Some one may remark that there are two material differences between the position of these State judges and that of the Federal judges. The latter are not appointed by a State, and are therefore in a more independent position when any question of conflict between State laws or Constitutions and the Federal Constitution or statutes comes before them. Moreover they hold office for life, whereas the State judge usually holds for a term of years, and has his re-election to think of. Can the State judge then be expected to show himself equally bold in declaring a State statute to be unconstitutional? Will he not offend the legislature, and the party managers who control it, by flying in their faces?

The answer is that although the judge may displease the legislature if he decides against the validity of an unconstitutional statute, he may displease the people if he decides for it; and it is safer to please the people than the legislature. The people at large may know little about the matter, but the legal profession know, and are sure to express their opinion. The profession look to the courts to save them and their clients from the heedlessness or improbity of the legislature, and will condemn a judge who fails in this duty. Accordingly, the judges seldom fail. They knock about State statutes most unceremoniously, and they seldom suffer for doing so. In one case only is their position a dangerous one. When the people, possessed by some strong desire or sentiment, have either by the provisions of a new Constitution, or by the force of clamour, driven the legislature to enact some measure meant to cure a pressing ill, they may turn angrily upon the judge who holds that measure to have been unconstitutional. This has several times happened, and is always liable to happen where elective judges hold office for short terms, with the unfortunate result of weakening the fortitude of the judges. In 1786 the supreme

through the carelessness of a clerk, neglected to "spread the Amendment, in full on its journal," as prescribed by the Constitution. The point being brought before the Supreme Court of Iowa, it was held that the Amendment, owing to this informality, had not been duly passed, and was wholly void.

"An illustration of the range which the action of courts may take in enforcing Constitutional safeguards was recently given by the Supreme Court of Wisconsin, when it held invalid a re-districting of the State (for elections to the State legislature), as being inconsistent with the provision of the Constitution that districts should be reasonably equal. Such checks on gerrymandering are necessary, and it is only thus that they can be made effective."

court of Rhode Island decided that an Act passed by the legislature was invalid, because contravening the provisions of the Colonial Charter (which was then still the Constitution of the State), securing to every accused person the benefit of trial by jury.[1] The legislature were furious, and summoned the judges to appear before them and explain the grounds of their decision. The attempt to dismiss them failed, but the judges were not re-elected by the legislature when their term of office expired at the end of the year. In Ohio, the legislature passed in 1805 an Act which Judge Pease, in a case arising under it, held to be repugnant to the Constitution of Ohio, as well as to the Federal Constitution, and accordingly declined to enforce. In 1808, he and another judge of the supreme court of the State who had concurred with him, were impeached by the House before the Senate of Ohio, but were acquitted. In 1823, the Supreme Court of Kentucky held invalid a Debtors' Relief act passed by the legislature on the ground that it violated the obligation of contracts clause of the Federal Constitution by making paper issued by a State bank legal tender. The judges were impeached, but a two-thirds majority for conviction could not be obtained, so the angry legislature extinguished the court itself and created a new court of Appeals, to which the governor appointed new men as judges. The old court, however, held its ground, insisting that the new court was unconstitutional, and after a passionate struggle, a new legislature repealed in 1825 the act creating the new court. So justice and reason prevailed. In 1871, the legislature of Illinois passed a law, intending to carry out a provision of the Constitution of 1870, which was held unconstitutional by Judge Lawrence, greatly to the disappointment of the farmers, who had expected valuable results from it. He was not impeached, but when shortly afterwards he sought re-election, he was defeated solely on the ground of this deci-

[1] See p. 244, *ante*. The Act was one for forcing State paper money into circulation by imposing a penalty, recoverable on summary conviction without a jury, on whoever should refuse to receive on the same terms as specie the bills of a State-chartered bank. No question of the United States Constitution could arise, because it did not yet exist. To these Rhode Island judges belongs the credit not only of having resisted an excited multitude, but of having set one of the first examples in American history of the exercise of a salutary function. Their decision was that they had no jurisdiction.

sion.[1] These instances show that the courts have had to fight for their freedom in the discharge of the duty which the Constitutions throw on them. But the paucity of such conflicts shows that this freedom is now generally recognized, and may be deemed, at least for the present, to be placed above the storms of popular passion.[2]

It will be seen from what has been said that the judges are an essential part of the machinery of State government. But they are so simply as judges, and not as invested with political powers or duties. They have not received, any more than the Federal judges, a special commission to restrain the legislature or pronounce on the validity of its acts. There is not a word in the State Constitutions, any more than in the Federal Constitutions, conferring any such right upon the courts, or indeed conferring any other right than all courts of law must necessarily enjoy. When they declare a statute unconstitutional they do so merely in their ordinary function of expounding the law of the State, its fundamental law as well as its laws of inferior authority, just as an English judge might hold an order made by the Queen in Council to be invalid, because in excess of the powers granted by the Act of Parliament under which it was made. It would be as clearly the duty of an English county court judge so to hold as of the highest court of appeal. So it is the duty of the humblest American State judge to decide on the constitutionality of a statute.

