vote at the polls takes place in obedience to a direction in that behalf contained in the Constitution, this is not strictly a Referendum, but a case of legislation by the people alone, as if the voters of the State were all gathered in one assembly.

Of these two methods the former needs no further illustration. Examples of the second, in both its forms, abound in the more recent Constitutions. So far back as 1843 we find Wisconsin referring it to the voters to decide whether or no banks shall be chartered.[1] Minnesota declares that a certain class of railway laws shall not take effect unless submitted to and ratified by a majority of the electors. And she provides, by a later amendment to her Constitution, that "the moneys belonging to the internal improvement land fund shall never be appropriated for any purpose till the enactment for that purpose shall have been approved by a majority of the electors of the State, voting at the annual general election following the passage of the

the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional authority alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism, his high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved" (*Constit. Limit.*, p. 141). He quotes from Locke (*Civil Government*, § 142) the remark that "The legislature neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." This is one of Locke's "bounds set to the legislative power of every commonwealth in every form of government"; but it has not precluded the British Parliament from delegating large, and in many cases truly legislative, powers to particular persons or authorities, such as the Crown in Council.

There has been much difference of opinion among American courts as to the extent to which a legislature may refer the operation of a general law to popular vote in a locality, but "the clear weight of authority is in support of legislation of the nature commonly known as local option laws." — Cooley, *ut supra*, p. 152; and see the cases collected in his notes.

[1] Constitution of 1843, Art. xi. § 5. — "The legislature may submit to the voters at any general election the question of 'Bank or no bank?' and if at any such election a number of votes equal to a majority of all the votes cast at such election on that subject shall be in favour of banks, then the legislature shall have power to grant bank charters, or to pass a general banking law, with such restrictions and under such regulations as they may deem expedient for the protection of the bill-holders: *Provided*, that no such grant or law shall have any force or effect until the same shall have been submitted to a vote of the electors of the State at some general election, and been approved by a majority of the votes cast on that subject at such election." Here the question is to come twice before the people. See also the Constitutions of Iowa, Michigan, Illinois, Kansas, Ohio, and Missouri. Kentucky by her constitution of 1891, § 60, provides that (with certain exceptions) "no law shall be enacted to take effect upon the approval of any other authority than the General Assembly."

Act."[1] In this last instance the referendum goes the length of constituting the voters the ultimate financial authority for the State, withdrawing from the legislature what might seem the oldest and most essential of its functions. So in not a few States no debts beyond a certain specified amount may be contracted except in pursuance of a vote of the people: and in others the rate of taxation is limited to a certain ratio to the total valuation of the State, subject to a power to increase the same by popular vote. And in California no law changing the seat of the State government is valid unless approved by the people.

It is not uncommon for proposals submitted by the legislature in the form of constitutional amendments to be rejected by the people. Thus in Indiana, Nebraska, Ohio, and Oregon, the legislature submitted amendments extending the suffrage to women, and the people in all four States refused the extension. In Colorado, where the Constitution of 1876 had provided for taking a special vote on the point, the legislature passed its woman franchise law, and laid it before the people in October 1877, when it was rejected by 14,000 votes to 7400. So West Virginia by her constitution of 1872, and South Dakota by hers of 1889, submitted proposals for proportional representation, which failed of acceptance.

The same principle of popular vote has been widely applied to local as well as to State government. Many recent Constitutions provide that the approval of the people at the polls shall be needed in order to validate a decision of the city, or county, or school district, or township authority regarding borrowing, or taxing, or lending public funds to some enterprise it may be desired to assist. Licensing questions are usually left to popular determination alone, with no interference by the local representative authority: while as respects municipal government, California has taken the novel course of allowing cities of more than 10,000 inhabitants to make their own charters, by the action of a drafting board of fifteen freeholders and a ratifying vote of the people, the State legislature having only a veto on the charter *en bloc*.[2]

[1] Amendments of 1871 and 1874 to the Constitution of 1857.

[2] Amendment of 1887 to the Constitution of California. Washington (Const. of 1889, Art. xi. § 12), adopting a similar provision, restricts it to cities with a population of 20,000 or over, but drops the requirement of approval by the State Legislature. See, for specimens of popular vote provisions for local areas, Appendix, note to Chapter XLIX.

What are the practical advantages of this plan of direct legislation by the people? Its demerits are obvious. Besides those I have already stated, it tends to lower the authority and sense of responsibility in the legislature; and it refers matters needing much elucidation by debate to the determination of those who cannot, on account of their numbers, meet together for discussion, and many of whom may have never thought about the matter. These considerations will to most Europeans appear decisive against it. The proper course, they will say, is to improve the legislatures. The less you trust them, the worse they will be. They may be ignorant; yet not so ignorant as the masses.

