of law, and is to be solved by determining whether or no a law of inferior authority is inconsistent with a law of superior authority. Whenever in any legal proceeding before any tribunal, either party relies on a State statute, and the other party alleges that this statute is *ultra vires* of the State legislature, and therefore void, the tribunal must determine the question just as it would determine whether a bye-law made by a municipal council or a railway company was in excess of the law-making power which the municipality or the company had received from the higher authority which incorporated it and gave it such legislative power as it possesses. But although Federal courts are fully competent to entertain a question arising on the construction of a State Constitution, their practice is to follow the precedent set by any decision of a court of the State in question, just as they would follow the decision of a French court in determining a point of French law. Each State must be assumed to know its own law better than a stranger can; and the supreme court of a State is held to be the authorized exponent of the mind of the people who enacted its Constitution.

A State Constitution is really nothing but a law made directly by the people voting at the polls upon a draft submitted to them. The people when they so vote act as a primary and constituent assembling, just as if they were all summoned to meet in one place like the folkmoots of our Teutonic forefathers. It is only their numbers that prevent them from so meeting in one place, and oblige the vote to be taken at a variety of polling places. Hence the enactment of a Constitution is an exercise of direct popular sovereignty to which we find few parallels in modern Europe, though it was familiar enough to the republics of antiquity, and has lasted till now in some of the cantons of Switzerland.[1]

The importance of this character of a State Constitution as a popularly-enacted law, overriding every minor State law, becomes all the greater when the contents of these Constitutions are examined. Europeans conceive of a constitution as

[1] Nowadays, however, the Landesgemeinden (which survive only in Uri, Unterwalden, Glarus, and Appenzell, having been recently discontinued in Schwyz and Zug) do not act as constituent or constitution-enacting bodies, though they still directly legislate.

an instrument, usually a short instrument, which creates a frame of government, defines its departments and powers, and declares the "primordial rights" of the subject or citizen as against the rulers. An American State Constitution does this, but does more; and in most cases, infinitely more. It deals with a variety of topics which in Europe would be left to the ordinary action of the legislature, or of administrative authorities; and it pursues these topics into a minute detail hardly to be looked for in a fundamental instrument. Some of these details will be mentioned presently. Meantime I will sketch in outline the frame and contents of the more recent constitutions, reserving for next chapter remarks on the differences of type between those of the older and those of the newer States.

A normal Constitution consists of five parts: —

I. The definition of the boundaries of the State. (This does not occur in the case of the older States.)

II. The so-called Bill of Rights — an enumeration (whereof more anon) of the citizens' primordial rights to liberty of person and security of property. This usually stands at the beginning of the Constitution, but occasionally at the end.

III. The frame of government — *i.e.* the names, functions, and powers of the legislative bodies (including provisions anent the elective suffrage), the executive officers, and the courts of justice.

IV. Miscellaneous provisions relating to administration and law, including articles treating of education, of the militia, of taxation and revenue, of the public debts, of local government, of State prisons and hospitals, of agriculture, of labour, of impeachment, and of the method of amending the Constitution, besides other matters still less political in their character. The order in which these occur differs in different instruments, and there are some in which some of the above topics are not mentioned at all. The more recent Constitutions and those of the newer States are much fuller on these points.

V. The Schedule, which contains provisions relating to the method of submitting the Constitution to the vote of the people, and arrangements for the transition from the previous Constitution to the new one which is to be enacted by that vote. Being of a temporary nature, the schedule is not strictly a part of the Constitution.

The Bill of Rights is historically the most interesting part of these Constitutions, for it is the legitimate child and representative of Magna Charta, and of those other declarations and enactments, down to the Bill of Rights of the Act of 1 William and Mary, session 2, by which the liberties of Englishmen have been secured. Most of the thirteen colonies when they asserted their independence and framed their Constitutions inserted a declaration of the fundamental rights of the people, and the example then set has been followed by the newer States, and, indeed, by the States generally in their most recent Constitutions. Considering that all danger from the exercise of despotic power upon the people of the States by the executive has long since vanished, their executive authorities being the creatures of popular vote and nowadays rather too weak than too strong, it may excite surprise that these assertions of the rights and immunities of the individual citizen as against the government should continue to be repeated in the instruments of to-day. A reason may be found in the remarkable constitutional conservatism of the Americans, and in their fondness for the enunciation of the general maxims of political freedom. But it is also argued that these declarations of principle have a practical value, as asserting the rights of individuals and of minorities against arbitrary conduct by a majority in the legislature, which might, in the absence of such provisions, be tempted at moments of excitement to suspend the ordinary law and arm the magistrates with excessive powers. They are therefore, it is held, still safeguards against tyranny; and they serve the purpose of solemnly reminding a State legislature and its officers of those fundamental principles which they ought never to overstep.[1] Although such provisions certainly do restrain a legislature in ways which the British Parliament would find inconvenient, few complaints of practical evils thence arising are heard.