[1] I quote from Mr. Hadley's book on railroad transportation (through Dr. Hitchcock's essay already referred to) the following account of the circumstances: — "The Constitutional Convention of Illinois in 1870 made an important declaration concerning State control of railway rates, on the basis of which a law was passed in 1871 establishing a system of maxima. This law was pronounced unconstitutional by Judge Lawrence. The result was that he immediately afterwards failed of re-election, solely on this ground. The defeat of Judge Lawrence showed the true significance of the farmers' movement [the so-called Granger movement]. They were concerned in securing what they felt to be their rights, and were unwilling that any constitutional barrier should be made to defeat the popular will. They had reached the point where they regarded many of the forms of law as mere technicalities. They were dangerously near the point where revolutions begin. But they did not pass the point. The law of 1873 avoided the issue raised by Judge Lawrence against that of 1871. Instead of directly fixing maxima, it provided that rates must be reasonable, and then provided for a commission to fix reasonable rates." The courage of Judge Lawrence was not therefore thrown away; it cost him his place, but it served the people and vindicated the law.

In 1890, the executive committee of the Minnesota Farmers' Alliance in passing resolutions demanding the abolition of the Federal Supreme Court, which had recently held that the State legislature had no power to fix railroad freight rates, relieved their feelings by saying, "We call attention to the fact that the citizens of England, from whom we have largely derived our form of government, would not permit for one instant a bench of judges to nullify an Act of Parliament. There the people are properly omnipotent. . . . In our anxiety to protect the rights of property we have created a machine that threatens to destroy the rights of man."

[2] There have of course been other instances in which judges have been impeached or removed; but I am here dealing only with those in which the ground of complaint was the declaring a legislative act to be invalid.

So far we have been considering restrictions imposed on the competence of the legislature, or on the methods of its procedure. We now come to the fourth and last of the checks which the prudence of American States imposes. It is a very simple, not to say naïve, one. It consists in limiting the time during which the legislature may sit. Formerly these bodies sat, like the English Parliament, so long as they had business to do. The business seldom took long. When it was done, the farmers and lawyers naturally wished to go home, and home they went. But when the class of professional politicians grew up, these wholesome tendencies lost their power over a section of the members. Politics was their business, and they had none other to call them back to the domestic hearth.[1] They had even a motive for prolonging the session, because they prolonged their legislative salary, which was usually paid by the day. Thus it became the interest of the tax-payer to shorten the session. His interest, however, was still stronger in cutting short the jobs and improvident bestowal of moneys and franchises on which he found his representatives employed. Accordingly most States have fixed a number of days beyond which the legislature may not sit. Many of these fix it absolutely; but a few prefer the method of cutting off the pay of their legislators after the prescribed number of days has expired, so that if they do continue to devote themselves still longer to the work of law-making, their virtue shall be its own reward.[2] Experience has, however, dis-

[1] The English Parliament found the tendency of members to slip away so strong that in the sixteenth century it enacted "that no knight of the shire or burgess do depart before the end of Parliament," and inflicted on the member leaving without the permission of Mr. Speaker, the penalty of losing "all those sums of money which he should or ought to have had for his wages."

[2] Thus the Constitution of Oregon, for instance, gives its members $2 a day, but provides that they shall never receive more than $120 in all, thus practi-

closed a danger in these absolutely limited sessions. It is that of haste and recklessness in rushing bills through without due discussion. Sometimes it happens that a bill introduced in response to a vehement popular demand is carried with a run (so to speak), because the time for considering it cannot be extended, whereas longer consideration would have disclosed its dangers. An ill-framed railway bill was thus lately lost in the Iowa legislature because full discussion (there being no time-limit) brought out its weak points. Hence some States have largely extended their sessions. Thus California has recently lengthened the days during which her legislators may receive pay from 60 to 100; and Colorado in 1885 extended the maximum of her session from 40 to 90 days, also raising legislative pay from $4 to $7 per diem.

