the Chinese, made under cover of the constitution of California of 1879 and divers statutes passed thereunder, have been defeated by the courts.

The safe rule for the private citizen may be thus expressed: "Ascertain whether the Federal law is constitutional (*i.e.* such as Congress has power to pass). If it is, conform your conduct to it at all hazards. If it is not, disregard it, and obey the law of your State." This may seem hard on the private citizen. How shall he settle for himself such a delicate point of law as whether Congress had power to pass a particular statute, seeing that the question may be doubtful and not have come before the courts? But in practice little inconvenience arises, for Congress and the State legislatures have learnt to keep within their respective spheres, and the questions that arise between them are seldom such as need disturb an ordinary man.

The same remarks apply to conflicts between the commands of executive officers of the National government on the one hand, and those of State officials on the other. If the national officer is acting within his constitutional powers, he is entitled to be obeyed in preference to a State official, and conversely, if the State official is within his powers, and the national officer acting in excess of those which the Federal Constitution confers, the State official is to be obeyed.

The limits of judicial power are more difficult of definition. Every citizen can sue and be sued or indicted both in the courts of his State and in the Federal courts, but in some classes of cases the former, in others the latter, is the proper tribunal, while in many it is left to the choice of the parties before which tribunal they will proceed. Sometimes a plaintiff who has brought his action in a State court finds when the case has gone a certain length that a point of Federal law turns up which entitles either himself or the defendant to transfer it to a Federal court, or to appeal to such a court should the decision have gone against the applicability of the Federal law. Suits are thus constantly transferred from State courts to Federal courts, but no one can ever reverse the process and carry a suit from a Federal court to a State court. Within its proper sphere of pure State law, — and of course the great bulk of the cases turn on pure State law, — there is no appeal from a State

court to a Federal court; and though the point of law on which the case turns may be one which has arisen and been decided in the Supreme court of the Union, a State judge, in a State case, is not bound to regard that decision. It has only a moral weight, such as might be given to the decision of an English court, and where the question is one of State law, whether common law or statute law, in which State courts have decided one way and a Federal court the other way, the State judge ought to follow his own courts. So far does this go, that a Federal court in administering State law, ought to reverse its own previous decision rather than depart from the view which the highest State court has taken.[1] All this seems extremely complex. I can only say that it is less troublesome in practice than could have been expected, because American lawyers are accustomed to the intricacies of their system.

When a plaintiff has the choice of proceeding in a State court or in a Federal court, he is sometimes, especially if he has a strong case, inclined to select the latter, because the Federal judges are more independent than those of most of the States, and less likely to be influenced by any bias. So, too, if he thinks that local prejudice may tell against him, he will prefer a Federal court, because the jurors are summoned from a wider area, and because the judges are accustomed to exert a larger authority in guiding and controlling the jury. But it is usually more convenient to sue in a State court, seeing that there is such a court in every county, whereas Federal courts are comparatively few; in many States there is but one.[2]

The Federal authority, be it executive or judicial, acts upon the citizens of a State directly by means of its own officers, who are quite distinct from and independent of the State officials. Federal indirect taxes, for instance, are levied all along the coast and over the country by Federal custom-house collectors and excisemen, acting under the orders of the treasury

[1] This is especially the rule in cases involving the title to land. But though the theory is as stated in the text, the Federal courts not unfrequently (especially in commercial cases), act upon their own view of the State law, and have sometimes been accused of going so far as to create a sort of Federal common law.

[2] Of course a plaintiff who thinks local prejudice will befriend him will choose the State court, but the defendant may have the cause removed to a Federal court if he be a citizen of another State or an alien, or if the question at issue is such as to give Federal jurisdiction.

department at Washington. The judgments of Federal courts are carried out by United States marshals, likewise dispersed over the country and supplied with a staff of assistants. This is a provision of the utmost importance, for it enables the central National government to keep its finger upon the people everywhere, and make its laws and the commands of its duly constituted authorities respected whether the State within whose territory it acts be heartily loyal or not, and whether the law which is being enforced be popular or obnoxious. The machinery of the National government ramifies over the whole Union as the nerves do over the human body, placing every point in direct connection with the central executive. The same is, of course, true of the army: but the army is so small and stationed in so few spots, mostly in the Far West where Indian raids are feared, that it scarcely comes into a view of the ordinary working of the system.

What happens if the authority of the National government is opposed, if, for instance, an execution levied in pursuance of a judgment of a Federal court is resisted, or Federal excisemen are impeded in the seizure of an illicit distillery?