A general notion of these Bills of Rights may be gathered from that enacted for itself in 1879 by the State of California, printed in the Appendix to this volume. I may mention, in addition, a few curious provisions which occur in some of them.

All provide for full freedom of religious opinion and worship, and for the equality before the law of all religious denominations and their members; and many forbid the establishment of any particular church or sect, and declare that no public money ought to be applied in aid of any religious body or sectarian institution.[1] But Delaware holds it to be "the duty of all men frequently to assemble for public worship"; and Vermont adds that "every sect or denomination of Christians ought to observe the Sabbath or Lord's Day." And thirteen States declare that the provisions for freedom of conscience are not to be taken to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the State,[2] Mississippi adding (1890) that they shall not be construed to exclude the Bible from use in schools, and Idaho denouncing bigamy and polygamy as crimes to be made punishable.

[1] The influence of the Declaration of Independence of 1776 is of course perceptible in them all.

Louisiana (Constitution of 1879) declares that "all government of right originates with the people, is founded on their will alone, and is instituted solely for the good of the whole, deriving its just powers from the consent of the governed. Its only legitimate end is to protect the citizen in the enjoyment of life, liberty, and property. When it assumes other functions, it is usurpation and oppression."

Thirty-one States declare that "all men have a natural, inherent, and inalienable right to enjoy and defend life and liberty"; and all of these, except the melancholy Missouri, add the "natural right to pursue happiness."

Twenty-two declare that all men have "a natural right to acquire, possess, and protect property."

Mississippi and Louisiana (Constitutions of 1868) provided that "the right of all citizens to travel upon public conveyances shall not be infringed upon nor in any manner abridged." Both States have now dropped this injunction.[3]

[1] Not till 1889, however, did New Hampshire strike out of her Constitution of 1792 a provision enabling the legislature to authorize towns to provide for the support of "public *Protestant* teachers of piety, religion, and morality."

[2] In Arkansas, Maryland, Mississippi, North Carolina, South Carolina, and Texas, a man is declared ineligible for office if he denies the existence of God; in Pennsylvania and Tennessee he is ineligible if he does not believe in God, and in the existence of future rewards and punishments. In Arkansas and Maryland such a person is also incompetent as a witness or juror.

[3] These provisions were inserted shortly after the Civil War in order to protect the negroes.

Kentucky (Constitution of 1891) lays down that "absolute arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority. All men when they form a social compact are equal. All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, happiness, and security, and the protection of property. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may deem proper."[1]

All in one form or another secure the freedom of writing and speaking opinions, and some add that the truth of a libel may be given in evidence.[2]

Nearly all secure the freedom of public meeting and petition. Considering that these are the last rights likely to be infringed by a State government, it is odd to find Florida in her Constitution of 1886 providing that "the people shall have the right to assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances," and Kentucky in 1891 equally concerned to secure this right.

Many provide that no *ex post facto* law, nor law impairing the obligation of a contract, shall be passed by the State legislature; and that private property shall not be taken by the State without just compensation.

Many forbid the creation of any title of nobility.

Many declare that the right of citizens to bear arms shall never be denied, a provision which might be expected to prove inconvenient where it was desired to check the habit of carrying revolvers. Tennessee therefore (Constitution of 1870) prudently adds that "the legislature shall have power to regulate the wearing of arms, with a view to prevent crime." So also Texas, where such a provision is certainly not superfluous.

[1] Until 1891, Kentucky added, "The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave and its increase is the same and as inviolable as the right of the owner of any property whatever," although this doctrine had been annulled, in effect, by the thirteenth amendment to the Federal Constitution.