But the improvement of the legislatures is just what the Americans despair of, or, as they prefer to say, have not time to attend to. Hence they fall back on the direct popular vote as the best course available under the circumstances of the case, and in such a world as the present. They do not claim that it has any great educative effect on the people. But they remark with truth that the mass of the people are equal in intelligence and character to the average State legislator, and are exposed to fewer temptations. The legislator can be "got at," the people cannot. The personal interest of the individual legislator in passing a measure for chartering banks or spending the internal improvement fund may be greater than his interest as one of the community in preventing bad laws. It will be otherwise with the bulk of the citizens. The legislator may be subjected by the advocates of women's suffrage or liquor prohibition to a pressure irresistible by ordinary mortals; but the citizens are too numerous to be all wheedled or threatened. Hence they can and do reject proposals which the legislature has assented to. Nor should it be forgotten that in a country where law depends for its force on the consent of the governed, it is eminently desirable that law should not outrun popular sentiment, but have the whole weight of the people's deliverance behind it.[1]

[1] In the case of local option there is the further argument that to commit the question of licences to a local representative is virtually to make the election of that authority turn upon this single question, and that there is an advantage in making a restriction on the freedom of the individual issue directly from the vote of the people, who may feel themselves doubly bound to enforce what they have directly enacted.

A brilliant, though severe, critic of Canadian institutions[1] deplores the want of some similar arrangement in the several Provinces of the Dominion. Having remarked that the veto of the lieutenant-governor on the Acts of a Provincial legislature is in practice a nullity, and that the central government never vetoes such Acts except where they are held to exceed the constitutional competence of the legislature, he urges that what is needed to cure the faults of Provincial legislation is to borrow the American plan of submitting constitutional amendments (and, he might add, laws) to popular vote. "The people cannot be lobbied, wheedled, or bull-dozed; the people is not in fear of its re-election if it throws out something supported by the Irish, the Prohibitionist, the Catholic, or the Methodist vote."

If the practice of recasting or amending State Constitutions were to grow common, one of the advantages of direct legislation by the people would disappear, for the sense of permanence would be gone, and the same mutability which is now possible in ordinary statutes would become possible in the provisions of the fundamental law. But this fault of small democracies,[2] especially when ruled by primary assemblies, is unlikely to recur in large democracies, such as most States have now become, nor does it seem to be on the increase among them. Reference to the people, therefore, acts as a conservative force; that is to say, it is a conservative method as compared with action by the legislature.

In England, and indeed in most European countries, representative government has been hitherto an institution with markedly conservative elements, because the legislating representatives have generally belonged to the wealthy or well-born and educated classes, who, having something to lose by change, are disinclined to it, who have been looked up to by the masses, and who have been imperfectly responsive to popular impulses. American legislatures have none of these features. The men are not superior to the multitude, partly because the multitude

[1] Mr. Goldwin Smith.

[2] So frequent a charge against the Greek republics and the Italian republics of the middle ages, as Dante says, apostrophizing Florence—

"Ch' a mezzo Novembre,
Non giunge quel che tu d' Ottobre fili."

is tolerably educated and tolerably well off. The multitude does not defer to them. They are horribly afraid of it, and indeed of any noisy section in it. They live in the breath of its favour; they hasten to fulfil its behests almost before they are uttered. Accordingly an impulse or passion dominant among the citizens tells at once on the legislature, and finds expression in a law, the only check being, not the caution of that body and its willingness to debate at length, but the incapacity it often shows to embody in a practical form the wishes manifested by the people. Hence in the American States representative government has by no means that conservative quality which Europeans ascribe to it, whereas the direct vote of the people is the vote of men who are generally better instructed than the European masses, more experienced in politics, more sensible of their interest in the stability of the country. If, therefore, we regard the referendum in its effect upon the State legislature, we shall regard it as being rather a bit and bridle than a spur.

This method of legislation by means of a Constitution or amendments thereto, arising from sentiments and under conditions in many respects similar to those which have produced the referendum in Switzerland, is an interesting illustration of the tendency of institutions, like streams, to wear their channels deeper. A historical accident, so to speak, suggested to the Americans the subjection of their legislatures to a fundamental law, and the invention has been used for other purposes far more extensively than its creators foresaw. It is now, moreover, serviceable in a way which those who first used it did not contemplate, though they are well pleased with the result. It acts as a restraint not only on the vices and follies of legislators, but on the people themselves. Having solemnly bound themselves by their Constitution to certain rules and principles, the people come to respect those principles. They have parted with powers which they might be tempted in a moment of excitement, or under the pressure of suffering, to abuse through their too pliant representatives; and although they can resume these powers by enacting a new Constitution or amending the old one, the process of resumption requires time, and involves steps which secure care and deliberation, while allowing passion to cool, and the prospect of a natural relief

from economic evils to appear. It has been well observed by Dr. von Holst[1] that the completeness and consistency with which the principle of direct sovereignty of the whole people is carried out in America has checked revolutionary tendencies, by pointing out a peaceful and legal method for the effecting of political or economical changes, and has fostered that disposition to respect the decision of the majority which is essential to the success of popular governments.

