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RESPONSIBILITY OF
AMERICAN BAR

WILLIAM W. COOK



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POWER AND
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AMERICAN BAR

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**POWER AND
RESPONSIBILITY OF
AMERICAN BAR**

**RELATIONS TO DEMOCRATIC INSTITUTIONS AS SHOWN IN
THE GREAT PART IT PLAYS IN THE EVERYDAY WORK OF
GOVERNMENT, IN ITS CONTRIBUTION TO THE FORMATION
OF OUR CONSTITUTIONAL SYSTEM, AND ITS CONTINUED
AND NECESSARY SERVICE IN MAKING THAT SYSTEM
WORK IN ACTUAL PRACTICE**

THE American government has been and essentially is a government by lawyers. Of the 28 Presidents 23 have been lawyers; of the 46 Secretaries of State 44 have been lawyers; all of the Attorneys General; all of the judges of the federal courts; of the 56 Signers of the Declaration of Independence 25 were lawyers; and of the 55 framers of the Federal Constitution 31 were lawyers.¹ In the present Congress over two-thirds of the Senators are lawyers (69 out of 96) and over half of the Representatives (276 out of 435). In 1920 there were but 122,519 lawyers,² judges, and justices in this country of over one hundred and five millions of people. Never before in the history of the world has so great and intelligent a nation been governed by so small a body of men.

This power of the legal profession in America is hardly realized by the profession itself. And that power is increasing year by year. The reason for this power is (1) knowledge of government and laws and judicial decisions, past and present; (2) trained faculties and discipline of mind; (3) facility of expression and power of debate; (4) fertility of resource in matters of public policy; (5) a spirit of compromise in a

time of deadlock; (6) sympathy with democratic institutions leading to the lawyers being trusted by the public; (7) the real lawyer doesn't abuse his mind by arguing sophistry.³

De Tocqueville in his celebrated work, "Democracy in America," said:⁴ "The government of democracy is favourable to the political power of lawyers; for when the wealthy, the noble, and the prince, are excluded from the government, they are sure to occupy the highest stations in their own right, as it were, since they are the only men of information and sagacity, beyond the sphere of the people, who can be the object of the popular choice. . . . The people in democratic states do not mistrust the members of the legal profession, because it is well known that they are interested in serving the popular cause; and it listens to them without irritation, because it does not attribute to them any sinister designs."

It is fortunate that in the early history of the English Bar the grave danger that the lawyers would form a separate estate, like the nobility, the knights and the hierarchy of the Church, passed by.⁵

And yet the legal profession has been at times very unpopular, and even at the present time, while respected and trusted, is not particularly popular. Why is this?

II

The unpopularity of lawyers has often been due to temporary causes. In the early Colonial times and until the middle of the eighteenth century, as pointed out by Mr. Warren,⁶ the lawyers occupied a very inferior position, because the Colonies looked upon them as representing the common law which had been feudal and tyrannical, and because they considered the lawyers as instruments of its subtleties and iniquities, and because the clergy in New England, the merchants and landowners in New York, and the planters in Virginia and Maryland, looked with suspicion on the growing power of the lawyers as a class and because the Royal Governors overruled all law, and because the judges were laymen, too ignorant to sustain a professional bar.⁷ Then came the Revolution by which time some lawyer was the leading man in every important town in the Colonies.⁸ After the Revolution the times were so hard and the collection of debts (including imprisonment for debt under the laws of those days), and the foreclosing of mortgages and enforcement of claims generally, bore so heavily on all classes that the lawyers, who seemed to be the only class that thrived, became more unpopular than ever.⁹

In Europe the legal profession has not been popular with kings. As long ago as 1332 Edward III, in

issuing writs for the return of members of Parliament, ordered that no lawyers be returned.¹⁰ In 1404 Henry IV did the same and his Parliament was called the "Dunce's Parliament." It appears that Henry was in great need of money and feared that the lawyers "would oppose his excessive demands and hinder his illegal purposes," as Whitelock quaintly expressed it.¹¹ Mr. Warren points out that three centuries later the Colonies of Massachusetts and Rhode Island enacted a similar prohibition as to their legislatures.¹²

Early in the seventeenth century when Coke was chief justice a case arose where counsel disputed the existence of any prerogative in the King to make a particular grant. The King (James I) sent for the judges and objected, and, as Hallam describes it, "observed that the judges ought to check those advocates who presume to argue against his prerogative; that the popular lawyers had been the men, ever since his accession, who had trodden in all parliaments upon it, though the law could never be respected if the King were not revered."¹³ When the House of Commons in 1610 remonstrated to James I against some of his proclamations, the King demanded of Coke an opinion as to what answer a King should make to this remonstrance and Coke replied "that the king cannot change any part of the common law, nor create any offence

by his proclamation which was not an offence before, without parliament."¹⁴ Again, when James I demanded of the Judges that in any particular case they should not render judgment until they had consulted with him if he desired, "Coke only answered that, when the case should arise, he would do what should be fit for a judge to do."¹⁵ Later, when sixty-nine years of age, the old man was thrown into prison by the King, because, as a member of Parliament and constitutional lawyer, he insisted on freedom of parliamentary discussion and liberty of speech. Hallam says that in the time of James II "It was agreed among lawyers that the king could not dispense with the common law, nor with any statute prohibiting that which was *malum in se*, nor with any right or interest of a private person or corporation."¹⁶ Turning to Russia, Peter the Great, when in London, was surprised at the great number of lawyers in Westminster Hall and said that he had but two lawyers in all his dominions and that he intended to hang one of them as soon as he got back.¹⁷ Russia today is paying the penalty.

And there is another class, namely, the literary class which rarely has a good word for the lawyers. In all Shakespeare there is but one popular lawyer, Portia, a woman, in what is probably the most dramatic scene

in all literature, though based on law that was not law. And even Hamlet, the melancholy Dane, makes sport of a dead lawyer's skull. In "Henry VI" one of Jack Cade's rabble shouted, "The first thing we do, let's kill all the lawyers," and Jack Cade replied, "Nay, that I mean to do." Warren, a lawyer himself, in his "Ten Thousand a Year," depicts the villainy of the law firm of "Quirk, Gammon & Snap."¹⁸ Dickens in "David Copperfield" puts upon the legal profession the infamous Uriah Heep, and in the same novel has the old probate lawyer explain to the young lawyer the "pretty pickings" in fees in that court, with the remark that if that court was touched, "down comes the country." In "Pickwick Papers" he introduces Serjeant Buzfuz and the inimitable Sam Weller, who as a witness unexpectedly brought out the "honorable conduct" of the opposite solicitors in taking the case "on spec, and to charge nothin' at all for costs" unless collected from the defendant, Pickwick. In the "Tale of Two Cities," Sydney Carton, the drunkard, is "jackal" to Stryver, the braggart. O. Henry refers to lawyers as "legal corsairs." Even our beloved Washington Irving in his Knickerbocker's History¹⁹ refers to the better lawyers as "the knights-errant of modern days, who go about redressing wrongs and defending the defenceless, not for the love of filthy lucre, nor the

selfish cravings of renown, but merely for the pleasure of doing good," and then having paid his compliments to the "pettifoggers," he refers to himself as "having been nearly ruined by a law suit which was decided against me; and my ruin having been completed by another, which was decided in my favor."

