onist. In 1801, in an application requiring the secretary of state to deliver a commission, it declared itself to have the power to compel an executive officer to fulfil a ministerial duty affecting the rights of individuals.[1] President Jefferson protested angrily against this claim, but it has been repeatedly reasserted, and is now undoubted law. It was in this same case that the court first explicitly asserted its duty to treat as invalid an Act of Congress inconsistent with the Constitution. In 1805 its independence was threatened by the impeachment of Justice Chase, the aim of the Republican (Democratic) party then dominant in Congress being to set a precedent for ejecting, by means of impeachment, judges (and especially Chief-Justice Marshall), whose attitude on constitutional questions they condemned. The acquittal of Chase dispelled this danger: nor could John Randolph, who then led the House, secure the acceptance of an amendment to the Constitution which he thereupon proposed for enabling the President to remove Federal judges on an address of both Houses of Congress. In 1806 the court for the first time pronounced a State statute void; in 1816 and 1821 it rendered decisions establishing its authority as a supreme court of appeal from State courts on "federal questions," and unfolding the full meaning of the doctrine that the Constitution and Acts of Congress duly made in pursuance of the Constitution are the fundamental and supreme law of the land. This was a doctrine which had not been adequately apprehended even by lawyers, and its development, legitimate as we now deem it, roused opposition. The ultra-Democrats who came into power under President Jackson in 1829, were specially hostile to a construction of the Constitution which seemed to trench upon State rights,[2] and when in 1832 the Supreme court ordered the State of Georgia to release persons imprisoned under a Georgian statute which

[1] *Marbury* v. *Madison*, 1 Cranch, 137. In this case the court refused to issue the mandamus asked for, but upon the ground that the statute of Congress giving to the Supreme court original jurisdiction to issue a mandamus was inconsistent with the Constitution. See also *Kendal* v. *United States*, 12 Peters, 616; *United States* v. *Schurz*, 102 U. S. 378.

[2] Martin Van Buren (President 1837–41) expressed the feelings of the bulk of his party when he complained bitterly of the encroachments of the Supreme court, and declared that it would never have been created had the people foreseen the powers it would acquire.

the court declared to be invalid,[1] Jackson, whose duty it was to enforce the decision by the executive arm, remarked, "John Marshall has pronounced his judgment: let him enforce it if he can." The successful resistance of Georgia in the Cherokee dispute [2] gave a blow to the authority of the court, and marked the beginning of a new period in its history, during which, in the hands of judges mostly appointed by the Democratic party, it made no further advance in power.

In 1857 the Dred Scott judgment, pronounced by a majority of the judges, excited the strongest outbreak of displeasure yet witnessed. The Republican party, then rising into strength, denounced this decision in the resolutions of the convention which nominated Abraham Lincoln in 1860, and its doctrine as to citizenship was expressly negatived in the fourteenth constitutional amendment adopted after the War of Secession.

It was feared that the political leanings of the judges who formed the court at the outbreak of the war would induce them to throw legal difficulties in the prosecution of the measures needed for re-establishing the authority of the Union. These fears proved ungrounded, although some contests arose as to the right of officers in the Federal army to disregard writs of habeas corpus issued by the court.[3] In 1868, having then become Republican in its sympathies by the appointment of new members as the older judges disappeared, it tended to sustain the congressional plan of reconstruction which President Johnson desired to defeat, and in subsequent cases it has given effect to most, though not to all, of the statutes passed by Congress under the three amendments which abolished slavery and secured the rights of the negroes. In 1866 it refused to entertain proceedings instituted for the purpose of forbidding the President to execute the Reconstruction Acts.

Two of its later acts are thought by some to have affected

[1] This was only one act in the long struggle of the Cherokee Indians against the oppressive conduct of Georgia — conduct which the court emphatically condemned, though it proved powerless to help the unhappy Cherokees.

[2] The matter did not come to an absolute conflict, because before the time arrived for the court to direct the United States marshal of the district of Georgia to summon the *posse comitatus* and the President to render assistance in liberating the prisoners, the prisoners submitted to the State authorities, and were thereupon released. They probably believed that the imperious Jackson would persist in his hostility to the Supreme court.