Supposing the United States marshal or other Federal officer to be unable to overcome the physical force opposed to him, he may summon all good citizens to assist him, just as the sheriff may summon the *posse comitatus*. If this appeal proves insufficient, he must call upon the President, who may either order national troops to his aid or may require the militia of the State in which resistance is offered to overcome that resistance. Inferior Federal officers are not entitled to make requisitions for State force. The common law principle that all citizens are bound to assist the ministers of the law holds good in America as in England, but it is as true in the one country as in the other, that what is everybody's business is nobody's business. Practically, the Federal authorities are not resisted in the more orderly States and more civilized districts. In such regions, however, as the mountains of Tennessee, Eastern Kentucky, and North Carolina the inland revenue officials find it very hard to enforce the excise laws, because the country is wild, concealment is easy among the woods and rocks, and the population sides with the smugglers. And in some of the western States

an injunction granted by a court, whether a Federal or a State court, is occasionally disregarded.[1] Things were, of course, much worse before the War of Secession had established the authority of the central government on an immovable basis. Federal law did not prove an unquestioned protection either to persons who became in some districts unpopular from preaching Abolitionism, or to those Southern slave-catchers, who endeavoured, under the Fugitive Slave laws, to recapture in the northern States slaves who had escaped from their masters.[2] Passion ran high, and great as is the respect for law, passion in America, as everywhere else in the world, will have its way.

If the duly constituted authorities of a State resist the laws and orders of the National government, a more difficult question arises. This has several times happened.

In November 1798 the legislature of Kentucky adopted resolutions declaring that the Constitution was not a submission of the States to a general government, but a compact whereby they formed such a government for special purposes and delegated to it certain definite powers; that when the general government assumed undelegated powers, its acts were unauthoritative and void; and that it had not been made the exclusive or final judge of the extent of the powers delegated to it. Five weeks later the Virginia legislature passed similar but more guarded resolutions, omitting, *inter alia*, the last of the above mentioned deliverances of Kentucky. Both States went on to declare that the Sedition and Alien Acts recently passed by Congress were unconstitutional, and asked the other States to join in this pronouncement and to co-operate in securing the repeal of the statutes.[3] Seven States answered, all in an adverse sense.

[1] The attacks upon the Chinese which Federal authorities have had to check have mostly taken place not in States but in Territories (such as Washington and Montana till recently were), where the direct power of the Federal Government is greater than in a State. See Chapter XLVII.

[2] It was held that a State could not authorize its courts to enforce the Fugitive Slave laws. Being Federal statutes, their enforcement belonged to the National government only. Consider *Prigg* v. *Pennsylvania*, 16 Pet. 539.

[3] There have been endless discussions in America as to the true meaning and intent of these famous resolutions, a lucid account of which may be found in the article (by Mr. Alex. Johnston) "Kentucky Resolutions," in the *American Cyclopædia of Political Science*. The Kentucky resolutions were drafted by Jefferson, who however did not acknowledge his authorship till 1821, the Virginia resolutions by the more cautious Madison. Those who defend Jefferson's

In 1808 the legislatures of some of the New England States passed resolutions condemning the embargo which the National government had laid upon shipping by an Act of that year. The State judges, emboldened by these resolutions, took an attitude consistently hostile to the embargo, holding it to be unconstitutional; popular resistance broke out in some of the coast towns; and the Federal courts in New England seldom succeeded in finding juries which would convict even for the most flagrant violation of its provisions. At the outbreak of the war of 1812 the governors of Massachusetts and Connecticut refused to allow the State militia to leave their State in pursuance of a requisition made by the President under the authority of an Act of Congress, alleging the requisition to be unconstitutional; and in October 1814 the legislatures of these two States and of Rhode Island, States in which the New England feeling against the war had risen high, sent delegates to a Convention at Hartford, which, after three weeks of secret session, issued a report declaring that "it is as much the duty of the State authorities to watch over the rights reserved as of the United States to exercise the powers delegated," laying down doctrines substantially similar to those of the Kentucky resolutions, and advising certain amendments to the Federal Constitution, with a menace as to further action in case these should be rejected. Massachusetts and Connecticut adopted the report; but before their commissioners reached Washington, peace with Great Britain had been concluded. In 1828–30 Georgia refused to obey an Act of Congress regarding the Cherokee Indians, and to respect the treaties which the United States had made with that tribe and the Creeks. The Georgian legislature passed and enforced Acts in contempt of Federal authority, and disregarded the orders of the Supreme court, President Jackson, who had an old frontiersman's hatred to the Indians, declining to interfere.

action argue, and probably rightly, that what he aimed at was not forcible resistance, but the amendment of the Constitution so as to negative the construction that was being put upon it by the Federalists.