The fact is the man of literature does not like the man of law. The former is shy, sensitive, imaginative and non-combative. The latter is bold, aggressive, disputatious and with his feet on the ground all the time. The former sometimes has need of the latter; the latter never has need of the former. Moreover, the bad lawyer makes a picturesque, intellectual villain, while a good lawyer has little of the Bowery dramatic in his career and can only play the role of ponderous perspicuity. Nevertheless, the fact that flings at lawyers are more popular in closet literature than on the stage indicates that the great public instinctively knows whom it may trust.

Yet even now there is a prejudice against lawyers. William Allen Butler said that this is due to the fact that there are bad men in every calling, and probably more in the legal profession than in the other learned professions, there being greater opportunities for mis-doing, and that the worst specimens are generally ac-

cepted as types of the profession. And then Mr. Butler strikes a higher note when he says,

The Law is the most positive of sciences, and the most vigorous of human forces. In its practical application to the affairs of men, it is perpetually compelling an unwilling submission to its demands. It makes men give up property which they want to keep, to pay debts which they prefer to owe or to avoid, and to perform obligations which they seek to break. It is perpetually dealing its blows and driving its bolts in the attack or support of some interest of person, of property, or public or social order. Those who practice it as a profession are necessarily placed in an attitude of perpetual antagonism to members or classes of the community, to individuals or bodies of men. It must, therefore, needs be that offences come; and the profession as a class has often to assume the defensive against criticism and attack, and to reassert the principles by which its action is guided and governed.²¹

Lawsuits are troublesome, expensive and generally not profitable. Often they rankle by reason of caustic remarks by the attorneys. It is much the same as though alongside a doctor administering relief there sat another doctor recounting the sins of commission and omission of the patient. Moreover, the legal profession is under constant public observation. Its doings are talked about by the public and commented on by the press. Lawyers are held responsible for the acts of corporations and properly so because the corporations act under legal advice. The professional ethics of the one generally correspond with the business ethics of the other; if one is bad, both are bad; if

one is good, both are good; otherwise lawyer and client separate after a few years. In other words, in the long run the lawyer can be judged by his clients; the clients by their lawyer.

III

Why then is the legal profession respected and trusted by the public? Because as Senator Hoar put it, "The lawyer is the chief defence, security and preserver of free institutions and of public liberty."²² This is true of the English bar as well as the American bar. In England constitutional history has been a struggle to prevent and curb despotic power of the Crown. The barons (including the higher nobility) in 1215 at Runnymede forced King John to agree to Magna Charta. That great document was to protect the barons against the usurpations of the Crown. The plain people were ignored. About three hundred years thereafter the plain people asserted themselves through the House of Commons and claimed the same rights as against the Crown. When the Crown resisted they cut off the head of Charles I in 1649, and drove out James II in 1688, and ended the despotic dream of George III, when he lost the American Colonies—a terrible price, but the result was worth it.

The English bar during those centuries was on the

whole aiding this struggle against the Crown. As early as 1556 in the reign of Mary, the judges in passing on one of her proclamations said that "no proclamation can make a new law, but only confirm and ratify an ancient one."²² A few years later, in 1602, when Queen Elizabeth granted a monopoly in the making of cards, the court held the grant void.²⁴

But while the English bar developed constitutional law in England by helping to resist royal usurpations, it has never questioned the power of Parliament itself and could not. It is difficult for the modern American mind to grasp fully the fact that Parliament is omnipotent and that no court can question the constitutionality of its enactments. In an American sense, the Constitution of England is found only in the character of the English people, who flame up from one end of the Kingdom to the other, when Parliament goes wrong.²⁵

Turning to the American bar, two principles of constitutional law of transcendent importance appear for the first time in history, one of which that bar established and the other it rendered workable. Each of them has preserved the American Union. One is the power of the courts to declare void a statute of a state or of Congress itself and even acts of the Executive Department. The other is in defining the misty

boundary line between the sovereign powers of the federal government and the sovereign powers of the States.

IV

The greatest and most original achievement was the establishment of the supremacy of the judiciary. Nowhere else in all history had this experiment in government been tried.²⁶ Lord Brougham said of it, "The power of the Judiciary to prevent either the State Legislatures or Congress from overstepping the limits of the Constitution, is the very greatest refinement in social policy to which any state of circumstances has ever given rise, or to which any age has ever given birth."²⁷ That is why the Supreme Court of the United States is the greatest court that ever existed. Union labor today denounces the courts for their labor decisions.²⁸ Forty years ago the farmers' granges did the same, because confiscatory railroad rate reductions were declared illegal. Twenty years ago capital and the railroads thought they could do as they pleased, but Congress and the courts took a strangle hold that nearly killed. Labor will learn, as capital and the granges learned, that no class will be allowed to dominate this country. None are above the law. The Supreme Court, supreme in its intelligence,

fearlessness and impartiality, adjudicates subjects of the highest human interest and its power extends from the Philippines to Porto Rico, besides over continental United States. It summons imperial States to its bar and it says to Congress and the Executive, "Thus far shalt thou go and no farther." It listens patiently to high and low, and its decisions conscientiously considered and learnedly expressed, have the absolute confidence of the people." It is the guardian of the liberties of the people.

Pinkney well said of that court, "Its position is upon the outer wall. . . . It forms the point at which our different systems of government meet in collision, when collision unhappily exists. . . . They [the judges] are, if I may so call them, the great arbitrators between contending sovereignties."⁸⁰ That was said about a hundred years ago and is even more true now than then. That court is the keystone of the arch; without it the structure would fall into ruins. It is the greatest court that ever existed; never before has a court been called upon to reconcile a division of sovereign powers; never before has a court had power to annul the statutes of forty-eight sovereign states and of a federal government.

Let us turn to some of the decisions of that court, illustrating the above statements. *Marbury v. Madi-*

son,³¹ decided in 1803, held that the Supreme Court might declare unconstitutional and void an *Act of Congress*. Prior to that time several of the State Supreme Courts had held to the same effect as to state statutes,³² yet *Marbury v. Madison* stands out as a great and new landmark in constitutional law, not only on account of the reasoning of Chief Justice Marshall, but also on account of its being the pronouncement of the Supreme Court of the United States, and hence binding on every State and every citizen of every State, as well as on Congress itself.³³ In 1810 the Supreme Court held that it had jurisdiction to declare void a *statute of a state* which violated the Constitution of the United States.³⁴ In 1816 the Supreme Court established its power to review the *judgment of a State Court* which violated a provision of the Constitution of the United States.³⁵

These momentous decisions were not without peril. They aroused a terrific storm on the part of the dominant Jeffersonian party. Chief Justice Marshall was in imminent danger of impeachment by Congress, both branches being hostile. All this passed by, and the verdict of history is that while Marshall was not a profound student of general law, yet he was a master of the American Constitution and was almost inspired in his determination to construe the Constitution so as

to preserve the Union. This, with his wonderful power of judicial reasoning and simplicity of statement, has made him an historical figure, whose reputation grows with the years.⁸⁶

Nor does the Executive Department escape from the control of *Marbury v. Madison*. In fact, that proceeding was against the Secretary of State. As early as 1804⁸⁷ the Supreme Court held that a government officer seizing property illegally, even under the order of the President by authority of Act of Congress, is liable in damages. Chief Justice Marshall in rendering the opinion of the court said that he was first inclined to think that suit would not lie, but finally agreed with his brethren that the President's instructions could not legalize an act which otherwise was illegal. Nearly eighty years passed when in 1882 the same question arose again clearly in *United States v. Lee*,⁸⁸ where ejection was held to lie against government officers acting under the direction of the Executive Department and claiming that their possession of the land in question was the possession of the United States. The Supreme Court held that the Executive branch of the government is not immune from judicial inquiry where it does not possess the power which it claims.⁸⁹

This brings us to the second great contribution of the American bar, namely, the establishment of a new form of constitutional government.

