responsibility for misdoing. On the whole, therefore, there can be no doubt that the democratic spirit is now more energetic and pervasive than it was in the first generation. It is a different kind of spirit. It is more practical, more disposed to extend the sphere of governmental interference, less content to rely on general principles. One discovers in the wording of the most recent constitutions a decline of that touching faith in the efficacy of broad declarations of abstract human rights which marked the disciples of Jefferson. But if we compare the present with the second or Jacksonian age, it may be said that there has been in progress for some years past a certain anti-democratic reaction, fainter than the levelling movement of sixty years ago, and not likely to restore the state of things that existed before that movement, yet noticeable as showing that the people do learn by experience, and are not indisposed to reverse their action and get clear of the results of past mistakes. The common saying that on the road to democracy there are *vestigia nulla retrorsum* is not universally true in America.

That there are strong conservative tendencies in the United States is a doctrine whose truth will be illustrated later on. Meanwhile it is worth while to ask how far the history of State constitutions confirms the current notion that democracies are fond of change. The answer is instructive, because it shows how flimsy are the generalizations which men often indulge in when discussing forms of government, as if all communities with similar forms of government behaved in the same way. All the States of the Union are democracies, and democracies of nearly the same type. Yet while some change their constitutions frequently, others scarcely change theirs at all. Let me recall the reader's mind to the distinction already drawn between the older or New England type and the newer type, which we find in the Southern as well as the Western States. It is among the latter that changes are frequent. Louisiana, for instance, whose State life began in 1812, has had six complete new constitutions, without counting the so-called Secession Constitution of 1861. So has Georgia. Arkansas, which dates from 1836, has had five, besides many amendments passed in the intervals. Virginia and South Carolina (both original States) have had five each. Among

the Northern States, Pennsylvania (an original State) has had four; Illinois, dating from 1818, three; New York, three; Delaware, three; whereas Connecticut and Rhode Island (both original States) and Maine (dating from 1820), have had only one each, Vermont and New Hampshire two each. Massachusetts still lives under her Constitution of 1780, which has indeed been amended at various dates, yet not to such an extent as to efface its original features. Of the causes of these differences I will now touch on two only. One is the attachment which in an old and historic, a civilized and well-educated community, binds the people to their accustomed usages and forms of government. It is the newer States, without a past to revere, with a population undisciplined or fluctuating, that are prone to change. In well-settled commonwealths the longer a constitution has stood untouched, the longer it is likely to stand, because the force of habit is on its side, because an intelligent people learns to value the stability of its institutions, and to love that which it is proud of having created.

The other cause is the difference between the swiftness with which economic and social changes move in different parts of the country. They are the most constant sources of political change, and find their natural expression in alterations of the Constitution. Such changes have been least swift and least sudden in the New England and Middle States, though in some of the latter the growth of great cities, such as New York and Philadelphia, has induced them, and induced therewith a tendency to amend the constitutions so as to meet new conditions and check new evils. They have been most marked in regions where population and wealth have grown with unexampled speed, and in those where the extinction of slavery has changed the industrial basis of society. Here lies the explanation of the otherwise singular fact that several of the original States, such as Virginia and Georgia, have run through many constitutions. These whilom Slave States have not only changed greatly but changed suddenly: society, as well as political life, was dislocated by the Civil War, and has had to make more than one effort to set itself right.

The total number of distinct constitutions adopted in 1776 or enacted in the several States since that year — the States

being then 13 and now 44 in number — is 113; and to these constitutions about 240 partial amendments have been at different times adopted.[1] The period since 1860 shows a somewhat greater frequency of change than the eighty-four years preceding; but that may be accounted for by the effects of the war on the Southern States. The average duration of a constitution has been estimated at thirty years, and there are now six which have lasted more than sixty years. Both whole constitutions and particular amendments are frequently rejected by the people when submitted to them at the polls. This befel six draft constitutions and more than twenty-eight amendments between 1877 and 1887.[2]

Putting all these facts together, and bearing in mind to how large an extent the constitutions now, whether wisely or foolishly, embody ordinary private and administrative law and therefore invite amendment, the American democracy seems less inclined to changefulness and inconstancy than either abstract considerations or the descriptions of previous writers, such as Tocqueville, would have led us to expect. The respect for these fundamental instruments would no doubt be greater if the changes in them were even fewer, and the changes would be fewer if the respect were greater; but I see little reason to think that the evil is increasing.

A few more observations on what the Constitutions disclose are needed to complete this brief sketch of the most instructive sources for the history of popular government which our century has produced — documents whose clauses, while they attempt to solve the latest problems of democratic commonwealths, often recall the earliest efforts of our English forefathers to restrain the excesses of mediæval tyranny.