[3] See *Ex parte Milligan*, 4 Wall. 129.

public confidence. One of these was the reversal, first in 1871, and again, upon broader but not inconsistent grounds, in 1884, of the decision, given in 1870, which declared invalid the Act of Congress making government paper a legal tender for debts. The original decision of 1870 was rendered by a majority of five to three. The court was afterwards changed by the creation of an additional judgeship,[1] and by the appointment of a new member to fill a vacancy which occurred after the settlement, though before the delivery, of the first decision. Then the question was brought up again in a new case between different parties, and decided in the opposite sense (*i.e.* in favour of the power of Congress to pass legal tender Acts) by a majority of five to four. Finally, in 1884, another suit having brought up a point practically the same, though under a later statute passed by Congress, the court determined with only one dissentient voice that the power existed.[2] This last decision excited some criticism, especially among the more conservative lawyers, because it seemed to remove restrictions hitherto supposed to exist on the authority of Congress, recognizing the right to establish a forced paper currency as an attribute of the sovereignty of the national government. But be the decision right or wrong, a point on which high authorities are still divided, the reversal by the highest court in the land of its own previous decision may have tended to unsettle men's reliance on the stability of the law; while the manner of the earlier reversal, following as it did on the appointment of two new justices, both known to be in favour of the view which the majority of the court had just disapproved, disclosed a weak point in the constitution of the tribunal which may some day prove fatal to its usefulness.

The other misfortune was the interposition of the court in the presidential electoral count dispute of 1877.[3] The five justices of the Supreme court who were included in the electoral commission then appointed voted on party lines no less steadily than did the senators and representatives who sat on

[1] Appointed, however, under an Act passed in April 1869.

[2] The earlier decision in favour of the power deduced it from war powers, the later from the general sovereignty of the national government. See *Hepburn* v. *Griswold*, 8 Wall. 603; *Legal Tender Cases*, 12 Wall. 457; *Juilliard* v. *Greenman*, 110 U. S. 421.

[3] See above, Chapter V.

it. A function scarcely judicial, and certainly not contemplated by the Constitution, was then for the first time thrown upon the judiciary, and in discharging it the judiciary acted exactly like non-judicial persons.

Notwithstanding this occurrence, which after all was quite exceptional, the credit and dignity of the Supreme court stand very high. No one of its members has ever been suspected of corruption, and comparatively few have allowed their political sympathies to disturb their official judgment. Though for many years back every President has appointed only men of his own party, and frequently leading politicians of his own party,[1] the new-made judge has left partisanship behind him, while no doubt usually retaining that bias or tendency of his mind which party training produces. When a large majority of the judges belong to one party, the other party regret the fact, and welcome the prospect of putting in some of their own men as vacancies occur; yet the desire for an equal representation of both parties is based, not on a fear that suitors will suffer from the influence of party spirit, but on the feeling that when any new constitutional question arises it is right that the tendencies which have characterized the view of the Constitution taken by the Democrats on the one hand and the Republicans on the other, should each be duly represented.

Apart from these constitutional questions, the value of the Federal courts to the country at large has been inestimable. They have done much to meet the evils which an elective and ill-paid State judiciary inflicts on some of the newer and a few even of the older States. The Federal Circuit and District judges, small as are their salaries, are in most States individually superior men to the State judges, because the greater security of tenure induces abler men to accept the post. Being irremovable, they feel themselves independent of parties and politicians, whom the elected State judge, holding for

[1] I have heard American lawyers express surprise as well as admiration at the occasional departures in England (as notably in the case of Lord Justice Holker, who, having been Attorney-General of one party, was, in respect of his eminent merits, appointed Lord Justice of Appeal by the other) from the practice of political appointments to judicial office. Such non-political appointments are however occasionally made in the several States by the governors, or even (as in the case of Chief-Justice Redfield of Vermont) by the legislature.

a limited term, may be tempted to conciliate with a view to re-election. Plaintiffs, therefore, when they have a choice of suing in a State court or a Federal court, frequently prefer the latter; and the litigant who belongs to a foreign country, or to a different State from that in which his opponent resides, may think his prospects of an unbiassed decision better before it than before a State tribunal. Nor is it without interest to add that criminal justice is more strictly administered in the Federal courts.

Federal judgeships of the second and third rank (Circuit and District) have been hitherto given to the members of the President's party, and by an equally well-established usage, to persons resident in the State or States where the circuit or district court is held. In 1891, however, a Republican President appointed two Democrats to be judges of the new circuit courts of appeals, and placed several Democrats on the (temporary) Private Land Claims court. Cases of corruption are practically unknown, and partisanship has been rare. The chief defects have been the inadequacy of the salaries, and the insufficiency of the staff in the more populous commercial States to grapple with the vast and increasing business which flows in upon them. So too, in the Supreme court, arrears have so accumulated that it is sometimes three years or more from the time when a cause is entered till the day when it comes on for hearing. Some have proposed to meet this evil by limiting the right of appeal to cases involving a considerable sum of money; others would divide the Supreme court into two divisional courts for the hearing of ordinary suits, reserving for the full court points affecting the construction of the Constitution.