V

A new form of federal government was established by the Constitution of the United States and it remained for the legal profession to make that form feasible and workable in actual practice. For over one hundred and thirty years the bar and bench have been working out that proposition and even now their work is not completed and new questions are arising continually which test the learning and resources of both bench and bar. That new idea and form of constitutional government was, and is, that sovereign powers pertaining to government may be, and in the American republic have been, divided between the federal government and the States. That was an experiment in government and so far has proved successful in the United States, although it took four years of civil war to establish it. That war succeeded because the armies of the North marched to battle with a crusader's faith that they were right—a right demonstrated by Webster in his argument with Hayne.

This American federal idea differs from the federal idea in Europe.

Greece gave to the world the idea of a free, independent city, ruled by its own people. That was a priceless gift. But Greek cities never could combine into a permanent federal union and so they perished by the arms of Philip of Macedon at Chaeroneia in 338 B. C. Grote points out as to the Greeks "that in respect to political sovereignty, complete disunion was among their most cherished principles. The only source of supreme authority to which a Greek felt respect and attachment, was to be sought within the walls of his own city. Political disunion—sovereign authority within the city walls—thus formed a settled maxim in the Greek mind."⁴⁰

Rome originated the idea of a federal government, but Rome went only part way. The Roman republic conquered many nations and, in fact, practically all the conquests were by the republic and not by the later Roman Empire.⁴¹ Rome gave to the conquered nations Roman laws and the protection of Roman arms, and in return collected tribute. Rome originated and adopted the fixed policy of allowing its subject nations to continue their own religion and laws, except so far as they conflicted with Roman policy. Rome always retained the power, however, of changing the laws of the subject nations and herein it fell short of a complete federal idea. The result was that in the

conflict of factions in Rome itself, the Roman Governors (pro-consuls) of the subject nations were almost independent and waged wars on their own account, and levied taxes and kept the proceeds, subject to the risk of impeachment at Rome if they went too far. There was chaos, and if the Cæsars had not succeeded, the civilized world would probably have crumbled to pieces and civilization itself been put back for centuries. The Roman federal idea lacked the self-preserving and self-recuperating element of local self-government, free from control of the central government, and nothing but despotic power held the Empire together for five hundred years after the termination of the republic.

England at first adopted the Roman federal idea and its faults. English colonies and conquered countries were administered for profit by the control of their exports, imports and manufacturies, and that led to the loss of the American colonies, and would have led to the loss of Canada if that policy had not been changed in 1840. Since then, England has *practically* adopted the full federal idea of local self-government, free from the interference of Parliament.

The United States in its federal Constitution of 1787 carried the federal idea to its logical conclusion

by boldly dividing sovereign powers between the federal government and the States. Single sovereignty became a dual sovereignty. At once a clash arose. In the case of *Chisholm v. Georgia* in 1793⁴³ the Supreme Court held that a state could be sued in the Federal Supreme Court by a citizen of another state, as allowed by the Constitution of the United States. This proposition had been vigorously denied by Georgia. The court upheld the Constitution and sustained the suit. Judge Cooley says that that decision "first of all laid down the doctrine which reconciled constitutional State sovereignty with national supremacy and permanent union."⁴⁴ He points out that Georgia claimed it was "inconsistent with the very nature of sovereignty that a tribunal created as a convenience in government should exercise a superior and controlling power over the sovereign itself."⁴⁴ And Judge Cooley further says, "The deduction was irresistible: the sovereignty of the nation was in the people of the nation, and the residuary sovereignty of each State in the people of each State."⁴⁵

On the other hand, the Supreme Court tolerates no interference by Congress with clear State Rights. The "Civil Rights Act"⁴⁶ and the Child Labor Law⁴⁷ of Congress were declared unconstitutional and void for that reason.

In this division of sovereign powers, between the federal government and the States, the powers given to the federal government are explicitly stated in the Constitution, all other sovereign powers being left with the States.⁴⁸ Judge Cooley points out that in this division of sovereign powers those which belong to the states are greater than those which are given to the federal government.⁴⁹

Not only are the sovereign powers, which constituted the old-time state, divided in America between the federal government and the States, but in some instances a single power is divided, as, for instance, the power of taxation and the power over commerce.

In taxation neither the federal government, nor the States can tax each other, nor their governmental agencies,⁵⁰ nor each other's issues of bonds,⁵¹ nor the income therefrom.⁵²

In the division of the sovereign power over commerce between the federal government and the States, the federal government is given power over interstate and international commerce, while the States retain power over intrastate commerce. Books have been written on this subject alone, and the subject has tested the resources of the bar and bench for over a hundred years. The decisions of the Supreme Court

on that subject demonstrate in themselves that without the bar and bench to define and render workable and feasible this division of sovereign powers between the federal government and the States, the Union would have gone to pieces at an early stage of its existence. To illustrate the doubts and difficulties which were encountered and overcome, a few illustrations may well be given. For instance, the States claimed that they might reduce intrastate rates of *quasi* public corporations, and that such reductions could not be questioned by the courts. At first in the "Granger Cases" the Supreme Court sustained that view.⁵³ But the bar insisted that the federal court did have power to set aside a confiscatory rate imposed by state statute or commission, this not being "due process of law" under the Fourteenth Amendment, and in 1890 the Supreme Court adopted that view and set aside a reduction of rates by a state commission as being in violation of the Fourteenth Amendment.⁵⁴ Later the Supreme Court decided first, that the states had exclusive power over strictly intrastate commerce not connected with interstate commerce; second, that the federal government and States had concurrent power in certain cases until Congress exercised its power; third, that Congress had exclusive power in still other cases whether it exercised that power or not.⁵⁵ These

rules in themselves show the difficulty of reconciling the dual sovereignty, a problem that only the bar and bench could solve. In fact, in this very present year, 1922, the Supreme Court has rendered the momentous decision that Congress may override state statutes, state commissions, state decisions and state contracts relative to intrastate traffic, where interstate traffic is interfered with.⁵⁶ This follows the decision of that court in the Shreveport case.⁵⁷

There are other illustrations. New York State granted to Fulton, the inventor of the steamboat, a monopoly of navigation on the Hudson River. The Supreme Court held the statute void, as an unconstitutional interference with interstate commerce.⁵⁸ A State assumed the power to regulate interstate rates which involved intrastate rates as a part of the route, but the Supreme Court held that this a State could not do.⁵⁹ "Due process of law"⁶⁰ is construed as prohibiting Congress itself from impairing the obligation of its own contracts,⁶¹ although that prohibition in express words applies only to the States.⁶² The federal government has no police power, but the principles of the police power are followed in applying "due process of law."⁶³

This bewildering maze and labyrinth of constitutional law is something new in the world. It has sup-

planted the divine right of kings. It has arisen from the American dual sovereignty and is the guardian of that dual sovereignty. It has piloted the two ships of state, state and federal; otherwise they would have collided and sunk. It is at once a vindication of the American bar and a challenge to it to live up to its principles. It is no occasion for smugness. It is a call to combat. It is an alarm bell that any decadence in the profession imperils the public safety. It is a summons to the American Bar to put itself in order and keep itself in order. It demands character, learning and business ethics—ethics to temper the industrialism of the age. And the courts will do their part. They are the finished product of the bar, elevated to the bench to personify the law.