The Constitutions witness to a singular distrust by the people of its own agents and officers, not only of the legislatures but also of local authorities, as well rural as urban, whose powers of borrowing or undertaking public works are strictly limited. Even the judges are in some States restrained in their authority to commit for contempt of court, and three

[1] Owing to the absence of any general official record, I am at present (Nov. 1892) unable to ascertain the exact number.

[2] Macpherson's *Handbook* mentions 25 constitutional amendments as adopted in the two years from August 1888 to July 1890, and 26 as rejected.

very recent constitutions contain severe provisions against abuse of his veto and appointing power by the governor, and against bribery offered to or by him.[1]

They witness also to a jealousy of the Federal government. By most constitutions a Federal official is made incapable, not only of State office, but of being a member of a State legislature. These prohibitions are almost the only references to the National government to be found in the State constitutions, which so far as their terms go might belong to independent communities. They usually talk of corporations belonging to other States as "foreign," and sometimes try to impose special burdens on them.

They show a wholesome anxiety to protect and safeguard private property in every way. The people's consciousness of sovereignty has not used the opportunity which the enactment of a constitution gives to override private rights: there is rather a desire to secure such rights from any encroachment by the legislature: witness the frequent provisions against the taking of property without due compensation, and against the passing of private or personal statutes which could unfairly affect individuals. The only exceptions to this rule are to be found in the case of anything approaching a monopoly, and in the case of wealthy corporations. But the "monopolist" is regarded as the enemy of the ordinary citizen, whom he oppresses; and the corporation — it is usually corporations that are monopolists — is deemed not a private person at all, but a sort of irresponsible tyrant whose resources enable him to overreach the law. Corporations are singled out for special taxation. Labour laws are enacted to apply to them only. A remarkable instance of this hostility to monopolies is to be found in the Constitution of Illinois of 1870, with its provisions anent grain elevators, warehouses, and railroads.[2] The newer constitutions of other Western States, such as Wisconsin and Texas, are not less instructive in this respect. Nor is it surprising that efforts should be made in some of the more recent instruments to strike at the combinations called "trusts."

[1] Constitutions of North Dakota, South Dakota, and Wyoming, all of 1889.

[2] See the remarkable group of cases beginning with *Munn* v. *Illinois* (commonly called the Granger Cases) in 94 U. S. Reports, p. 113.

The extension of the sphere of State interference, with the corresponding departure from the doctrine of *laissez faire*, is a question so large and so interesting as to require a chapter to itself in my second volume. Here it may suffice to remark, that some departments of governmental action, which on the continent of Europe have long been handled by the State, are in America still left to private enterprise. For instance, the States neither own nor manage railways, or telegraphs, or mines, or forests, and they sell their public lands instead of working them. There is, nevertheless, visible in recent constitutions a strong tendency to extend the scope of public administrative activity. Most of the newer instruments establish not only railroad commissions, intended to control the roads in the interest of the public, but also bureaux of agriculture, labour offices, mining commissioners, land registration offices, dairy commissioners, insurance commissioners, and agricultural or mining colleges. And a reference to the statutes passed within the last few years in the Western States will show that more is being done in this direction by the legislatures, as exponents of popular sentiment, than could be gathered from the older among the Western constitutions.

A spirit of humanity and tenderness for suffering, very characteristic of the American people, appears in the directions which many constitutions contain for the establishment of charitable and reformatory institutions, and for legislation to protect children.[1] Sometimes the legislature is enjoined to provide that the prisons are made comfortable; or directions are given that homes or farms be provided as asylums for the aged and unfortunate.[2] On the other hand, this tenderness is qualified by the judicious severity which in most States debars persons convicted of crime from the electoral franchise. Lotteries are stringently prohibited by some of the recent constitutions.

In the older Northern constitutions, and in nearly all the more recent constitutions of all the States, ample provision is made for the creation and maintenance of schools. Even universities are the object of popular zeal, though a zeal not

[1] So Kentucky (Const. of 1891, § 243) and North Dakota (Const. of 1889, § 209) prohibit the labour of children under twelve.

[2] So Mississippi (Const. of 1890, § 262).

always according to knowledge. Most Western constitutions direct their establishment and support from public funds or land grants. Some of the latest constitutions contain significant provisions intended to propitiate labour. Thus Wyoming and Idaho declare that eight hours shall be a lawful day's work on all State and municipal works, Wyoming adding "in all mines." Many prohibit the letting out of convict labour; several forbid the employment or bringing into the State of any body of armed men, and several prohibit contracts by which employers may attempt to escape from liability for accidents to their workpeople. Mississippi abolishes (1890), so far as concerns railroads, the established legal doctrine of an employer's non-liability for accidents caused to a workman by the fault of a fellow-workman.

