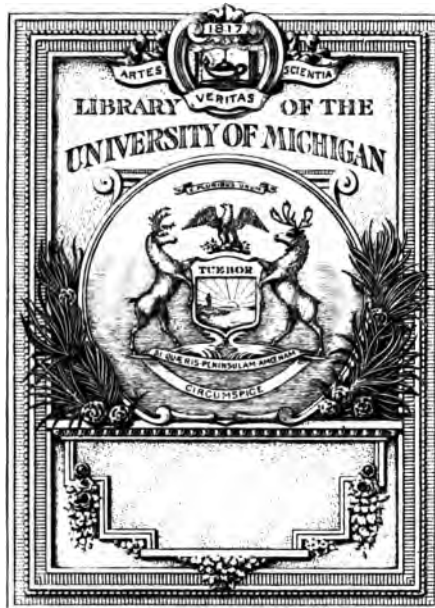


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THE
COMING COMMONWEALTH

AN AUSTRALIAN HANDBOOK
OF
FEDERAL GOVERNMENT

BY
ROBERT RANDOLPH GARRAN, B.A.

BARRISTER-AT-LAW; MEMBER OF THE EXECUTIVE COMMITTEE OF THE
AUSTRALASIAN FEDERATION LEAGUE, SYDNEY; DELEGATE TO
THE COROWA CONFERENCE OF 1883, AND THE BATHURST
CONVENTION OF 1896.



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TO MY FATHER

'ONE PEOPLE, ONE DESTINY.'

SIR HENRY PARKES.

**'FOR THE FIRST TIME IN THE WORLD'S HISTORY, THERE WILL BE A NATION
FOR A CONTINENT, AND A CONTINENT FOR A NATION.'**

HON. EDMUND BARTON.

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PREFACE

THIS book aims at being a short summary of what every Australian citizen ought to know in order to understand the question of Australian Federation.

The first part is a discussion of the federal system itself; the second is a historical, constitutional, and comparative sketch of the chief federal governments of the world, from the earliest times to the present day; the third deals with the special problems of Australian Federation. Under these three heads an attempt has been made to describe shortly the principles, the practice, and the proposed application of the federal system.

No space has been wasted in proving what no one now denies—the necessity and the urgency of Australian union. The well-worn platitudes on that subject are out of date; the question is no longer ‘Shall we federate?’ but ‘How shall we federate?’ This book, therefore, is a practical discussion of ways and means, prefaced by an account of those political principles and historical facts which cannot be ignored in the framing of an Australian Constitution.

Federal government has already a vast literature and history of its own, bearing directly on the problems which we in Australia must now face, and upon which every citizen will soon be asked to give a responsible vote. Few, however, will have time or opportunity to read all that has been written on the subject; and it is hoped that an outline of this kind will be useful both as a substitute for, and as an introduction to, a deeper study of the question. Of course the limits of this book, and the wide field to be covered, make exhaustive treatment impossible; but those who desire more detailed information will find references throughout to the leading authorities.

I take this opportunity of referring to a new and interesting work (*Federation and Empire*, by T. A. Spalding, LL. B.) which appeared too late to be noticed in the text. Mr. Spalding's theme is the federal union (or rather, disunion) of England, Scotland, Wales, and Ireland; but incidentally he discusses federal government in general, and challenges some of the accepted doctrines. Especially, he contends that federalism and parliamentary sovereignty are not necessarily inconsistent; that there might be a Federation in which the federal parliament had unlimited power to alter the Constitution. 'State rights,' (he argues), though only existing on sufferance, are as real, while they exist, as if they were secured by a 'rigid' constitution. This contention is chiefly one of words. It is obvious that subordinate local parliaments *could* be set up in the several parts of (for instance) the United Kingdom without abolishing the sovereignty of the central parliament; the only question is whether such an arrangement could fairly be called 'federal.' Mr. Spalding chooses to call it so, and though we may differ, we can hardly complain. The question can scarcely arise, however, except in those exceptional cases where federation follows upon unification, and therefore means the *granting* of state rights which previously did not exist. Where federation follows upon disunion, and state rights are *reserved*, the States will almost certainly insist that those rights shall be adequately secured by a constitution more or less 'rigid.' Mr. Spalding's argument, therefore, though pertinent to his own subject, does not specially concern us.

