leaders the same, although of course a prominent man enjoys especial influence in his own State. Hence, State politics are largely swayed by forces and motives external to the particular State, and common to the whole country, or two great sections of it; and the growth of local parties, the emergence of local issues and development of local political schemes, are correspondingly restrained.

These considerations explain why the States, notwithstanding the original diversities between some of them, and the wide scope for political divergence which they all enjoy under the Federal Constitution, are so much less dissimilar and less peculiar than might have been expected. European statesmen have of late years been accustomed to think of federalism and local autonomy as convenient methods either for recognizing and giving free scope to the sentiment of nationality which may exist in any part of an empire, or for meeting the need for local institutions and distinct legislation which may arise from differences between such a part and the rest of the empire. It is one or other or both of these reasons that have moved statesmen in such cases as those of Finland in her relations to Russia, Hungary in her relations to German Austria, Iceland in her relations to Denmark, Bulgaria in her relations to the Turkish Sultan, Ireland in her relations to Great Britain. But the final causes, so to speak, of the recognition of the States of the American Union as autonomous commonwealths, have been different. Their self-government is not the consequence of differences which can be made harmless to the whole body politic only by being allowed free course. It has been due primarily to the historical fact that they existed as commonwealths before the Union came into being; secondarily, to the belief that localized government is the best guarantee for civic freedom, and to a sense of the difficulty of administering a vast territory and population from one centre and by one government.

I return to indicate the points in which the legal independence and right of self-government of the several States appears. Each of the forty-four has its own —

Constitution (whereof more anon).

Executive, consisting of a governor, and various other officials.

Legislature of two Houses.

System of local government in counties, cities, townships, and school districts.

System of State and local taxation.

Debts, which it may repudiate at its own pleasure.

Body of private law, including the whole law of real and personal property, of contracts, of torts, and of family relations.

System of procedure, civil and criminal.

Court, from which no appeal lies (except in cases touching Federal legislation or the Federal constitution) to any Federal court.

Citizenship, which may admit persons (*e.g.* recent immigrants) to be citizens at times, or on conditions, wholly different from those prescribed by other States.

Three points deserve to be noted as illustrating what these attributes include.

I. A man gains active citizenship of the United States (*i.e.* a share in the government of the Union) only by becoming a citizen of some particular State. Being such citizen, he is forthwith entitled to the national franchise. That is to say, voting power in the State carries voting power in Federal elections, and however lax a State may be in its grant of such power, *e.g.* to foreigners just landed or to persons convicted of crime, these State voters will have the right of voting in congressional and presidential elections.[1] The only restriction on the States in this matter is that of the fourteenth and fifteenth Constitutional amendments, which have already been discussed. They were intended to secure equal treatment to the negroes, and incidentally they declare the protection given

[1] Congress has power to pass a uniform rule of naturalization (Const. Art. i. § 8).

Under the present naturalization laws a foreigner must have resided in the United States for five years, and for one year in the State or Territory where he seeks admission to United States citizenship, and must declare two years before he is admitted that he renounces allegiance to any foreign prince or state. Naturalization makes him a citizen not only of the United States but of the State or Territory where he is admitted, but does not necessarily confer the electoral franchise, for that depends on State laws.

In more than a third of the States the electoral franchise is now enjoyed by persons not naturalized as United States citizens.

to all citizens of the United States.[1] Whether they really enlarge it, that is to say, whether it did not exist by implication before, is a legal question, which I need not discuss.

II. The power of a State over all communities within its limits is absolute. It may grant or refuse local government as it pleases. The population of the city of Providence is more than one-third of that of the State of Rhode Island, the population of New York City one-fourth that of the State of New York. But the State might in either case extinguish the municipality, and govern the city by a single State commissioner appointed for the purpose, or leave it without any government whatever. The city would have no right of complaint to the Federal President or Congress against such a measure. Massachusetts lately remodelled the city government of Boston just as the British Parliament might remodel that of Birmingham. Let an Englishman imagine a county council for Warwickshire suppressing the municipality of Birmingham, or a Frenchman imagine the department of the Rhone extinguishing the municipality of Lyons, with no possibility of

