while instituted in imitation of the American, is not the only authority competent to determine whether a Cantonal law is void because inconsistent with the Federal Constitution, for in some cases recourse must be had not to the Court but to the Federal Council, which is a sort of executive cabinet of the Confederation. And the Federal Court is bound to enforce every law passed by the Federal legislature, even if it violate the Constitution. In other words, the Swiss Constitution has reserved some points of Cantonal law for an authority not judicial but political, and has made the Federal legislature the sole judge of its own powers, the authorized interpreter of the Constitution, and an interpreter not likely to proceed on purely legal grounds.[1] To an English or American lawyer the Swiss copy seems neither so consistent with sound theory nor so safe in practice as the American original. But the statesmen of Switzerland felt that a method fit for America might be ill-fitted for their own country, where the latitude given to the executive is greater; and the Swiss habit of constantly recurring to popular vote makes it less necessary to restrain the legislature by a permanently enacted instrument. The political traditions of the European continent differ widely from those of England and America; and the Federal Judicature is not the only Anglo-American institution which might fail to thrive anywhere but in its native soil.

[1] See upon this fascinating subject, the provisions of the Swiss Federal Constitution of 1874, arts. 102, 110, and 114; also Dubs, *Das oeffentliche Recht der Schweizerischen Eidgenossenschaft*, and a valuable pamphlet by M. Ch. Soldan, entitled *Du recours de Droit Public au Tribunal Fédéral;* Bâle, 1886. Dr. Dubs was himself the author of the plan whereby the Federal legislature is made the arbiter of its own constitutional powers.

CHAPTER XXIV

THE WORKING OF THE COURTS

THOSE readers who have followed thus far the account given of the Federal courts have probably asked themselves how judicial authorities can sustain the functions which America requires them to discharge. It is plain that judges, when sucked into the vortex of politics, must lose dignity, impartiality, and influence. But how can judges keep out of politics, when political issues raising party passions come before them? Must not constitutional questions, questions as to the rights under the Constitution of the Federal government against the States, and of the branches of the Federal government against one another, frequently involve momentous political issues? In the troublous times during which the outlines of the English Constitution were settled, controversy often raged round the courts, because the decision of contested points lay in their hands. When Charles I. could not induce Parliament to admit the right of levying contributions which he claimed, and Parliament relied on the power of the purse as its defence against Charles I., the question whether ship-money could lawfully be levied was vital to both parties, and the judges held the balance of power in their hands. At that moment the law could not be changed, because the Houses and the king stood opposed: hence everything turned on the interpretation of the existing law. In America the Constitution is at all times very hard to change: much more then must political issues turn on its interpretation. And if this be so, must not the interpreting court be led to assume a control over the executive and legislative branches of the government, since it has the power of declaring their acts illegal?

There is ground for these criticisms. The evil they point to has occurred and may recur. But it occurs very rarely, and

may be averted by the same prudence which the courts have hitherto generally shown. The causes which have enabled the Federal courts to avoid it, and to maintain their dignity and influence almost unshaken, are the following: —

I. The Supreme court — I speak of the Supreme court because its conduct has governed that of inferior Federal courts — has steadily refused to interfere in purely political questions. Whenever it finds any discretion given to the President, any executive duty imposed on him, it considers the manner in which he exercises his discretion and discharges the duty to be beyond its province. Whenever the Constitution has conferred a power of legislating upon Congress, the court declines to inquire whether the use of the power was in the case of a particular statute passed by Congress either necessary or desirable, or whether it was exerted in a prudent manner, for it holds all such matters to be within the exclusive province of Congress.

> "In measures exclusively of a political, legislative, or executive character, it is plain that as the supreme authority as to these questions belongs to the legislative and executive departments, they cannot be re-examined elsewhere. Thus Congress, having the power to declare war, to levy taxes, to appropriate money, to regulate intercourse and commerce with foreign nations, their mode of executing these powers can never become the subject of re-examination in any other tribunal. So the power to make treaties being confided to the President and Senate, when a treaty is properly ratified, it becomes the law of the land, and no other tribunal can gainsay its stipulations. Yet cases may readily be imagined in which a tax may be laid, or a treaty made upon motives and grounds wholly beside the intention of the Constitution. The remedy, however, in such cases is solely by an appeal to the people at the elections, or by the salutary power of amendment provided by the Constitution itself." [1]

Adherence to this principle has enabled the court to avoid an immixture in political strife which must have destroyed its credit, has deterred it from entering the political arena, where it would have been weak, and enabled it to act without fear in the sphere of pure law, where it is strong. Occasionally, however, as I shall explain presently, the court has come into collision with the executive. Occasionally it has been required to give decisions which have worked with tremendous force on