Judge Cooley observes to me, "The most authoritative exponents of the States' Rights creed would probably have said that 'the nullification by the States of all unauthorized acts done under cover of the Constitution' intended by the Resolutions, was a nullification by constitutional means."

Finally, in 1832, South Carolina, first in a State convention and then by her legislature, amplified while professing to repeat the claim of the Kentucky resolutions of 1798, declared the tariff imposed by Congress to be null and void as regarded herself, and proceeded to prepare for secession and war. In none of these cases was the dispute fought out either in the courts or in the field[1]; and the questions as to the right of a State to resist Federal authority, and as to the means whereby she could be coerced, were left over for future settlement. Settled they finally were by the Civil War of 1861–65, since which time the following doctrines may be deemed established: —

No State has a right to declare an act of the Federal government invalid.[2]

No State has a right to secede from the Union.

The only authority competent to decide finally on the constitutionality of an act of Congress or of the national executive is the Federal judiciary.[3]

Any act of a State legislature or a State executive conflicting with the Constitution, or with an act of the National government done under the Constitution, is really an act not of the State government, which cannot legally act against the Constitution, but of persons falsely assuming to act as such govern-

[1] The Acts complained of by Kentucky and Virginia provoked a reaction which led to the overthrow of the Federalist party which had passed them. Of the most important among them, one was repealed and the other, the Sedition Act, expired in 1801 by effluxion of time. Jefferson, when he became President in that year, showed his disapproval of it by pardoning persons convicted under it. The Embargo was raised by Congress in consequence of the strong opposition of New England. In these cases, therefore, it may be thought that the victory substantially remained with the protesting States, while the resistance of South Carolina to the tariff was settled by a compromise.

[2] Of course, as already observed, a State officer or a private citizen may disregard an act of the Federal government if he holds it unconstitutional. But he does so at his peril.

[3] Any court, State or Federal, may decide on such a question in the first instance. But if the question be a purely political one, it may be incapable of being decided by any court whatever (see Chapter XXIV.), and in such cases the decision of the political departments (Congress or the President, as the case may be) of the Federal government is necessarily final, though, of course, liable to be reversed by a subsequent Congress or President. The cases which arose on the Reconstruction Acts, after the War of Secession, afford an illustration. The attempts made to bring these before the courts failed, and the acts were enforced. See *Georgia* v. *Stanton*, 6 Wall. p. 57.

ment, and is therefore *ipso jure* void.[1] Those who disobey Federal authority on the ground of the commands of a State authority are therefore insurgents against the Union who must be coerced by its power. The coercion of such insurgents is directed not against the State but against them as individual though combined wrongdoers. A State cannot secede and cannot rebel. Similarly, it cannot be coerced.

This view of the matter, which seems on the whole to be that taken by the Supreme court in the cases that arose after the Civil War, disposes, as has been well observed by Judge Hare,[2] of the difficulty which President Buchanan felt (see his message of 3d December 1860) as to the coercion of a State by the Union. He argued that because the Constitution did not provide for such coercion, a proposal in the Convention of 1787 to authorize it having been ultimately dropped, it was legally impossible. The best answer to this contention is that such a provision would have been superfluous, because a State cannot legally act against the Constitution. All that is needed is the power, unquestionably contained in the Constitution (Art. iii. § 3), to subdue and punish individuals guilty of treason against the Union.[3]

Except in the cases which have been already specified, the National government has no right whatever of interfering either with a State as a commonwealth or with the individual citizens thereof, and may be lawfully resisted should it attempt to do so.

"What then?" the European reader may ask. "Is the National government without the power and the duty of correcting the social and political evils which it may find to exist in a particular State, and which a vast majority of the nation may condemn? Suppose widespread brigandage to exist in one of

[1] It may, however, happen that a State law is unconstitutional in part only, perhaps in some trifling details, and in such cases that part only will be invalid, and the rest of the law will be upheld. For instance, a criminal statute might be framed so as to apply retrospectively as well as prospectively. So far as retrospective it would be bad, but good for all future cases. (See Const., Art. i § 10, par. 1.)

[2] *American Constitutional Law*, p. 61.