Many recent Constitutions have tried another and probably a better expedient. They have made sessions less frequent. At one time every legislature met once a year. Now in all the States but five it is permitted to meet only once in two years.[1] Within the last fourteen years, at least seven States have changed their annual sessions to biennial. It does not appear that the interests of the commonwealths suffer by this suspension of the action of their chief organ of government.[2] On the contrary, they get on so much better without a legislature that certain bold spirits ask whether the principle ought not to be pushed farther. As Mr. Butler says —

"For a people claiming pre-eminence in the sphere of popular government, it seems hardly creditable that in their seeming despair of a cure for the chronic evils of legislation, they should be able to mitigate them only by making them intermittent. Under the biennial system the relief enjoyed in what are called the 'off-years' seems to have reconciled the body politic of the several States which have adopted it to the risk of an aggravation of the malady when the legislative year comes round and the old symptoms recur.

"The secretaries of State (of the several States) with whom I have communicated concur in certifying that no public inconvenience is caused by the biennial system; and one of them, of the State of Nebraska, in answer to my query if biennial sessions occasion any public inconvenience, writes 'None whatever. The public interests would be better subserved by having legislative sessions held only once in four years.'"

cally limiting the session to forty days. Texas is a little more liberal, for her Constitution is content to reduce the pay after sixty days from $5 to $3 per day, at which reduced rate members may apparently go on as long as they please. All the States which fix a limit of time are Southern or Western, except Pennsylvania and Maryland, whose legislatures certainly need every check that can be applied. The forty days' session of Georgia may be extended by a two-thirds vote of an absolute majority of each House.

[1] But sometimes the legislature by adjourning gives itself a second session.

[2] The members, however, being usually new to the work, are rawer and positively more dangerous when their term includes only one session than they are in a second session where there are two.

The Americans seem to reason thus: "Since a legislature is very far gone from righteousness, and of its own nature inclined to do evil, the less chance it has of doing evil the better. If it meets, it will pass bad laws. Let us therefore prevent it from meeting."

They are no doubt right as practical men. They are consistent, as sons of the Puritans, in their application of the doctrine of original sin. But this is a rather pitiful result for self-governing democracy to have arrived at.

"Is there not," some one may ask, "a simpler remedy? Why all these efforts to deal with the various symptoms of the malady, instead of striking at the root of the malady itself? Why not reform the legislatures by inducing good men to enter them, and keeping a more constantly vigilant public opinion fixed upon them?"

The answer to this very pertinent question will be found in the chapters of Part III. which follow. I will only so far anticipate what is there stated as to observe that the better citizens have found it so difficult and troublesome to reform the legislatures that they have concluded to be content with curing such and so many symptoms as they can find medicines for, and waiting to see in what new direction the virus will work. "After all," they say, "the disease, though it is painful and vexing, does not endanger the life of the patient, does not even diminish his strength. The worst that the legislatures can do is to waste some money, and try some foolish experiments from which the good sense of the people will presently withdraw. Every one has his crosses to bear, and ours are comparatively light." All which is true enough, but ignores two important features in the situation, one, that the constitutional organs of government become constantly more discredited, the other that the tremendous influence exerted

by wealth and the misuse of public rights permitted to capitalists, and especially to companies, have created among the masses of the people ideas which may break out in demands for legislation of a new and dangerous kind.

The survey of the State governments which we have now completed suggests several reflections.

One of these is that the political importance of the States is no longer what it was in the early days of the Republic. Although the States have grown enormously in wealth and population, they have declined relatively to the central government. The excellence of State laws and the merits of a State administration make less difference to the inhabitants than formerly, because the hand of the National government is more frequently felt. The questions which the State deals with, largely as they influence the welfare of the citizen, do not touch his imagination like those which Congress handles, because the latter determine the relations of the Republic to the rest of the world, and affect all the area that lies between the two oceans. The State set out as an isolated and self-sufficing commonwealth. It is now merely a part of a far grander whole, which seems to be slowly absorbing its functions and stunting its growth, as the great tree stunts the shrubs over which its spreading boughs have begun to cast their shade.

I do not mean to say that the people have ceased to care for their States; far from it. They are proud of their States, even where there may be little to be proud of. That passionate love of competition which possesses English-speaking men, makes them eager that their State should surpass the neighbouring States in the number of the clocks it makes, the hogs it kills, the pumpkins it rears, that their particular star should shine at least as brightly as the other forty-three in the national flag. But if these commonwealths meant to their citizens what they did in the days of the Revolution, if they commanded an equal measure of their loyalty, and influenced as largely their individual welfare, the State legislatures would not be left to professionals or third-rate men. The truth is that the State has shrivelled up. It retains its old legal powers over the citizens, its old legal rights as against the central government. But it does not interest its citizens

as it once did. Men do not now say, like Ames in 1782, that their State is their country.[1] And as the central government overshadows it in one direction, so the great cities have encroached upon it in another. The population of a single city is sometimes a fourth or a fifth part of the whole population of the State; and city questions interest this population more than State questions do; city officials have begun to rival or even to dwarf State officials.