[1] "The line of distinction between the privileges and immunities of citizens of the United States, and those of citizens of the several States, must be traced along the boundary of their respective spheres of action, and the two classes must be as different in their nature as are the functions of their respective governments. A citizen of the United States as such has a right to participate in foreign and inter-state commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, and to pass from State to State, and into foreign countries, because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws. The privileges suggest the immunities. Wherever it is the duty of the United States to give protection to a citizen against any harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to Federal citizenship. One very plain immunity is exemption from any tax, burden, or imposition under State laws as a condition to the enjoyment of any right or privilege under the laws of the United States. . . . Whatever one may claim as of right under the Constitution and laws of the United States by virtue of his citizenship, is a privilege of a citizen of the United States. Whatever the Constitution and laws of the United States entitle him to exemption from, he may claim an exemption in respect to. And such a right or privilege is abridged whenever the State law interferes with any legitimate operation of Federal authority which concerns his interest, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the Federal Constitution or law. But the United States can neither grant nor secure to its citizens rights or privileges which are not expressly or by reasonable implication placed under its jurisdiction, and all not so placed are left to the exclusive protection of the States." — Cooley, *Principles*, pp. 245–247.

intervention by the central authority, and he will measure the difference between the American States and the local governments of Western Europe.

III. A State commands the allegiance of its citizens, and may punish them for treason against it. The power has rarely been exercised, but its undoubted legal existence had much to do with inducing the citizens of the Southern States to follow their governments into secession in 1861. They conceived themselves to owe allegiance to the State as well as to the Union, and when it became impossible to preserve both, because the State had declared its secession from the Union, they might hold the earlier and nearer authority to be paramount. Allegiance to the State must now, since the war, be taken to be subordinate to allegiance to the Union. But allegiance to the State still exists; treason against the State is still possible. One cannot think of treason against Warwickshire or the department of the Rhone.

These are illustrations of the doctrine which Europeans often fail to grasp, that the American States were originally in a certain sense, and still for certain purposes remain, sovereign States. Each of the original thirteen became sovereign (so far as its domestic affairs were concerned, though not as respects international relations) when it revolted from the mother country in 1776. By entering the Confederation of 1781–88 it parted with one or two of the attributes of sovereignty, by accepting the Federal Constitution in 1788–91 it subjected itself for certain specified purposes to a central government, but claimed to retain its sovereignty for all other purposes. That is to say, the authority of a State is an inherent, not a delegated, authority. It has all the powers which any independent government can have, except such as it can be affirmatively shown to have stripped itself of, while the Federal Government has only such powers as it can be affirmatively shown to have received. To use the legal expression, the presumption is always for a State, and the burden of proof lies upon any one who denies its authority in a particular matter.[1]

[1] As the colonies had associated themselves into a league, at the very time at which they revolted from the British Crown, and as their foreign relations were always managed by the authority and organs of this league, no one of

What State sovereignty means and includes was a question which incessantly engaged the most active legal and political minds of the nation, from 1789 down to 1870. Some thought it paramount to the rights of the Union. Some considered it as held in suspense by the Constitution, but capable of reviving as soon as a State should desire to separate from the Union. Some maintained that each State had in accepting the Constitution finally renounced its sovereignty, which thereafter existed only in the sense of such an undefined domestic legislative and administrative authority as had not been conferred upon Congress. The conflict of these views, which became acute in 1830 when South Carolina claimed the right of nullification, produced Secession and the war of 1861–65. Since the defeat of the Secessionists, the last of these views may be deemed to have been established, and the term "State sovereignty" is now but seldom heard. Even "States' rights" have a different meaning from that which they had thirty years ago.[1]

A European who now looks calmly back on this tremendous controversy of tongue, pen, and sword, will be apt to express his ideas of it in the following way. He will remark that much of the obscurity and perplexity arose from confounding the sovereignty of the American nation with the sovereignty of the Federal Government. The Federal Government clearly was sovereign only for certain purposes, *i.e.* only in so far as it had received specified powers from the Constitution. These powers did not, and in strict legal construction do not now, abrogate the supremacy of the States in their proper sphere. A State still possesses one important attribute of sovereignty — immunity from being sued except by another State. But

them ever was for international purposes a free and independent sovereign State. Abraham Lincoln was in this sense justified in saying that the Union was older than the States, and had created them as States. But what are we to say of North Carolina and Rhode Island, after the acceptance of the Constitution of 1787–89 by the other eleven States? They were out of the old Confederation, for it had expired. They were not in the new Union, for they refused during many months to enter it. What else can they have been during those months except sovereign commonwealths?