VI

The responsibility of the American Bar is very great. This country is a country of diversified climates and many-sided characteristics of its people. Moreover, it is continually taking on new burdens in the way of protectorates over Central and South American countries and in the West Indies and in the Pacific Ocean. A great war has taken place and the exercise of the federal powers has reached propor-

tions never before dreamed of. Two amendments to the Constitution have added to the federal powers, one as to the income tax and the other as to prohibition. Both touch closely the daily life of the people.

In the conflict of interests of different sections there looms always the danger of the nation falling apart, the same as threatened the latter days of the Roman republic. That republic was finally held together by the despotism of the Cæsars and the sacrifice of democratic institutions. These institutions had broken down and were no longer capable of maintaining law and order. History will repeat itself. The American republic will fall apart, or a new Cæsar will seize the power and rule by force, or the American Bar will be needed to hold the republic together without sacrifice of its democratic principles. De Tocqueville saw this when he said, "I cannot believe that a republic could subsist at the present time, if the influence of lawyers in public business did not increase in proportion to the power of the people."

Storm and stress is the life of Washington, and in the conflicts of sections and the clashing of interests the bar will have to be the steady, compromising, conservative power. This will be no easy matter when the country has a population of five hun-

dred millions of people. Lord Macaulay in his celebrated pessimistic letter in 1857 said:

It is quite plain that your Government will never be able to restrain a distressed and discontented majority. For with you the majority is the Government, and has the rich, who are always a minority, absolutely at its mercy.

Here will be, I fear, spoliation. The spoliation will increase the distress. The distress will produce fresh spoliation. There is nothing to stop you. Your Constitution is all sail and no anchor.⁶⁵

Macaulay was a brilliant writer but not much of a statesman or seer, and his direful prediction has come true only with that most despotic of all governments—Russia. Moreover, Macaulay neglected to mention that a republic has dangers from the rich as well as the poor, as, for example, in the closing days of the Roman republic when the rich by monopolizing the land to the exclusion of the poor and working that land by slaves, eliminated the independent yeomanry, thereby leading to the downfall of the republic. In America spoliation is not possible while the agricultural class controls, and wealth is not dangerous unless and until it changes, controls or eliminates that class. Ignorant and arrogant wealth is more dangerous than intelligent wealth, because the former destroys character, while the latter tends to improve it.

It is true that there is danger always to a republic both from the very rich and the very poor. There the

capacity of the American Bar will be tested and its character will determine the issue. If the bar is determined that law and order shall prevail and that the laws shall reflect enlightened public opinion, then the menace of local disturbances, class selfishness and foreign propaganda will merely quicken the public conscience. But if the bar fails chaos will come.

De Tocqueville describes the legal profession as an intellectual aristocracy.⁶⁶ An aristocracy it is *not*. It has no titles, no privileges and knows no law of descent. Its ranks are open to the humblest of mankind, who has intellect and character.

Intellectual it *is*. It is no profession for the stupid, the indolent or the ignorant. In Emerson's forceful language, it is "a profession which never admits a fool." Its successes are earned and its activities many-sided. It leads into all other occupations; no other occupations leads into it. There are few who tread its hot and dusty highway from end to end, but those few mould public opinion instead of following it. The public is no longer keenly interested in speeches in courts and legislative halls, but the personal influence of lawyers in every town and in counsel was never before so great. Judgment is more important than words. Formerly this country was about ninety per cent. agricultural as

against about thirty per cent. now, and the centre of intellectual activity was in Congress and the courts—guided by lawyers; today we have great corporations, absorbing the talent of the country—counselled by lawyers. The power of the American Bar is unorganized and unseen, but upon it depends the continuity of constitutional government and the perpetuity of the republic itself. Bacon said "I hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves by way of amends to be a help and ornament thereunto."

The rule of reason of Chief Justice White, the Time Spirit of Goethe, the movements of the age, pressed forward by the thinkers, formulated by the lawyers, and made irresistible by the masses, moving towards that which is right and just, mark the progress and expansion of the law. Here is where the legal profession is supreme and its power and responsibility reach their culmination.

"'Tis thus at the roaring loom of Time we ply,
And weave for God the garment thou see'st
Him by."

1. See Warren's History of the American Bar, p. 11. Also Address of United States Senator Hoar of Massachusetts before the Virginia State Bar Association in July, 1898. Also Carson's History of the Supreme Court, p. 25. Also an address by J. H. Benton, Jr., of Boston before the New Hampshire Bar Association in 1894 (see reports of that Association, p. 226, and particularly pp. 246-248) giving also in an appendix valuable tables as to cases in the Supreme Court, declaring unconstitutional Acts of Congress and state statutes, with references to the Acts and statutes themselves; also tables as to lawyers in Constitutional Conventions and Congress and in executive positions up to that date. There is a slight variation in the figures given by these authorities, but that evidently is due to the fact that it is sometimes difficult to determine whether a public official had been a lawyer, for instance, Mr. Blaine, secretary of state, who studied for a short time in a law office.

2. TOTAL NUMBER OF PERSONS REPORTED AS LAWYERS, JUDGES, AND JUSTICES IN THE UNITED STATES, 1920, ACCORDING TO THE UNITED STATES CENSUS:

State	Male	Female	Total	Proportion to Population
United States	120,781	1,738	122,519	1 to 862
Alabama	1,899	17	1,416	1 " 1,658
Arizona	489	4	443	1 " 754
Arkansas	1,333	5	1,338	1 " 1,309
California	6,595	150	6,745	1 " 508
Colorado	1,517	22	1,539	1 " 610
Connecticut	1,328	13	1,339	1 " 1,031
Delaware	170	1	171	1 " 1,304
District of Columbia	2,357	58	2,415	1 " 181
Florida	1,128	11	1,137	1 " 851
Georgia	2,506	25	2,531	1 " 1,144
Idaho	646	6	652	1 " 662
Illinois	8,679	164	8,843	1 " 733
Indiana	3,267	40	3,307	1 " 886
Iowa	2,454	40	2,494	1 " 963
Kansas	1,644	32	1,676	1 " 1,055
Kentucky	2,368	14	2,382	1 " 1,014
Louisiana	1,189	17	1,206	1 " 1,491
Maine	793	8	801	1 " 958
Maryland	2,100	18	2,118	1 " 684
Massachusetts	4,851	108	4,954	1 " 777

2 TOTAL NUMBER OF PERSONS REPORTED AS LAWYERS, JUDGES, AND JUSTICES IN THE UNITED STATES, 1920, ACCORDING TO THE UNITED STATES CENSUS:

State	Male	Female	Total	Proportion to Population
Michigan	2,999	38	3,037	1 " 1,207
Minnesota	2,589	24	2,613	1 " 913
Mississippi	1,148	10	1,158	1 " 1,546
Missouri	4,434	72	4,506	1 " 755
Montana	863	12	875	1 " 627
Nebraska	1,507	21	1,528	1 " 848
Nevada	224	6	230	1 " 336
New Hampshire	378	1	379	1 " 1,169
New Jersey	3,865	53	3,918	1 " 805
New Mexico	342	..	342	1 " 1,053
New York	18,129	344	18,473	1 " 562
North Carolina	1,564	21	1,585	1 " 1,614
North Dakota	626	3	629	1 " 1,028
Ohio	6,401	84	6,485	1 " 888
Oklahoma	2,795	23	2,818	1 " 719
Oregon	1,398	26	1,424	1 " 550
Pennsylvania	6,710	74	6,784	1 " 1,285
Rhode Island	512	3	515	1 " 1,173
South Carolina	974	15	989	1 " 1,702
South Dakota	606	4	700	1 " 900
Tennessee	2,019	21	2,040	1 " 1,146
Texas	5,271	52	5,323	1 " 874
Utah	526	1	527	1 " 852
Vermont	335	9	344	1 " 1,024
Virginia	1,975	6	1,981	1 " 1,115
Washington	2,208	29	2,237	1 " 606
West Virginia	1,318	8	1,326	1 " 1,103
Wisconsin	1,951	27	1,978	1 " 1,330
Wyoming	265	3	268	1 " 725

Professor Burdick of Columbia University, in an address before the New Hampshire Bar Association, February 29, 1904, said (See "Green Bag," Vol. 16, p. 280) that at that time England had 1 lawyer to every 1,100 people; France 1 to 4,100; Germany 1 to 8,700; Russia 1 to 81,000; China none; the United States 1 to 700.

There were about 18,250 lawyers having offices in New York City (including lawyers living in New Jersey and Connecticut and having offices in Manhattan, but not including Brooklyn nor law firms which would be duplications) in 1922, according to Bender's Lawyers Diary. An astonishingly large proportion of the names seem to be foreign.

8. Judge Henry Wade Rogers in the Introduction to "Constitutional History as seen in American Law," says (p. 28): "It has been said that the lawyers of the colonies were of necessity better fitted for constitution making than any body of legislators in the world. And this remark we believe is entirely true. The controversies which led to the secession of the colonies from the mother country turned on questions of law. The colonists complained of a violation of their natural and constitutional rights at the hands of Great Britain, and the colonial lawyers were the leaders in the contest. They, therefore, studied profoundly works on government and on the philosophy of history, as well as the philosophic writers on jurisprudence. Moreover, it had been for years their vocation to make old laws conform to the changed conditions of life in the new world, rejecting that which seemed unsuitable to the situation in which they found themselves. They were thus prepared as no other class of men ever had been for the construction of written constitutions. They were the authors of the constitutions of the States, and afterwards of the Constitution of the United States."

In Rome, Gibbon says, "Arms, eloquence, and the study of the civil law promoted a citizen to the honours of the Roman state; and the three professions were sometimes more conspicuous by their union in the same character." *Decline and Fall of the Roman Empire*; ch. 44, Vol. 7, p. 822, Lausanne Ed.

4. p. 800. 352 [Vol. I 1867 Ed.]

5. Stubbs in his *Constitutional History of England*, Vol. II, ch. xv, pp. 197, 198, says:

"In the uncertainty which for some half century attended the ultimate form in which the estates would rank themselves, two other classes or subdivisions of estates might have seemed likely to take a more consolidated form and to bid for more direct power than they finally achieved. The lawyers and the merchants occasionally seem as likely to form an estate of the realm as the clergy or the knights. Under a king with the strong legal instincts of Edward I., surrounded by a council of lawyers, the patron of great jurists and the near kinsman of three great legislators, the practice and study of law bid fair for a great constitutional position. Edward would not, like his uncle Frederick II., have closed the high offices of the law to all but the legal families, and so turned the class, as Frederick did the knightly class, into a caste; or, like his brother-in-law, Alfonso

the Wise, have attempted to supersede the national law by the civil law of Rome; or, like Philip the Fair, have suffered the legal members of his council to form themselves into a close corporation almost independent of the rest of the body politic; but where the contemporary influences were so strong we can hardly look to the king alone as supplying the counteracting weight. It is perhaps rather to be ascribed to the fact that the majority of the lawyers were still in profession clerks; that the Chancery which was increasing in strength and wholesome influence, was administered almost entirely by churchmen, and that the English universities did not furnish for the common law of England any such great school of instruction as Paris and Bologna provided for the canonist or the civilian. Had the scientific lawyers ever obtained full sway in English courts, notwithstanding the strong antipathy felt for the Roman law, the Roman law must ultimately have prevailed, and if it had prevailed, it might have changed the course of English history. To substitute the theoretical perfection of a system, which was regarded as less than inspired only because it was not of universal applicability, for one, the very faults of which produced elasticity and stimulated progress and reform whilst it trained the reformers for legislation, would have been to place the development of the constitution under the heel of the king, whose power the scientific lawyer never would curtail but when it comes into collision with his own rules and precedents. The action of the Privy Council, which to some extent played the part of a private parliament, was always repulsive to the English mind; had it been a mere council of lawyers, the result might have been still more calamitous than it was. The summons of the justices and other legal counsellors to parliament, by a writ scarcely distinguishable from that the barons themselves, shows how nearly this result was reached."

Stubbs also says (p. 202): "The national council as it existed at the end of the reign of Edward I. was a parliamentary assembly consisting of three bodies, the clergy represented by the bishops, deans, archdeacons, and proctors; the baronage spiritual and temporal; the commons of the realm, represented by the knights of the shire and the elected citizens and burgesses; and in addition to all these, as attendant on the king and summoned to give counsel, the justices and other members of the continual council."

The "barons" in early English history included the entire nobility above the order of knights. There were Greater Barons (some with other titles) and Lesser Barons. See Stubbs, Vol. II,

pp. 191, 209; Vol. III, pp. 437, 440. The "barons," who in 1215 forced King John at Runnymede to agree to Magna Charta, included the higher nobility. See Ency. Brit. under "Barons."

Political institutions were in a formative and chaotic state in those days.

Green in his History of the English People (ch. II) says: "In the earlier Parliaments each of the four orders of clergy, barons, knights, and burgesses met, deliberated, and made their grants apart from each other. This isolation however of the Estates soon showed signs of breaking down. Though the clergy held steadily aloof from any real union with its fellow-orders, the knights of the shire were drawn by the similarity of their social position into a close connexion with the lords. They seem in fact to have been soon admitted by the baronage to an almost equal position with themselves, whether as legislators or counsellors of the Crown. The burgesses on the other hand took little part at first in Parliamentary proceedings, save in those which related to the taxation of their class. But their position was raised by the strifes of the reign of Edward the Second when their aid was needed by the baronage in its struggle with the Crown; and their right to share fully in all legislative action was asserted in the statute of 1322. From this moment no proceedings can have been considered as formally legislative save those conducted in full Parliament of all the estates. In subjects of public policy however the barons were still regarded as the sole advisers of the Crown, though the knights of the shire were sometimes consulted with them. But the barons and knighthood were not fated to be drawn into a single body whose weight would have given an aristocratic impress to the constitution. Gradually, through causes with which we are imperfectly acquainted, the knights of the shire drifted from their older connexion with the baronage into so close and intimate a union with the representatives of the towns that at the opening of the reign of Edward the Third the two orders are found grouped formally together, under the name of 'The Commons.' It is difficult to overestimate the importance of this change. Had Parliament remained broken up into its four orders of clergy, barons, knights, and citizens, its power would have been neutralized at every great crisis by the jealousies and difficulty of cooperation among its component parts. A permanent union of the knighthood and the baronage on the other hand would have converted Parliament into the mere representative of an aristocratic caste, and would have robbed it of the strength which it has drawn from its connexion

with the great body of the commercial classes. The new attitude of the knighthood, their social connexion as landed gentry with the baronage, their political union with the burgesses, really welded the three orders into one, and gave that unity of feeling and action to our Parliament on which its power has ever since mainly depended."