Observe, however, that while the growth of the Union has relatively dwarfed the State, the absolute increase of the State in population has changed the character of the State itself. In 1790 seven of the thirteen original States had each of them less than 300,000, only one more than 500,000 inhabitants. Now twenty-seven have more than 1,000,000 each, and nine of these more than 2,000,000. We must expect to find that, in spite of railroads and telegraphs, the individual citizens will know less of one another, will have less personal acquaintance with their leading men, and less personal interest in the affairs of the community than in the old days when the State was no more populous than an English county like Bedford or Somerset. Thus the special advantages of local government have to a large extent vanished from the American States of to-day. They are local bodies in the sense of having no great imperial interests to fire men's minds. They are not local in the sense of giving their members a familiar knowledge and a lively interest in the management of their affairs. Hamilton may have been right in thinking that the large States ought to be subdivided.[2] At any rate it is to this want of direct local interest

[1] So even in 1811, Josiah Quincy said in Congress: "Sir, I confess it, the first public love of my heart is the Commonwealth of Massachusetts. There is my fireside: there are the tombs of my ancestors."

[2] It is, however, also argued that there are some large States in which the mischievous action of the multitude of a great city is held in check by the steadier rural voters. If such States had been subdivided, the subdivision which happened to contain the great city would lie at the mercy of this multitude. The question has not taken practical shape, for no State has yet asked to be divided, though there is at present a movement to divide Kansas into two States by a N. and S. line.

Texas is the only State which possesses (under the statute admitting her) a right to divide herself into several States without obtaining permission from Congress.

Hamilton's reason seems to have been a fear that the States would be too strong for the National government.

on the part of the people, that some of the faults of their legislatures may be ascribed.

The chief lesson which a study of the more vicious among the State legislatures teaches, is that power does not necessarily bring responsibility in its train. I should be ashamed to write down so bald a platitude, were it not one of those platitudes which are constantly forgotten or ignored. People who know well enough that, in private life, wealth or rank or any other kind of power is as likely to mar a man as to make him, to lower as to raise his sense of duty, have nevertheless contracted the habit of talking as if human nature changed when it entered public life, as if the mere possession of public functions, whether of voting or of legislating, tended of itself to secure their proper exercise. We know that power does not purify men in despotic governments, but we talk as if it did so in free governments. Every one would of course admit, if the point were put flatly to him, that power alone is not enough, but that there must be added to power, in the case of the voter, a direct interest in the choice of good men, in the case of the legislator, responsibility to the voters, in the case of both, a measure of enlightenment and honour. What the legislatures of the worst States show is not merely the need for the existence of a sound public opinion, for such a public opinion exists, but the need for methods by which it can be brought into efficient action upon representatives, who, if they are left to themselves, and are not individually persons with a sense of honour and a character to lose, will be at least as bad in public life as they could be in private. The greatness of the scale on which they act, and of the material interests they control, will do little to inspire them. New York and Pennsylvania are by far the largest and wealthiest States in the Union. Their legislatures are confessedly among the worst.

CHAPTER XLVI

STATE POLITICS

In the last preceding chapters I have attempted to describe first the structure of the machinery of State governments, and then this machinery in motion as well as at rest, — that is to say, the actual working of the various departments in their relations to one another. We may now ask, What is the motive power which sets and keeps these wheels and pistons going? What is the steam that drives the machine?

The steam is supplied by the political parties. In speaking of the parties I must, to some slight extent, anticipate what will be more fully explained in Part III.: but it seems worth while to incur this inconvenience for the sake of bringing together all that refers specially to the States, and of completing the picture of their political life.[1]

The States evidently present some singular conditions for the development of a party system. They are self-governing communities with large legislative and administrative powers, existing inside a much greater community of which they are for many purposes independent. They must have parties, and this community, the Federal Union, has also parties. What is the relation of the one set of parties to the other?

There are three kinds of relations possible, viz. —

Each State might have a party of its own, entirely unconnected with the national parties, but created by State issues — *i.e.* advocating or opposing measures which fall within the exclusive competence of the State.

Each State might have parties which, while based upon State issues, were influenced by the national parties, and in some sort of affiliation with the latter.

[1] Many readers may find it better to skip this chapter until they have read those which follow (Chapters LIII.–LVI.) upon the history, tenets, and present condition of the great national parties.