One question remains to be put and answered.

The Supreme court is the living voice of the Constitution[1] — that is, of the will of the people expressed in the fundamental law they have enacted. It is, therefore, as some one has said, the conscience of the people, who have resolved to restrain themselves from hasty or unjust action by placing

[1] The Romans called their chief judicial officer the prætor, "the living voice of the civil law"; but as this "civil law" consisted largely of custom, he naturally enjoyed a wider discretion in moulding and expanding as well as in expounding the law than do the American judges, who have a formally enacted constitution to guide and restrain them.

their representatives under the restriction of a permanent law. It is the guarantee of the minority, who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction.

To discharge these momentous functions, the court must be stable even as the Constitution is stable. Its spirit and tone must be that of the people at their best moments. It must resist transitory impulses, and resist them the more firmly the more vehement they are. Entrenched behind impregnable ramparts, it must be able to defy at once the open attacks of the other departments of the government, and the more dangerous, because impalpable, seductions of popular sentiment.

Does it possess, has it displayed, this strength and stability?

It has not always followed its own former decisions. This is natural in a court whose errors cannot be cured by the intervention of the legislature. The English final Court of Appeal always follows its previous decisions, though high authorities have declared that cases may be imagined in which it would refuse to do so. And that court (the House of Lords) can afford so to adhere, because, when an old decision begins to be condemned, Parliament can forthwith alter the law. But as nothing less than a constitutional amendment can alter the law contained in the Federal Constitution, the Supreme court must choose between the evil of unsettling the law by reversing, and the evil of perpetuating bad law by following, a former decision. It may reasonably, in extreme cases, deem the latter evil the greater.

The Supreme court feels the touch of public opinion. Opinion is stronger in America than anywhere else in the world, and judges are only men. To yield a little may be prudent, for the tree that cannot bend to the blast may be broken. There is, moreover, this ground at least for presuming public opinion to be right, that through it the progressive judgment of the world is expressed. Of course, whenever the law is clear, because the words of the Constitution are plain or the cases interpreting them decisive on the point raised, the court must look solely to those words and cases, and cannot permit any other consideration to affect its mind. But when the terms of the Constitution

admit of more than one construction, and when previous decisions have left the true construction so far open that the point in question may be deemed new, is a court to be blamed if it prefers the construction which the bulk of the people deem suited to the needs of the time? A court is sometimes so swayed consciously, more often unconsciously, because the pervasive sympathy of numbers is irresistible even by elderly lawyers. A remarkable example is furnished by the decisions (in 1876) of the Supreme court in the so-called Granger cases, suits involving the power of a State to subject railways and other corporations or persons exercising what are called "public trades" to restrictive legislation without making pecuniary compensation.[1] I do not presume to doubt the correctness of these decisions; but they evidently represent a different view of the sacredness of private rights and of the powers of a legislature from that entertained by Chief-Justice Marshall and his contemporaries. They reveal that current of opinion which now runs strongly in America against what are called monopolies and the powers of incorporated companies.

The Supreme court has changed its colour, *i.e.* its temper and tendencies, from time to time, according to the political proclivities of the men who composed it. It changes very slowly, because the vacancies in a small body happen rarely, and its composition therefore often represents the predominance of a past and not of the presently ruling party. From 1789 down till the death of Chief-Justice Marshall in 1835 its tendency was to the extension of the powers of the Federal government, and therewith of its own jurisdiction, because the ruling spirits in it were men who belonged to the old Federalist party, though that party fell in 1800, and disappeared in 1814. From 1835 till the War of Secession its sympathies were with the doctrines of the Democratic party. Without actually abandoning the positions of the previous period, the court, during these years when Chief-Justice Taney presided over it, leant against any further extension of Federal power or of its own jurisdiction. During

[1] See *Munn* v. *Illinois*, and the following cases in 94 U. S. Rep. 193 (with which compare *C. M. & St. P. R. R. Co.* v. *Minn.*, 134 U. S. 418; and *Budd* v. *N. Y.*, 12 S. C. Reporter, 648). This was one of those cases in which the court felt bound to regard not only the view which it took itself of the meaning of the Constitution but that which a legislature might reasonably take. — See Chapter XXXIV. *post*. As to the non-liability to make compensation where licences for the sale of intoxicants are forbidden, see *Mugler* v. *Kansas*, 123 U. S. Rep. 623.

and after the war, when the ascendency of the Republican party had begun to change the composition of the court, a third period opened. Centralizing ideas were again powerful: the vast war powers asserted by Congress were in most instances supported by judicial decision, the rights of States while maintained (as in the Granger cases) as against private persons or bodies, were for a time regarded with less favour whenever they seemed to conflict with those of the Federal government. In none of these three periods can the judges be charged with any prostitution of their functions to party purposes. Their action flowed naturally from the habits of thought they had formed before their accession to the bench, and from the sympathy they could not but feel with the doctrines on whose behalf they had contended. Even on the proverbially upright and impartial bench of England the same tendencies may be discerned. There are constitutional questions, and questions touching what may be called the policy of the law, which would be decided differently by one English judge or by another, not from any conscious wish to favour a party or a class, but because the views which a man holds as a citizen cannot fail to colour his judgment even on legal points.