6. See Warren's *History of American Bar*, p. 25.

7. *Id.* pp. 4-18.

8. *Id.* p. 18.

9. McMaster in his *History of the People of the United States* describes this at length as follows (Vol. I, pp. 302, 308), speaking of Massachusetts:

"The mere sight of a lawyer as he hurried along the street was enough to call forth an oath or a muttered curse from the louts who hung round the tavern. The reason is plain. During the years of the war the administration of justice had been almost wholly suspended. After the war, debts had increased to a frightful extent. The combination of these two circumstances had multiplied civil actions to a number that seems scarcely credible. The lawyers were overwhelmed with cases. The courts could not try half that came before them. For every man who had an old debt, or a mortgage, or a claim against a Tory or a refugee, hastened to have it adjusted. While, therefore, everyone else was idle, the lawyers were busy, and, as they always exacted a retainer, and were sure to obtain their fees, grew rich fast. Every young man became an attorney, and every attorney did well. Such prosperity soon marked them out as fit subjects for the discontented to vent their anger on. They were denounced as banditti, as blood-suckers, as pick-pockets, as wind-bags, as smooth-tongued rogues. Those who, having no cases, had little cause to complain of the lawyers, murmured that it was a gross outrage to tax them to pay for the sittings of courts into which they never had brought and never would bring an action.

"Meanwhile the newspapers were filled with inflammatory writings. The burdens that afflicted the State were attributed to the attorneys. One paper repeatedly insisted that this class of men should be abolished. Another called upon the electors to leave them out of office, and to bid their representatives to annihilate them. The advice was largely followed. In almost every country town a knowledge of the law was held to be the best reason in the world why a man should not be made a legislator. But nowhere was this

feeling stronger than in the capital. In the representation of Boston was one place which her citizens had for many years past delighted to bestow on men whom eloquence and learning had raised to the first rank at the bar. That place had been successively filled by Pratt, by Thatcher, by Otis, and by Adams. It was now given to a man of less hateful calling."

10. Stubbs Constitutional History of England, Vol. III, p. 46.

11. *Id.* p. 257.

12. See Warren's History, p. 25. The following is from an article, "The Ideal Lawyer," by Mr. Justice Brewer in "The Atlantic Monthly" for November, 1906 (XCVIII, p. 587):

"By an act passed in 1668 'usual and common attorneys' were excluded from seats in the General Court, as the Massachusetts legislature is called. In 1656 the following statute was enacted:

"This court, taking into consideration the great charge resting upon the colony, by reason of the many and tedious discourses and pleadings in the courts, both of the plaintiff and the defendant, as also the readiness of many to prosecute suits in law for small matters, it is therefore ordered, by this court and the authority thereof, that when any plaintiff or defendant shall plead by himself or his *attorney*, for a longer time than *one hour*, the party that is sentenced or condemned shall pay twenty shillings for each hour so pleading more than the common fees appointed by the court for the entrance of actions, to be added to the execution for the use of the country.'"

13. Hallam, Vol. I, ch. VI, pp. 341, 342.

14. Hallam, Vol. I, ch. VI, p. 331.

15. Hallam, Vol. I, ch. VI, p. 342.

16. Hallam, Vol. II, ch. XIV, p. 278.

17. A Memoir of the Life of Peter the Great by John Barrow, p. 86. See also "The Lawyer: A Pest or a Panacea," by Francis M. Burdick, published in "The Green Bag," Vol. XVI, p. 226.

18. Sir Walter Scott, on the other hand, who read law four years and was made an advocate in 1792, depicted the fairness and judicial poise of lawyers, as, for instance, in the trial of Effie Deans

in "The Heart of Mid-Lothian." The French writers also show appreciation of the legal profession, especially of the "Notary," who in France is a combination of lawyer and business man.

19. Book IV, ch. V.

20. William Allen Butler, an eminent New York lawyer, in a lecture on February 8rd, 1871, before a law school in New York City, said (pp. 7-9):

"The literature of our mother tongue, reflecting the current opinions of each succeeding generation, is full of instances of coarse abuse or sharp satire directed against lawyers, by authors, wits, pamphleteers and penny-a-liners. It is curious to note that the current of invective has often set strongest against the Bar, at the very moment when it was doing its best and noblest work, in aid of social order or of the progress of the race. In the seventeenth century, just after Hampden and his noble band had fought in the Courts the battle of English liberty and constitutional law, the Press was issuing tracts with such titles as these: '*The Downfall of Unjust Lawyers*,' '*Doomsday Drawing Near, With Thunder and Lightning for Lawyers*' (1645, by John Rogers), '*A Rod for the Lawyers*' (1659, by William Cole), '*Essay Wherein is Described the Smugglers, Lawyers' and Officers' Frauds*' (1675). Congreve, about the same time, makes one of his stage characters say that 'a witch will sail in a sieve, but the devil would not venture aboard a lawyer's conscience.' Ben Johnson's epitaph on Justice Randall condenses in a couplet the popular estimate of the profession:

"God works wonders now and then,
Here lyes a lawyer, an honest man.'

"Swift, somewhat later, in such pithy English as he alone could command, at the very time when Chief Justice Holt had just closed his noble career, and Lord Mansfield was beginning to win his great judicial fame, paints the profession as 'a society of men, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black and black is white, according as they are paid.'

"Milton describes the lawyers of his day as 'grounding their purposes, not on the prudent and heavenly contemplation of justice and equity, which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat contentions, and flowing

fees,' and his praise of Coke is offset by a censure of his brethren at the Bar."

21. See Address, pp. 13, 14, referred to above.

22. Address referred to above, p. 13.

23. Dalison's Rep. 20. That report is in Norman French. The following is a translation:

Year 2 & 3 Philip & Mary

Note: It was agreed, for law, that the King can make proclamation to his subjects, as a terror to the people, in order to put them in fear of his displeasure, but not so as to inflict other certain penalty, such as to forfeit their lands or goods, or to impose a fine, or to suffer imprisonment or other punishment; for no proclamation, in itself, makes a law which was not previously such, but only confirms and ratifies an ancient law, and by no means changes that, or makes further new divers precedents which shall be observed in spite of the Exchequer to the contrary; but the justices pay no regard to them. Whereof Take Notice! See year 31 Henry VIII, chap. 8 and year 35 Henry VIII, chap. 28, *et seq.* & 25 Henry VIII, chap. 2.

24. Darcy v. Allen (The Case of the Monopolies), 11 Coke, 84 b (44 Eliz., i.e. 1602), holding that a grant by the Crown of the sole making of cards within the realm was void. The decision was by Chief Justice Popham, speaking for the court. Coke, as Attorney-General, had argued in support of the grant. The court said: "This grant is *primae impressionis*, for no such was ever seen to pass by letters patent under the great seal before these days, and therefore it is a dangerous innovation, as well without any precedent, or example, as without authority of law, or reason."

25. Judge Rogers says: "It is well understood that in Great Britain sovereignty resides in the Parliament, and that it can change the Constitution at its pleasure." Introduction to "Constitutional History as Seen in American Law," p. 10.