Although a Constitution is the fundamental and supreme law of the State, one must not conclude that its provisions are any better observed and enforced than those of an ordinary statute. There is sometimes reason to suspect that when an offence is thought worthy of being specially mentioned in a constitution, this happens because it is specially frequent, and because men fear that the legislature may shrink from applying due severity to repress it, or the public prosecuting authorities may wink at it.[1] Certain it is that in many instances the penalties threatened by constitutions fail to attain their object. For instance, the constitutions of most of the Southern States have for many years past declared duellists, and even persons who abet a duel by carrying a challenge, incapable of office, or of sitting in the legislature. Yet the practice of private warfare does not seem to have declined in Mississippi, Texas, or Arkansas, where these provisions exist. Virginia had such a provision in her constitution of 1830. She repeated it in her constitution of 1850, but with the addendum, that the disqualification should not attach to those who had offended previously—*i.e.* in violation of the constitution of 1830.[2] So far as the enactment has had any

[1] This is said to happen in some States as respects lotteries.

[2] "The General Assembly may provide that no person shall be capable of holding or being elected to any post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of this commonwealth who shall hereafter fight a duel, or send or accept a challenge to fight a duel, the probable issue of which may be the death of the challenger or

effect, that effect would seem to have been to encourage the practice of shooting at sight, which is neither morally nor socially an improvement on duelling, though apparently exempt from these constitutional penalties.

New York has been so much exercised on the subject of bribery and corruption, as to declare (amendments of 1874), not only that every member of the legislature and every officer shall take an oath that he has given nothing as a consideration for any vote received for him (amendment to Art. xii. § 1), and that the legislature shall pass laws excluding from the suffrage all persons convicted of bribery or of any infamous crime (amendment to Art. ii. § 2), but also (amendment to Art. xv. §§ 1 and 2) that the giving or offering to or receiving by an officer of any bribe shall be a felony. The recent constitutions of North Dakota, Montana, and Wyoming declare log-rolling to be bribery. South Dakota requires her legislators and officers to swear that they have not received and will not receive a free pass over a railroad for any vote or influence they may give, while Kentucky deprives of office (*ipso facto*) any legislative public officer or judge who accepts such a favour. And lobbying, which is openly practised in every building where a legislature meets, is declared by California to be a felony, and by Georgia to be a crime.

challenged, or who shall be second to either party, or shall in any manner aid or assist in such duel, or shall be knowingly the bearer of such challenge or acceptance; but no person shall be so disqualified by reason of his having heretofore fought such duel or sent or accepted such challenge, or been second in such duel, or bearer of such challenge or acceptance" (Constitution of 1830, Art. iii. § 12, repeated in Constitution of 1850, Art. iv. § 17). In her Constitution of 1870 Virginia is not content with suggesting to the legislature to disqualify duellists, but does this directly by Art. iii. § 3. Seventeen Constitutions now declare duellists disqualified for office, and nine others add a disqualification for the franchise. Nearly all are Southern and Western States. Kentucky (Const. of 1891) requires all officers, members of the General Assembly, and persons being admitted to the bar to take an oath that they have not fought a duel since the adoption of the Constitution, nor aided any person in so offending.

CHAPTER XXXIX

DIRECT LEGISLATION BY THE PEOPLE

The difficulties and defects inherent in the method of legislating by a Constitution are obvious enough. Inasmuch as the people cannot be expected to distinguish carefully between what is and what is not proper for a fundamental instrument, there arises an inconvenient as well as unscientific mixture and confusion of private law and administrative regulation with the frame of government and the general doctrines of public law. This mixture, and the practice of placing in the Constitution directions to the legislature to legislate in a certain sense, or for certain purposes, embarrass a legislature in its working by raising at every turn questions of its competence to legislate, and of the agreement between its acts and the directions contained in the Constitution. And as the legislature is seldom either careful or well-advised, there follows in due course an abundant crop of questions as to the constitutionality of statutes, alleged by those whom they affect prejudicially in any particular instance to be either in substance inconsistent with the Constitution, or such as the legislature was expressly forbidden by it to pass. These inconveniences are no doubt slighter in America than they would be in Europe, because the lawyers and the judges have had so much experience in dealing with questions of constitutional conflict and *ultra vires* legislation that they now handle them with amazing dexterity. Still, they are serious, and such as a well-ordered government ought to avoid. The habit of putting into the Constitution matters proper for an ordinary statute has the further disadvantage that it heightens the difficulty of correcting a mistake or supplying an omission. The process of amending a constitution even in one specific point is a slow one, to which neither the legislature, as the proposing author-