[2] A curious survival may be noted in the provisions enabling the jury to determine law as well as fact in libel cases; *e.g.* Mississippi (1890) and Kentucky (1891) in criminal, Wyoming (1889) also in civil cases.

And six others[1] allow the legislature to forbid the carrying of concealed weapons.

Some declare that the estates of suicides shall descend in the ordinary course of law.

Most provide that conviction for treason shall not work corruption of blood nor forfeiture of estate.

Eight forbid white and coloured children to be taught in the same public schools, while Wyoming provides that no distinction shall be made in the public schools on account of sex, race, or colour.

Many declare the right of trial by jury to be inviolate, even while permitting the parties to waive it. Idaho empowers a jury in civil cases to render a verdict by a three-fourths majority, and Wyoming permits it to consist of less than twelve.

Some forbid imprisonment for debt, except in case of fraud, and secure the acceptance of reasonable bail, except for the gravest charges.[2]

Several declare that "perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed."

Many forbid the granting of any hereditary honours, privileges, or emoluments.

North Carolina declares that "as political rights and privileges are not dependent upon or modified by property, no property qualification ought to affect the right to vote or hold office"; and also, "secret political societies are dangerous to the liberties of a free people, and should not be tolerated."

Massachusetts sets forth, as befits a Puritan State, high moral views: "A frequent recurrence to the fundamental principles of the Constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty and to maintain a free government. The people ought consequently to have a particular attention to all those principles in the choice of their officers and representatives, and they have a right to

[1] North Carolina, Mississippi, Missouri, Louisiana, Colorado, and Montana, States in which daily experience shows that the measures taken have not proved successful.

[2] Mississippi (Const. of 1890) allows courts of justice to exclude, in some classes of prosecutions, persons not necessary for the conduct of the trial. Wyoming (1889) provides that no person detained as a witness be confined in any room where criminals are imprisoned.

require of their law-givers and magistrates an exact and constant observance of them."

South Dakota and Wyoming provide that aliens shall have the same rights of property as citizens. Montana confers this benefit as respects mining property, while Washington prohibits the ownership of land by aliens, except for mining purposes. New York (Const. of 1846) provides: "All lands within this State are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates."

North Dakota (1889) enacts: "Every citizen shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way any citizen from obtaining or enjoying employment already obtained from any other corporation or person, shall be deemed guilty of a misdemeanor."

Maryland (Const. of 1867) declares that "a long continuance in the executive departments of power or trust is dangerous to liberty; a rotation, therefore, in those departments is one of the best securities of permanent freedom." She also pronounces all gifts for any religious purpose (except of a piece of land not exceeding five acres for a place of worship, parsonage, or burying-ground) to be void unless sanctioned by the legislature.

Montana and Idaho declare the use of lands for constructing reservoirs, water-courses, or ways for the purposes of mining or irrigation, to be a public use, subject to State regulation.

These instances, a few out of many, may suffice to show how remote from the common idea of a Bill of Rights, are some of the enactments which find a place under that heading. The constitution makers seem to have inserted here such doctrines or legal reforms as seemed to them matters of high import or of wide application, especially when they could find no suitable place for them elsewhere in the instrument.

Of the articles of each State Constitution which contain the frame of State government it will be more convenient to speak in the chapters which describe the mechanism and character of the governments and administrative systems of the several States. I pass on therefore to what have been classed as the Miscellaneous Provisions. These are of great interest as revealing the spirit and tendencies of popular government in America,

the economic and social condition of the country, the mischiefs that have arisen, the remedies applied to these mischiefs, the ideas and beliefs of the people in matters of legislation.