[3] Swiss practice allows the Federal government to coerce a disobedient canton. This is commonly done by quartering Federal troops in it at its expense till its government yields — a form of coercion which Swiss frugality dislikes — or by withholding its share of Federal grants.

the States, endangering life and property. Suppose contracts to be habitually broken, and no redress to be obtainable in the State courts. Suppose the police to be in league with the assassins. Suppose the most mischievous laws to be enacted, laws, for instance, which recognize polygamy, leave homicide unpunished, drive away capital by imposing upon it an intolerable load of taxation. Is the nation obliged to stand by with folded arms while it sees a meritorious minority oppressed, the prosperity of the State ruined, a pernicious example set to other States? Is it to be debarred from using its supreme authority to rectify these mischiefs?"

The answer is, Yes. Unless the legislation or administration of such a State transgresses some provision of the Federal Constitution (such as that forbidding *ex post facto* laws, or laws impairing the obligation of a contract), the National government not only ought not to interfere but cannot interfere. The State must go its own way, with whatever injury to private rights and common interests its folly or perversity may cause.

Such a case is not imaginary. In the Slave States before the war, although the negroes were not, as a rule, harshly treated, many shocking laws were passed, and society was going from bad to worse. In parts of a few of the western States at this moment, the roads and even the railways are infested by robbers, justice is uncertain and may be unattainable when popular sentiment does not support the law. Homicide often goes unpunished by the courts, though sometimes punished by Judge Lynch. So, too, in a few of these States statutes opposed to sound principles of legislation have been passed, and have brought manifold evils in their train. But the Federal government looks on unperturbed, with no remorse for neglected duty.

The obvious explanation of this phenomenon is that the large measure of independence left to the States under the Federal system makes it necessary to tolerate their misdoings in some directions. As a distinguished authority[1] observes to me, "The Federal Constitution provided for the protection of contracts, and against those oppressions most likely to result from popular passion and demoralization; and if it had been proposed to go further and give to the Federal authority a

[1] Judge Cooley.

power to intervene in still more extreme cases, the answer would probably have been that such cases were far less likely to arise than was the Federal power to intervene improperly under the pressure of party passion or policy, if its intervention were permitted. To have authorized such intervention would have been to run counter to the whole spirit of the Constitution, which kept steadily in view as the wisest policy local government for local affairs, general government for general affairs only. Evils would unquestionably arise. But the Philadelphia Convention believed that they would be kept at a minimum and most quickly cured by strict adherence to this policy. The scope for Federal interference was considerably enlarged after the Civil War, but the general division of authority between the States and the nation was not disturbed."

So far from lamenting as a fault, though an unavoidable fault, of their Federal system, the State independence I have described, the Americans are inclined to praise it as a merit. They argue, not merely that the best way on the whole is to leave a State to itself, but that this is the only way in which a permanent cure of its diseases will be effected. They are consistent not only in their Federal principles but in their democratic principles. "As *laissez aller*," they say, "is the necessary course in a Federal government, so it is the right course in all free governments. Law will never be strong or respected unless it has the sentiment of the people behind it. If the people of a State make bad laws, they will suffer for it. They will be the first to suffer. Let them suffer. Suffering, and nothing else, will implant that sense of responsibility which is the first step to reform. Therefore let them stew in their own juice: let them make their bed and lie upon it. If they drive capital away, there will be less work for the artisans: if they do not enforce contracts, trade will decline, and the evil will work out its remedy sooner or later. Perhaps it will be later rather than sooner: if so, the experience will be all the more conclusive. Is it said that the minority of wise and peaceable citizens may suffer? Let them exert themselves to bring their fellows round to a better mind. Reason and experience will be on their side. We cannot be democrats by halves; and where self-government is given, the majority

of the community must rule. Its rule will in the end be better than that of any external power." No doctrine more completely pervades the American people, the instructed as well as the uninstructed. Philosophers will tell you that it is the method by which Nature governs, in whose economy error is followed by pain and suffering, whose laws carry their own sanction with them. Divines will tell you that it is the method by which God governs: God is a righteous Judge and God is provoked every day, yet He makes His sun to rise on the evil and the good, and sends His rain upon the just and the unjust. He does not directly intervene to punish faults, but leaves sin to bring its own appointed penalty. Statesmen will point to the troubles which followed the attempt to govern the reconquered seceding States, first by military force and then by keeping a great part of their population disfranchised, and will declare that such evils as still exist in the South are far less grave than those which the denial of ordinary self-government involved. "So," they pursue, "Texas and California will in time unlearn their bad habits and come out right if we leave them alone: Federal interference, even had we the machinery needed for prosecuting it, would check the natural process by which the better elements in these raw communities are purging away the maladies of youth, and reaching the settled health of manhood."

A European may say that there is a dangerous side to this application of democratic faith in local majorities and in *laissez aller*. Doubtless there is: yet those who have learnt to know the Americans will answer that no nation better understands its own business.