State Constitutions, considered as laws drafted by a Convention and enacted by the people at large, are better both in form and substance than laws made by the legislature, because they are the work of abler, or at any rate of honester, men, acting under a special commission which imposes special responsibilities on them. The appointment of a Constitutional Convention excites general interest in a State. Its functions are weighty, far transcending those of the regular legislature. Hence some of the best men in the State desire a seat in it, and, in particular, eminent lawyers become candidates, knowing how much it will affect the law they practise. It is therefore a body superior in composition to either the Senate or the House of a State. Its proceedings are followed with closer attention; and it is exempt from the temptations with which the power of disposing of public funds bestrews the path of ordinary legislators; its debates are more instructive; its conclusions are more carefully weighed, because they cannot be readily reversed.[2] Or if the work of altering the constitution is carried out by a series of amendments, these are likely to be more fully considered by the legislature than ordinary statutes would be, and to be framed with more regard to clearness and precision.[3]

In the interval between the settlement by the convention of its draft constitution, or by the legislature of its draft amend-

[1] *Constitutional Law of the United States*, § 90.

[2] Where it is desired not to complicate the acceptance or rejection of a draft constitution with the enactment of some particular provision, that provision is separately submitted to the people; if they approve it, it is inserted in the constitution.

[3] There is much controversy in America as to whether the better method of reforming a constitution be to recast it by a convention or remove particular blemishes by a series of amendments. Probably the one plan or the other is to be preferred, according to the condition of public sentiment and the likelihood of securing a strong convention.

ments, and the putting of the matter to the vote of the people, there is copious discussion in the press and at public meetings, so that the citizens often go well prepared to the polls. An all-pervading press does the work which speeches did in the ancient republics, and the fact that constitutions and amendments so submitted are frequently rejected, shows that the people, whether they act wisely or not, do not at any rate surrender themselves blindly to the judgment of a convention, or obediently adopt the proposals of a legislature.

These merits are indeed not always claimable for conventions and their remodelled constitutions, much less for individual amendments. The Constitution of California of 1879 (whereof more in a later chapter) is a striking instance to the contrary; nor have the recent Conventions even of such old States as Mississippi and Kentucky shewn all the judgment that the problems before them required. But a general survey of this branch of our inquiry leads to the conclusion that the peoples of the several States, in the exercise of this their highest function, show little of that haste, that recklessness, that love of change for the sake of change, with which European theorists, both ancient and modern, have been wont to credit democracy; and that the method of direct legislation by the citizens, liable as it doubtless is to abuse, causes, in the present condition of the States, fewer evils than it prevents.

It would doubtless be better, if good legislatures were attainable, to leave the enactment of what are really mere statutes to the legislature, instead of putting them in a Constitution. But if good legislatures are unattainable, if it is impossible to raise the Senate and the House of each State above that low level at which (as we shall presently see) they now stand, then the system of direct popular action may be justified as a salutary effort of the forces which make for good government, opening for themselves a new channel.

CHAPTER XL

STATE GOVERNMENTS: THE LEGISLATURE

THE similarity of the frame of government in the forty-four republics which make up the United States, a similarity which appears the more remarkable when we remember that each of these republics is independent and self-determined as respects its frame of government, is due to the common source whence the governments flow. They are all copies, some immediate, some mediate, of ancient English institutions, viz. chartered self-governing corporations, which, under the influence of English habits, and with the precedent of the English parliamentary system before their eyes, developed into governments resembling that of England in the eighteenth century. Each of the thirteen colonies had up to 1776 been regulated by a charter from the British Crown, which, according to the best and oldest of all English traditions, allowed it the practical management of its own affairs. The charter contained a sort of skeleton constitution, which usage had clothed with nerves, muscles, and sinews, till it became a complete working system of free government. There was in each a governor, in two colonies chosen by the people,[1] in the rest nominated by the crown or the "proprietor"; there was a legislature; there were executive officers acting under the governor's commission and judges nominated by him; there were local self-governing communities. In none, however, did there exist what we call cabinet government, *i.e.* the rule of the legislature through a committee of its own members, coupled with the irresponsibility of the permanent nominal head of the executive. This separation of the execu-

[1] However, in Rhode Island the governor was chosen, not as now by the people at large, but by the Company assembled in general court, a body which passed into the legislature of the colony. See Charter of Rhode Island, 1663. In Connecticut the general court chose if the people failed to elect, or a sudden vacancy occurred.