Among such provisions we find a great deal of matter which is in no distinctive sense constitutional law, but general law, *e.g.* administrative law, the law of judicial procedure, the ordinary private law of family, inheritance, contract, and so forth; matter therefore which seems out of place in a constitution because fit to be dealt with in ordinary statutes. We find minute provisions regarding the management and liabilities of banking companies, of railways, or of corporations generally; regulations as to the salaries of officials, the quorum of courts sitting in banco, the length of time for appealing, the method of changing the venue, the publication of judicial reports; detailed arrangements for school boards and school taxation (with rules regarding the separation of white and black children in schools), for a department of agriculture, a canal board, or a labour bureau; we find a prohibition of lotteries, of polygamy, of bribery, of lobbying, of the granting of liquor licences, of usurious interest on money, an abolition of the distinction between sealed and unsealed instruments, a declaration of the extent of a mechanic's lien for work done. We even find the method prescribed in which stationery and coals for the use of the legislature shall be contracted for, and provisions for fixing the rates which may be charged for the storage of corn in warehouses. The framers of these more recent constitutions have in fact neither wished nor cared to draw a line of distinction between what is proper for a constitution and what ought to be left to be dealt with by the State legislature. And, in the case of three-fourths at least of the States, no such distinction now, in fact, exists.

How is this confusion to be explained? Four reasons may be suggested.

The Americans, like the English, have no love for scientific arrangement. Although the Constitutions have been drafted by lawyers, and sometimes by the best lawyers of each State, logical classification has not been sought after.

The people found the enactment of a new Constitution a convenient opportunity for enunciating doctrines they valued and carrying through reforms they desired. It was a simpler

and quicker method than waiting for legislative action, so, when there was a popular demand for the establishment of an institution, or for some legal change, this was shovelled into the new Constitution and enacted accordingly.

The peoples of the States have come to distrust their respective legislatures. Hence they desire not only to do a thing forthwith and in their own way rather than leave it to the chance of legislative action, but to narrow as far as they conveniently can (and sometimes farther) the sphere of the legislature.

There is an unmistakable wish in the minds of the people to act directly rather than through their representatives in legislation. The same conscious relish for power which leads some democracies to make their representatives mere delegates, finds a further development in passing by the representatives, and setting the people itself to make and repeal laws.

Those who have read the chapters describing the growth and development of the Federal Constitution, will naturally ask how far the remarks there made apply to the Constitutions of the several States.

These instruments have less capacity for expansion, whether by interpretation or by usage, than the Constitution of the United States: firstly, because they are more easily, and therefore more frequently, amended or recast; secondly, because they are far longer, and go into much more minute detail. The Federal Constitution is so brief and general that custom must fill up what it has left untouched, and judicial construction evolve the application of its terms to cases they do not expressly deal with. But the later State Constitutions are so full and precise that they need little in the way of expansive construction, and leave comparatively little room for the action of custom.

The rules of interpretation are in the main the same as those applied to the Federal Constitution. One important difference must, however, be noted, springing from the different character of the two governments. The National Government is an artificial creation, with no powers except those conferred by the instrument which created it. A State Government is a natural growth, which *prima facie* possesses all the powers incident to any government whatever. Hence, if the question arises whether a State legislature can pass a law

on a given subject, the presumption is that it can do so: and positive grounds must be adduced to prove that it cannot. It may be restrained by some inhibition either in the Federal Constitution, or in the Constitution of its own State. But such inhibition must be affirmatively shown to have been imposed, or, to put the same point in other words, a State Constitution is held to be, not a document conferring defined and specified powers on the legislature, but one regulating and limiting that general authority which the representatives of the people enjoy *ipso jure* by their organization into a legislative body.

"It has never been questioned that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written Constitutions. That must be conceded to be a fundamental principle in the political organization of the American States. We cannot well comprehend how, upon principle, it could be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular State in question." [1]

"The people, in framing the Constitution, committed to the legislature the whole law-making powers of the State which they did not expressly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception." [2]

It must not, however, be supposed from these dicta that even if the States were independent commonwealths, the Federal Government having disappeared, their legislatures would enjoy anything approaching the omnipotence of the British Parliament, "whose power and jurisdiction is," says Sir Edward Coke, "so transcendent and absolute that it cannot be confined, either for persons or causes, within any bounds." "All mischiefs and grievances," adds Blackstone, "operations and remedies that transcend the ordinary course of the laws are within the reach of this extraordinary tribunal." Parliament being

[1] Redfield, C.-J., in 27 Vermont Reports, p. 142, quoted by Cooley, *Constit. Limit.*, p. 108.

[2] Denio, C.-J., in 15 N. Y. Reports, p. 543, quoted *ibid.* p. 107.