The Fathers of the Constitution studied nothing more than to secure the complete independence of the judiciary. The President was not permitted to remove the judges, nor Congress to diminish their salaries. One thing only was either forgotten or deemed undesirable, because highly inconvenient, to determine, — the number of judges in the Supreme court. Here was a weak point, a joint in the court's armour through which a weapon might some day penetrate. Congress having in 1801, pursuant to a power contained in the Constitution, established sixteen Circuit courts, President Adams, immediately before he quitted office, appointed members of his own party to the justiceships thus created. When President Jefferson came in, he refused to admit the validity of the appointments; and the newly elected Congress, which was in sympathy with him, abolished the Circuit courts themselves, since it could find no other means of ousting the new justices. This method of attack, whose constitutionality has been much doubted, cannot be used against the Supreme court, because that tribunal is directly created by the Constitution. But as the Constitution does not pre-

scribe the number of justices, a statute may increase or diminish the number as Congress thinks fit. In 1866, when Congress was in fierce antagonism to President Johnson, and desired to prevent him from appointing any judges, it reduced the number, which was then ten, by a statute providing that no vacancy should be filled up till the number was reduced to seven. In 1869, when Johnson had been succeeded by Grant, the number was raised to nine, and presently the altered court allowed the question of the validity of the Legal Tender Act, just before determined, to be reopened. This method is plainly susceptible of further and possibly dangerous application. Suppose a Congress and President bent on doing something which the Supreme court deems contrary to the Constitution. They pass a statute. A case arises under it. The court on the hearing of the case unanimously declares the statute to be null, as being beyond the powers of Congress. Congress forthwith passes and the President signs another statute more than doubling the number of the justices. The President appoints to the new justiceships men who are pledged to hold the former statute constitutional. The Senate confirms his appointments. Another case raising the validity of the disputed statute is brought up to the court. The new justices outvote the old ones: the statute is held valid: the security provided for the protection of the Constitution is gone like a morning mist.

What prevents such assaults on the fundamental law — assaults which, however immoral in substance, would be perfectly legal in form? Not the mechanism of government, for all its checks have been evaded. Not the conscience of the legislature and the President, for heated combatants seldom shrink from justifying the means by the end. Nothing but the fear of the people, whose broad good sense and attachment to the great principles of the Constitution may generally be relied on to condemn such a perversion of its forms. Yet if excitement has risen high over the country, a majority of the people may acquiesce; and then it matters little whether what is really a revolution be accomplished by openly violating or by merely distorting the forms of law. To the people we come sooner or later: it is upon their wisdom and self-restraint that the stability of the most cunningly devised scheme of government will in the last resort depend.

CHAPTER XXV

COMPARISON OF THE AMERICAN AND EUROPEAN SYSTEMS

The relations to one another of the different branches of the government in the United States are so remarkable and so full of instruction for other countries, that it seems desirable, even at the risk of a little repetition, to show by a comparison with the Cabinet or parliamentary system of European countries how this complex American machinery actually works.

The English system on which have been modelled, of course with many variations, the systems of France, Belgium, Holland, Italy, Germany, Hungary (where, however, the English scheme has been compounded with an ancient and very interesting native-born constitution), Sweden, Norway, Denmark, Spain, and Portugal, as well as the constitutions of the great self-governing English colonies in North America, the Cape, and Australasia — this English system places at the head of the state a person in whose name all executive acts are done, and who is (except in France) irresponsible and irremovable.[1] His acts are done by the advice and on the responsibility of ministers chosen nominally by him, but really by the representatives of the people — usually, but not necessarily, from among the members of the legislature. The representatives are, therefore, through the agents whom they select, the true government of the country. When the representative assembly ceases to trust these agents, the latter (unless they dissolve the legislature) resign, and a new set are appointed. Thus the executive as well as the legislative power really belongs to the majority of the representative chamber, though in appointing agents, an expedient which its size makes needful, it is forced

[1] In the British colonies the governor is irremovable by the colony, and irresponsible to its legislature, though responsible to and removable by the home government.