibiting the manufacture and sale of intoxicating liquors is not unconstitutional as depriving one of property without due process of law (*Beer Co. vs. Massachusetts*, 97 *U. S.*, 25).

In our early colonial days the Congregational Church was established by law in Connecticut and elsewhere in New England, and the Anglican state church in Virginia. One of the marvels of history is the story of that furious bigotry that exiled so worthy a man as Roger Williams from the settlement of Massachusetts Bay. Religious toleration found its first important legislative expression in Maryland, where Roman Catholicism had early entrenched itself. As late as 1877 the Constitution of New Hampshire continued to exclude Catholics from legislative office to the great shame of Christianity and the disgrace of that commonwealth. Religious freedom does not include the right to practice polygamy or commit other crimes in the name of conscience. The right to bear arms does not justify the carrying of concealed weapons, but only extends to the establishment of a State militia, a citizen soldiery. The intolerable burden and tyranny of

general warrants executed against all suspected individuals are under the ban of constitutional inhibition. Trial by jury means not only the determination of guilt or innocence by a petit jury in criminal cases, but the intervention of the whole body of the people represented on the grand jury in the decision of the initial question as to who shall be put on trial. The exigencies of the military and naval service are such as to make trial by the quicker process of court martial necessary. The prisoner is allowed to stand mute, and cannot be compelled to testify against himself, as he is in Bavaria and other continental countries. The prisoner has the right to be confronted with the witnesses against him, to look them in the eye while they are testifying against him: so while testimony taken on commission may be read on behalf of the defense, such testimony ought not to be received for the prosecution. Eminent domain signifies the original and ultimate ownership by the state of all land, personal property and incorporeal hereditaments (*Constitution of New York, Article I.*, §§ 11 *and* 13). The right to condemn private property for public use is enjoyed by the Federal government, by the States, and even by municipalities; it is also exercised by railroads and other corporations. The compensation which the law requires to be paid is ascertained by disinterested commissioners. All property which a private individual assumes to hold is subject to taxation and to appropriation by the state under the power of eminent domain. This may include franchises granted for a given period of time or even in perpetuity (*West River Bridge* vs. *Dix*, 6 *Howard*, 507)[1]

The Civil Rights Bill was passed March 1st, 1875. It enacted that all persons of whatever nativity, race, color, or persuasion, religious or political, shall be entitled to the full and equal enjoyment of the accommodations of inns, public conveyances, theatres, and other places of public amusement. Such legislation was not warranted by the thirteenth amend-

ment, which simply extends to slavery. Denial to blacks of equal accommodations in inns, public conveyances, and places of public amusement imposes no badge of slavery (*Civil Rights Cases*, 109 *U. S.*, 3). But although the Federal act has been pronounced unconstitutional, except so far as concerns the territories, the District of Columbia, and other places under the exclusive jurisdiction of the United States, the blacks are not left without ample protection, at least in New York. Unjust discrimination on the part of hotel-keepers and common carriers is prevented by statute. Hebrews are also protected against such discriminations, as the phraseology of the statute adds "creed" to "race" and "color" (*LL. of* 1881, *Chap.* 400; *Penal Code*, § 383; 1 *R. S.*, *8th edition*, *Banks*, p. 300).

The last three amendments are the result of the late war. The thirteenth abolished slavery. The fourteenth endeavored to secure the free exercise of the right of suffrage for the emancipated blacks by reducing the representation in Congress of those States that denied them that right. The South, however, preferred to have its representation cut down rather than allow negroes to vote. The fifteenth amendment was, therefore, adopted, which practically admitted negroes to the suffrage by disallowing race, color and previous condition of servitude as tests for the exclusion of persons from the exercise of the elective franchise.

Many other amendments to the national Constitution have been proposed. One that is now attracting a large measure of public attention forbids the grant of public moneys in aid of sectarian institutions. This principle has actually won its way to constitutional recognition in several Western States.

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