Judge Cooley says: "When the government, whatever the form, grants a constitution, it necessarily remains supreme over it. Quite emphatically has this been true of all unwritten constitutions. Fundamental laws which derive their origin from prescription must assume the existence of a government which is in possession of

sovereign powers, and whose laws, therefore, from time to time enacted, must from the very fact of this sovereignty be supreme. The constitution of England is no exception to this rule: it is and must be in subordination to the Parliament, and the Parliament may at any time exercise the power to enact laws in modification of its principles. The 'omnipotence of Parliament' is thus seen to be not a figure of speech merely, but a potential reality." Lecture, pp. 81, 82, published by Henry Wade Rogers.

26. Judge Henry Wade Rogers points out that this principle is purely American and without precedent in history. Introduction to Constitutional History as Seen in American Law. Judge Rogers there says (p. 10): "There was no precedent in ancient or modern judicial history, before these cases were decided, which warranted a court in asserting such a principle, and it was difficult for men trained under the English system of jurisprudence to conceive the idea that a mere court should assume the prerogative of setting aside a law enacted by the legislature and approved by the executive."

27. Quoted in Carson's History of the Supreme Court, p. 15.

28. It is claimed that the rich man has an advantage over the poor man in litigation. This rarely happens. Wealth today is in corporations and in litigation between a poor man and a corporation the poor man has the advantage.

29. The only court that can be compared with the Supreme Court is the Privy Council of the House of Lords in England. The Privy Council in the year from October 1, 1920, to October 1, 1921, decided 68 cases. The Supreme Court of the United States in the year from October 1, 1920, to October 1, 1921, decided 223 cases with written opinions. Mere numbers do not always mean much, but no one will seriously question the character of the decisions of the Supreme Court. The great difference between the two courts is that the Supreme Court protects the public from usurpations of government while the Privy Council has no power so to do. Moreover, the Supreme Court bases its decisions not merely on its own precedents, but also on the comparative jurisprudence of forty-nine States and on the English precedents, while the English courts base their decisions on English precedents alone.

30. Quoted by Carson, pp. 14, 15.

31. 1 Cranch, 137.

32. 1780—New Jersey—See *Holmes v. Walton*, referred to in *State v. Parkhurst*, 4 Halsted (9 N. J. L.) 444. There has been considerable controversy as to the accuracy of this date, 1780, but John A. Hartpence of the New Jersey Bar sends the writer conclusive proof of the correctness of that date in the shape of a copy of an order entered in the Supreme Court of New Jersey at the September term, 1780, rendering the decision in that case. See also 28 N. J. Law Journal, 164. Hence the statement in Carson's History of the Supreme Court (p. 120) that the "palm" must be awarded to Virginia instead of New Jersey is an error.

1782—Virginia—*Com. v. Caton*, 4 Call. 5; also in *Case of the Judges*, 4 Call. 185 (1788), and *Kamper v. Hawkins*, 1 Va. Cases 20 (1793).

1786—Rhode Island—*Trevett v. Weeden* (not published).

1788—Massachusetts—See Warren, p. 265.

1792—South Carolina—*Bowman v. Middleton*, 1 Bay 252. *Beveridge's Life of Marshall*, Vol. III, Appendix C, fully reviews the above decisions and others of later date on the same subject.

33. *Beveridge* in his *Life of Marshall*, Vol. III, pp. 1-100, gives a graphic account of the fiery debate in Congress on this whole subject.

34. *Fletcher v. Peck*, 6 Cranch, 87. The celebrated Dartmouth College Case (4 Wheat. 518—1819) applied this same principle of law to a statute impairing a college charter. The general effect of this Dartmouth College Case in protecting property is felt to this day, but the particular effect as to corporate charters was quickly neutralized by the States reserving the right to amend or repeal charters. As pointed out by the New York Court of Appeals in *Lord v. Equitable etc. Soc.*, 194 N. Y. 212, 221 (1909), this reservation "was the result of public alarm and protest caused by the decision of the supreme court of the United States in the celebrated Dartmouth College case, decided in 1819. . . . As soon as it was realized that the principle of the decision applied to the charters of all corporations and placed them forever beyond the power of legislation, the situation caused great anxiety throughout the nation. It was felt that danger threatened the public welfare when a thing created by law was placed beyond the control of law. The determination became general that if existing charters were stronger

than the state, no future charters should be, and action followed accordingly along the line suggested by Mr. Justice Storey in his concurring opinion in the Dartmouth College case, that if a state wished to alter charters it must reserve the right to do so. In this state as in others the feeling was almost universal that there never should be another corporation with powers beyond the control of the legislature."

85. *Martin v. Hunters Lessee*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264 (1821).

86. Beveridge in his *Life of Marshall* portrays all this. It is a book that no lawyer can afford not to read. It is to be hoped that he will compress the four volumes into one, so as to place it within the reach of all, with a little less criticism of Jefferson, inasmuch as Beveridge himself shows how the lower federal judiciary needed curbing at that time (Vol. III, pp. 23-49).

87. *Little v. Barrene*, 2 Cranch 170; *Cooley's Constitutional Law*, p. 157. On the other hand the courts have no power to enjoin the President from putting into effect an act of Congress, even though it is alleged to be unconstitutional. *State of Mississippi v. Johnson*, 4 Wall. 475 (1866).

88. 106 U. S. 196.

89. That same question was involved in a suit instituted by the writer associated with Judge Hughes, in behalf of a submarine cable company against the Postmaster-General who had taken possession of submarine cables by order of the President, carried into effect after the armistice had been signed in the recent war, under authority of a Joint Resolution of Congress passed prior to the armistice. The lower court held that the case was not justiciable. An appeal was taken and argued, and then over night the Postmaster-General hastily returned the cable lines to their owner and hence the Supreme Court did nothing more than declare that the case had become moot, and so reversed the decision of the court below and put an end to the suit. *Commercial Cable Co. v. Burleson*, 250 U. S. 360 (1919).

40. Grote's *History of Greece*, Part II, ch. II, pp. 343, 345. And Grote remarks that had there existed a federation "of tolerable wisdom and patriotism, and had the tendencies of the Hellenic mind been capable of adapting themselves to it, the whole course of later

Grecian history would probably have been altered; the Macedonian Kings would have remained only as respectable neighbors, borrowing civilization from Greece and expending their military energies upon Thracians and Illyrians; while United Hellas might even have maintained her own territory against the conquering legions of Rome." *Id.* p. 386.

41. "The principal conquests of the Romans were achieved under the republic." Gibbon, Vol. I, ch. I, p. 2. The republic produced men, the empire produced stagnation.

42. 2 Dallas Rep. 419. By Art. XI of the amendments to the Constitution this jurisdiction of the federal courts was withdrawn.

43. Cooley on the Federal Supreme Court, edited by Henry Wade Rogers, p. 50.

44. *Id.* p. 47.

45. *Id.* p. 48.

46. Civil Rights Cases, 109 U. S. 3 (1883).

47. *Bailey v. Drexel Furniture Co.*, 42 Sup. Ct. Rep. 449 (1922).

48. The Tenth Amendment to the Constitution reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The first eight amendments to the Constitution apply only to the federal government and not to the States. *Barron v. Baltimore*, etc., 7 Peters 243 (1833). The various state constitutions, however, contain very similar restrictions on state governmental powers.