[1] States rights was a watchword in the South for many years. In 1851 there was a student at Harvard College from South Carolina who bore the name of States Rights Gist, baptized, so to speak, into Calhounism. He rose to be a brigadier-general in the Confederate army, and fell in the Civil War.

the American nation which had made the Constitution, had done so in respect of its own sovereignty, and might well be deemed to retain that sovereignty as paramount to any rights of the States. The feeling of this ultimate supremacy of the nation was what swayed the minds of those who resisted Secession, just as the equally well-grounded persuasion of the limited character of the central Federal Government satisfied the conscience of the seceding South.

The Constitution of 1789 was a compromise, and a compromise arrived at by allowing contradictory propositions to be represented as both true. It has been compared to the declarations made with so much energy and precision of language in the ancient hymn *Quicunque Vult*, where, however, the apparent contradiction has always been held to seem a contradiction only because the human intellect is unequal to the comprehension of such profound mysteries. To every one who urged that there were thirteen States, and therefore thirteen governments, it was answered, and truly, that there was one government, because the people were one. To every one who declared that there was one government, it was answered with no less truth that there were thirteen. Thus counsel was darkened by words without knowledge; the question went off into metaphysics, and found no end, in wandering mazes lost.

There was, in fact, a divergence between the technical and the practical aspects of the question. Technically, the seceding States had an arguable case; and if the point had been one to be decided on the construction of the Constitution as a court decides on the construction of a commercial contract, they were possibly entitled to judgment. Practically, the defenders of the Union stood on firmer ground, because circumstances had changed since 1789 so as to make the nation more completely one nation than it then was, and had so involved the fortunes of the majority which held to the Union with those of the minority seeking to depart that the majority might feel justified in forbidding their departure. Stripped of legal technicalities, the dispute resolved itself into the problem often proposed but capable of no general solution: When is a majority entitled to use force for the sake of retaining a minority in the same political body with itself? To this question, when it appears in a concrete shape, as to the

similar question when an insurrection is justifiable, an answer can seldom be given beforehand. The result decides. When treason prospers, none dare call it treason.

The Constitution, which had rendered many services to the American people, did them an inevitable dis-service when it fixed their minds on the legal aspects of the question. Law was meant to be the servant of politics, and must not be suffered to become the master. A case had arisen which its formulæ were unfit to deal with, a case which had to be settled on large moral and historical grounds. It was not merely the superior physical force of the North that prevailed; it was the moral forces which rule the world, forces which had long worked against slavery, and were ordained to save North America from the curse of hostile nations established side by side.

The word "sovereignty," which has in many ways clouded the domain of public law and jurisprudence, confused men's minds by making them assume that there must in every country exist, and be discoverable by legal inquiry, either one body invested legally with supreme power over all minor bodies, or several bodies which, though they had consented to form part of a larger body, were each in the last resort independent of it, and responsible to none but themselves.[1] They forgot that a Constitution may not have determined where legal supremacy shall dwell. Where the Constitution of the United States placed it was at any rate doubtful, so doubtful that it would have been better to drop technicalities, and recognize the broad fact that the legal claims of the States had become incompatible with the historical as well as legal claims of the nation. In the uncertainty as to where legal right resided, it would have been prudent to consider where physical force resided. The South however thought herself able to resist any physical

[1] A further confusion arises from the fact that men are apt in talking of sovereignty to mix up (as the Benthamite school have unfortunately done) legal supremacy with practical predominance. They ought to go together, and law seeks to make them go together. But it may happen that the person or body in whom law vests supreme authority is unable to enforce that authority: so the legal sovereign and the actual sovereign — that is to say, the force which will prevail in physical conflict — are different. There is always a strongest force; but the force recognized by law may not be really the strongest; and of several forces it may be impossible to tell, till they have come into actual physical conflict, which is the strongest.

force which the rest of the nation might bring against her. Thus encouraged, she took her stand on the doctrine of States' Rights: and then followed a pouring out of blood and treasure such as was never spent on determining a point of law before, not even when Edward III. and his successors waged war for a hundred years to establish the claim of females to inherit the crown of France.