[1] Story, *Commentaries on the Constitution*, § 374.

politics. The most famous of these was the Dred Scott case,[1] in which the Supreme court, on an action by a negro for assault and battery against the person claiming to be his master, declared that a slave taken temporarily to a free State and to a Territory in which Congress had forbidden slavery, and afterwards returning into a slave State and resuming residence there, was not a citizen capable of suing in the Federal courts if by the law of the slave State he was still a slave. This was the point which actually called for decision; but the majority of the court, for there was a dissentient minority, went further, and delivered a variety of *dicta* on various other points touching the legal status of negroes and the constitutional view of slavery. This judgment, since the language used in it seemed to cut off the hope of a settlement by the authority of Congress of the then (1857) pending disputes over slavery and its extension, did much to precipitate the Civil War.

Some questions, and among them many which involve political issues, can never come before the Federal courts, because they are not such as are raisable in an action between parties. Of those which might be raised, some never happen to arise, while others do not present themselves in an action till some time after the statute has been passed or act done on which the court is called to pronounce. By that time it may happen that the warmth of feeling which expressed itself during debate in Congress or in the country has passed away, while the judgment of the nation at large has been practically pronounced upon the issue.

II. Looking upon itself as a pure organ of the law, commissioned to do justice between man and man, but to do nothing more, the Supreme court has steadily refused to decide abstract questions, or to give opinions in advance by way of advice to the executive. When, in 1793, President Washington requested its opinion on the construction of the treaty of 1778 with France, the judges declined to comply.

This restriction of the court's duty to the determination of concrete cases arising in suits has excited so much admiration

[1] *Scott* v. *Sandford*, 19 How. 393. There is an immense literature about this case, the legal points involved in which are too numerous and technical to be here stated. It is noticeable that the sting of the decision lay rather in the *obiter dicta* than in the determination of the main question involved.

from Tocqueville and other writers, that the corresponding disadvantages must be stated. They are these: —

To settle at once and for ever a disputed point of constitutional law would often be a gain both to private citizens and to the organs of the government. Under the present system there is no certainty when, if ever, such a point will be settled. Nobody may care to incur the trouble and expense of taking it before the court. A suit which raises it may be compromised or dropped.

When such a question, after perhaps the lapse of years, comes before the Supreme court and is determined, the determination may be different from what the legal profession has expected, may alter that which has been believed to be the law, may shake or overthrow private interests based upon views now declared to be erroneous.[1] These are, no doubt, drawbacks incident to every system in which the decisions of courts play a great part. There are many points in the law of England which are uncertain even now, because they have never come before a court of high authority, or, having been decided in different ways by co-ordinate courts, have not been carried to the final court of appeal. But in England, if the inconvenience is great, it can be removed by an Act of Parliament, and it can hardly be so great as it may be in America, where, since the doubtful point may be the true construction of the fundamental law of the Union, the President and Congress may be left in uncertainty as to how they shall shape their course. With the best wish in the world to act conformably to the Constitution, these authorities have no means of ascertaining before they act what, in the view of its authorized interpreters, the true meaning of the Constitution is. Moved by this consideration, seven States of the Union have by their Constitutions empowered the governor or legislature to require the written opinions of the judges of the highest State court on points submitted to them.[2] But the President of the

[1] The Dred Scott decision in 1857 declared the Missouri compromise, carried out by Act of Congress in 1820, to have been beyond the powers of Congress, which, to be sure, had virtually repealed it in the year 1854 by the Kansas-Nebraska legislation. Decisions have been given on the fourteenth and fifteenth amendments upsetting or qualifying congressional legislation passed years before.

[2] See Chapter XXXVII. *post*. There exists a similar provision in the statute of 1875, creating the Supreme Court of Canada, and the Government

United States can only consult his attorney-general,[1] and the Houses of Congress have no legal adviser, though to be sure they are apt to receive a profusion of advice from their own legal members.