49. Cooley on Constitutional Law (p. 143) says that "in the division of powers between States and nation, the larger portion, including nearly all that touched the interests of the people in their ordinary business relations and in their family and social life, were reserved to the States. All that related to the family and the domestic relation, the administration and distribution of estates, the forms of contract and conveyance, the maintenance of peace and order in the States, the punishment of common-law offences, the making provision for education, for public highways, for the protection of personal liberty and liberty of worship,—all these powers were

withheld from the jurisdiction of the federal government, and retained by the States, and their retention was calculated to give to the body of the people a larger interest in a proper administration of state authority than in that of the nation."

It may be added that the police power was retained by the States and no police powers were granted to the federal government. So also the granting of charters to local corporations and to municipalities and the regulation of *quasi* public corporations in their intrastate business was retained by the States.

50. *McCulloch v. Maryland*, 4 Wheat. 316 (1819), where a tax was levied by a State on a local branch of the Bank of the United States.

51. *Weston v. City Council of Charleston*, 2 Peters 449 (1829); *Bank of Commerce v. New York City*, 2 Black 620 (1862); *The Banks v. The Mayor*, 7 Wall. 16 (1868). *Cooley*, Constitutional Law, 3rd ed., p. 61; *Cooley*, Taxation, 3rd ed., pp. 129, etc. *United States v. Railroad Co.*, 17 Wall. 322 (1872); *Pollock v. Farmers L. etc. Co.*, 157 U. S. 429, 459 (1895); *Mercantile Nat. Bank v. New York*, 121 U. S. 138 (1886). A State may tax bonds owned by its citizens issued by another State, one state being foreign to another in this respect. *Bonaparte v. Tax Court*, 104 U. S. 592 (1881). A State, however, cannot require one of its own corporations to deduct a tax from the interest on its bonds owned by non-residents. *Case of the State Tax on Foreign-Held Bonds*, 15 Wall. 300 (1872); *Railroad Co. v. Jackson*, 7 Wall. 262 (1868). Inheritance taxes are different, the tax being on the privilege of transmittal and not on the property transmitted. Hence a federal inheritance tax may cover State bonds. *Plummer v. Coler*, 178 U. S. 115 (1900), and a State inheritance tax may cover federal government bonds. *Murdock v. Ward*, 178 U. S. 139 (1900).

52. 37 Cyc. L. & Proc. p. 880. The federal government can no more tax the income on state and municipal bonds than a state may tax the income on federal bonds. In fact, such a tax would practically be a tax on the bonds themselves, because whatever the rate of interest the issuing price would be less with the tax than without it and the difference would be the same as a tax on the bonds themselves. This, of course, pertains to future issues. An amendment to the Constitution is now proposed to allow the federal government to tax income from State bonds. The States are unlikely to consent

because (1) it would merely increase the rate of interest on State and municipal bonds and make a gift of that increase to the federal government; (2) the States would demand reciprocity, i.e., the right to tax income on federal bonds. Even reciprocity would be inequality. For instance, the income tax in New York State may be 3%; the federal income tax runs up to 50%. The people wish less public expenditures and less taxation, instead of more. Exemption of State bonds from the federal income tax enables and encourages the States to issue bonds for motor truck roads, thereby rendering the public less dependent on the railroads—very important in an emergency.

53. *Munn v. Illinois*, 94 U. S. 113 (1876) and various other cases in that same volume.

54. *Chicago M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418.

55. *Covington etc. Bridge Co. v. Kentucky*, 154 U. S. 204 (1894). *Judson on Interstate Commerce*, 3rd ed. §§24-42.

56. *Railroad Comm. of Wis. v. C. B. & Q. R. R.*, 42 Supr. Ct. Rep. 232 (1922), the court saying: "Commerce is a unit and does not regard state lines, and while under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso. . . . The affirmative power of Congress in developing interstate commerce agencies is clear. In such development, it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce, it deems necessary or desirable." This decision also held that not even a contract between a state and a railroad company as to intrastate passenger rates was any defense.

57. Where a state commission has reduced the intrastate rate of a railroad so as to discriminate in favor of points within the state as against points outside of the state, the Intrastate Commerce Commission may order that railroad to abolish the discrimination by lowering its interstate rate, or by partly lowering its interstate rate and partly raising its intrastate rate, or by raising the intrastate rate alone. *Houston etc. Ry. v. United States*, 234 U. S. 342

(1914). See also *American Express Co. v. Caldwell*, 244 U. S. 617 (1917), and *Illinois Central R. R. Co. v. Public Utilities Comm.*, 245 U. S. 498 (1918).

58. *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

59. *Wabash etc. Ry. Co. v. Illinois*, 118 U. S. 557 (1886).

60. Fifth Amendment.

61. *Sinking Fund Cases*, 99 U. S. 718 (1878); *United States v. Northern Pacific Ry. Co.*, 256 U. S. 51 (1921). But the rule is otherwise as to contracts between individuals. *Legal Tender Cases*, 79 U. S. 457 (1870), at p. 547, and see dissenting opinion at p. 580. "Due process of law" under the Fifth Amendment applicable to Congress does not give "equal protection of the laws," the same as under the Fourteenth Amendment applicable to the States, in matters of taxation at least. *La Belle Iron Works v. United States*, 256 U. S. 377 (1921), at pp. 392, 393. Chief Justice White in *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1 (1916), said (p. 24): "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause," subject, however, to there being no arbitrary confiscation of property by a gross disregard of classification producing gross inequality. This reasoning would seem to render Congress irresponsible in other directions also and is not very convincing.

62. Art. I, section 10.

63. *Hoke v. United States*, 227 U. S. 308 (1911), where the court said that Congress in exercising its power over interstate commerce "may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."

64. Part I, ch. 16, p. 301.

65. *Macaulay's Life and Letters*. Trevelyan, 2d Ed., Vol. 2, Appendix.

66. De Tocqueville says (Part I, ch. 16, p. 304): "The more we reflect upon all that occurs in the United States, the more shall we be persuaded that the lawyers, as a body, form the most powerful, if not the only counterpoise to the democratic element. In that country we perceive how eminently the legal profession is qualified by its powers, and even by its defects, to neutralize the vices which are inherent in popular government." He further says the American lawyers are "a sort of privileged body in the scale of intelligence," of which they are well aware and that they have "a certain contempt for the judgment of the multitude," and that "they, like most other men, are governed by their private interests and the advantages of the moment"; that "in a community in which lawyers are allowed to occupy, without opposition, that high station which naturally belongs to them, their general spirit will be eminently conservative and anti-democratic." He also says (p. 300): "The profession of the law is the only aristocratic element which can be amalgamated without violence with the natural elements of democracy, and which can be advantageously and permanently combined with them." He further says (pp. 305, 306): "As the lawyers constitute the only enlightened class which the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies, and they conduct the administration; they consequently exercise a powerful influence upon the formation of the law, and upon its execution. . . . The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time, and accommodates itself to all the movements of the social body; but this party extends over the whole community, and it penetrates into all classes of society; it acts upon the country imperceptibly, but it finally fashions it to suit its purposes."

De Tocqueville's statement that the American bar has contempt for the judgment of the plain people is incorrect. Whatever may have been the situation in 1835 when De Tocqueville wrote, that certainly is not the situation today. American lawyers know that in every great national emergency and on every great national question, the intuitions and instincts of the plain people have found the right way; and where they (the plain people) had no leader they produced one out of obscurity, such as Lincoln the lawyer, and when diplomacy failed they produced soldiers whose valor has not been surpassed since Caesar conquered Gaul.

[47]

on H. J.

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