What, then, do the rights of a State now include? Every right or power of a Government except: —

The right of secession (not abrogated in terms, but admitted since the war to be no longer claimable. It is expressly negatived in the recent Constitutions of several Southern States).

Powers which the Constitution withholds from the States (including that of intercourse with foreign governments).

Powers which the Constitution expressly confers on the Federal Government.

As respects some powers of the last class, however, the States may act concurrently with, or in default of action by, the Federal Government. It is only from contravention of its action that they must abstain. And where contravention is alleged to exist, whether legislative or executive, it is by a court of law, and, in case the decision is in the first instance favourable to the pretensions of the State, ultimately by a Federal court, that the question falls to be decided.[1]

A reference to the preceding list of what each State may create in the way of distinct institutions will show that these rights practically cover nearly all the ordinary relations of citizens to one another and to their Government, nearly all the questions which have been most agitated in England and France of recent years. An American may, through a long life, never be reminded of the Federal Government, except when he votes at presidential and congressional elections, buys a package of tobacco bearing the government stamp, lodges a complaint against the post-office, and opens his trunks for a custom-house officer on the pier at New York when he returns from a tour in Europe. His direct taxes are paid to officials acting under State laws. The State, or a local author-

[1] See Chapter XXII. *ante*.

ity constituted by State statutes, registers his birth, appoints his guardian, pays for his schooling, gives him a share in the estate of his father deceased, licenses him when he enters a trade (if it be one needing a licence), marries him, divorces him, entertains civil actions against him, declares him a bankrupt, hangs him for murder. The police that guard his house, the local boards which look after the poor, control highways, impose water rates, manage schools — all these derive their legal powers from his State alone. Looking at this immense compass of State functions, Jefferson would seem to have been not far wrong when he said that the Federal government was nothing more than the American department of foreign affairs. But although the National government touches the direct interests of the citizen less than does the State government, it touches his sentiment more. Hence the strength of his attachment to the former and his interest in it must not be measured by the frequency of his dealings with it. In the partitionment of governmental functions between nation and State, the State gets the most but the nation the highest, so the balance between the two is preserved.

Thus every American citizen lives in a duality of which Europeans, always excepting the Swiss, and to some extent the Germans, have no experience. He lives under two governments and two sets of laws; he is animated by two patriotisms and owes two allegiances. That these should both be strong and rarely be in conflict is most fortunate. It is the result of skilful adjustment and long habit, of the fact that those whose votes control the two sets of governments are the same persons, but above all of that harmony of each set of institutions with the other set, a harmony due to the identity of the principles whereon both are founded, which makes each appear necessary to the stability of the other, the States to the nation as its basis, the National Government to the States as their protector.

CHAPTER XXXVII

STATE CONSTITUTIONS

THE government of each of the forty-four States is determined by and set forth in its Constitution, a comprehensive fundamental law, or rather group of laws included in one instrument, which has been directly enacted by the people of the State, and is capable of being repealed or altered, not by their representatives, but by themselves alone. As the Constitution of the United States stands above Congress and out of its reach, so the Constitution of each State stands above the legislature of that State, cannot be varied in any particular by the State legislature, and involves the invalidity of any statute passed by that legislature which is found to be inconsistent with it.

The State Constitutions are the oldest things in the political history of America, for they are the continuations and representatives of the royal colonial charters, whereby the earliest English settlements in America were created, and under which their several local governments were established, subject to the authority of the English Crown and ultimately of the British Parliament. But, like most of the institutions under which English-speaking peoples now live, they have a pedigree which goes back to a time anterior to the discovery of America itself. It begins with the English Trade Guild of the middle ages, itself the child of still more ancient corporations, dating back to the days of imperial Rome, and formed under her imperishable law. Charters were granted to merchant guilds in England as far back as the days of King Henry I. Edward IV. gave an elaborate one to the Merchant Adventurers trading with Flanders in 1463. In it we may already discern the arrangements which are more fully set forth in two later charters of greater historical interest, the charter of Queen Elizabeth