III. Other causes which have sustained the authority of the court by saving it from immersion in the turbid pool of politics, are the strength of professional feeling among American lawyers, the relation of the bench to the bar, the power of the legal profession in the country. The keen interest which the profession takes in the law secures a large number of acute and competent critics of the interpretation put upon the law by the judges. Such men form a tribunal to whose opinion the judges are sensitive, and all the more sensitive because the judges, like those of England, but unlike those of continental Europe, have been themselves practising counsel. The better lawyers of the United States do not sink their professional sentiment and opinion in their party sympathies. They know good law even when it goes against themselves, and privately condemn as bad law a decision none the less because it benefits their party or their client. The Federal judge who has recently quitted the ranks of the bar remains in sympathy with it, respects its views, desires its approbation. Both his inbred professional habits, and his respect for those traditions which the bar prizes, restrain him from prostituting his office to party objects. Though he has usually been a politician, and owes his promotion to his party, his political trappings drop off him when he mounts the Supreme bench. He has now nothing to fear from party displeasure, because he is irremovable (except by impeachment), nothing to hope from party favour, because he is at the top of the tree and can climb no higher. Virtue has all the external conditions in her favour. It is true that virtue is compatible with the

of Ireland Bill, introduced into the House of Commons in 1886, but defeated there, contained (§ 25) a provision enabling the Lord-Lieutenant of Ireland or a Secretary of State to refer a question for opinion to the judicial committee of the Privy Council. In the Home Rule Bill of 1893 this provision reappeared in the modified form of a power to obtain, in urgent cases, the opinion of the Judicial Committee on the constitutionality of an Act passed by the Irish legislature.

[1] The President sometimes, for the benefit of the public, publishes the written opinion of the attorney-general on an important and doubtful point; but such an opinion has no more authority than what it may derive from the professional eminence of that officer.

desire to extend the power and jurisdiction of the court. But even allowing that this motive may occasionally sway the judicial mind, the circumstances which surround the action of a tribunal debarred from initiative, capable of dealing only with concrete cases that come before it at irregular intervals, unable to appropriate any of the sweets of power other than power itself, make a course of systematic usurpation more difficult and less seductive than it would be to a legislative assembly or an executive council. As the respect of the bench for the bar tends to keep the judges in the straight path, so the respect and regard of the bar for the bench, a regard grounded on the sense of professional brotherhood, ensure the moral influence of the court in the country. The bar has usually been very powerful in America, not only as being the only class of educated men who are at once men of affairs and skilled speakers, but also because there has been no nobility or territorial aristocracy to overshadow it.[1] Politics have been largely in its hands, and must remain so as long as political questions continue to be involved with the interpretation of constitutions. For the first sixty or seventy years of the Republic the leading statesmen were lawyers, and the lawyers as a whole moulded and led the public opinion of the country. Now to the better class of American lawyers law was a sacred science, and the highest court which dispensed it a sort of Mecca, towards which the faces of the faithful turned. Hence every constitutional case before the Supreme court was closely watched, the reasonings of the court studied, and its decisions appreciated as law apart from their bearing on political doctrines. I have heard elderly men describe the interest with which, in their youth, a famous advocate who had gone to Washington to argue a case before the Supreme court was welcomed by the bar of his own city on his return, how the rising men crowded round him to hear what he had to tell of the combat in that arena where the best intellects of the nation strove, how the respect which he never failed to express for the ability and impartiality of the court communicated itself to them, how admiration bred acquiescence,

[1] See Chapter XCVII. *post*. Professional interest in law seems to have been stronger in the last generation than it is now.

and the whole profession accepted expositions of the law unexpected by many, perhaps unwelcome to most. When it was felt that the judges had honestly sought to expound the Constitution, and when the cogency of their reasonings was admitted, resentment, if any there had been, passed away, and the support which the bar gave to the court ensured the obedience of the people.

That this factor in the maintenance of judicial influence proved so potent was largely due to the personal eminence of the judges. One must not call that a result of fortune which was the result of the wisdom of successive Presidents in choosing capable men to sit on the supreme Federal bench. Yet one man was so singularly fitted for the office of chief justice, and rendered such incomparable services in it, that the Americans have been wont to regard him as a special gift of favouring Providence. This was John Marshall, who presided over the Supreme court from 1801 till his death in 1835 at the age of eighty, and whose fame overtops that of all other American judges more than Papinian overtops the jurists of Rome or Lord Mansfield the jurists of England. No other man did half so much either to develop the Constitution by expounding it, or to secure for the judiciary its rightful place in the government as the living voice of the Constitution. No one vindicated more strenuously the duty of the court to establish the authority of the fundamental law of the land, no one abstained more scrupulously from trespassing on the field of executive administration or political controversy. The admiration and respect which he and his colleagues won for the court remain its bulwark: the traditions which were formed under him and them have continued in general to guide the action and elevate the sentiments of their successors.

Nevertheless, the court has not always had smooth seas to navigate. It has more than once been shaken by blasts of unpopularity. It has not infrequently found itself in conflict with other authorities.

The first attacks arose out of its decision that it had jurisdiction to entertain suits by private persons against a State.[1] This point was set at rest by the eleventh amendment; but the States then first learnt to fear the Supreme court as an antag-

[1] *Chisholm* v. *Georgia*, see above, p. 235.