PART I.

THE FEDERAL SYSTEM.

§ 1. *What It Is.*

FEDERATION is not a new word, nor is federalism a new idea; yet only within quite modern times have the word and the idea been wedded. Originally, 'federation' meant no more than 'league' or 'alliance'; it was not always, as now, set apart to denote a particular form of government. Federalism in early times was indeed hardly recognized as a distinct political system, and never reached the dignity of a name of its own;¹ but the rapid development of the system during the last hundred and odd years has caused a whole family of words to be told off to its service; and 'federation,' 'confederation,' 'confederacy,' with a host of related words, have acquired new shades of meaning and an altogether new importance.²

What, then, is this 'federal system,' whose root is so old, whose growth so new? Before seeking its origin and

¹ The various names used to describe a Greek confederation (*e.g.*, σύστημα, a 'group' or 'system'; συμπολιτεία, a 'joint polity'; τὸ κοινὸν, 'the commonwealth') all had other meanings, and did not necessarily imply a federal relation. The Latin terms (*societas, consociatio, fœdus*) were equally indefinite. The mediæval confederations were all known as 'leagues,' and were really, for the most part, little more.

² The new currency seems to have begun with the American 'Federalist' and 'Anti-federalist' parties about 1788. These names were perhaps suggested by Montesquieu's famous passage in praise of 'la république fédérative.'

tracing its history, it will be well to define the subject of our inquiry—to find out what the federal system is, and what are its special aims and characteristics.

According to Montesquieu (*L'Esprit des Loix*, published in 1748), federal government is 'a convention by which

Early several smaller States agree to become mem-
Definitions. bers of a larger one a kind of assemblage of societies that constitutes a new one.' Hamilton, in the *Federalist* (No. IX.), accepts this definition, paraphrasing 'assemblage of societies' into 'association of States,' and seems to think it sufficient. As a definition of federalism, as we understand it, it is certainly meagre. The fact is that, though federalism has been defined often enough of late years, we may look in vain for an adequate definition by early writers. This is precisely what we should expect. Definition is the outcome of theory; and the theory of federalism did not appear until the practice was familiar. Even the founders of the United States of America—the first great modern Federation—did not mean by federalism all that we mean, and did not fully understand its import. They were, some of them, political philosophers as well as practical statesmen; but, whilst their statecraft was mostly right, their philosophy was often wrong. Their federal experience was too limited to enable them to generalize safely; and, though their work stands to-day as the greatest constitution-making achievement of all time, we must look to later critics for the best commentary on it and on the system which it represents. Not until the example of America began to spread, and Federations multiplied in the new world and the old; not until people spoke no longer of *the* federal government, as if it were an isolated phenomenon, but were able to compare one federal government with another—not until then did it become possible to study federalism in the abstract, to separate essentials from accidentals, and to comprehend the system itself and the principles underlying it. Federalism first came into the world, not as a theory, but as a practical

necessity, to satisfy the aspirations of the federal spirit. Its modern revival and development have a similar cause and a similar explanation. On the heels of federal necessities came federal institutions; then, from a variety of examples, federal principles were deduced.

Even now, however, well explained as federalism has been, the idea is too elastic to be easily summed up in a single phrase. Its essence, once understood, is simple enough; but its very simplicity makes it liable to misunderstanding. Perhaps its explanation will be best introduced, not by a single elaborate definition, but by a few general statements and illustrations, with a running commentary between.

‘A Federal State is a political contrivance intended to reconcile national unity and power with the maintenance of *state rights*.’¹ The ‘political contrivance’ by which this reconciliation is reached is, like most reconciliations, a compromise. It consists in binding a group of States into a Nation without destroying their individuality as States—a result which is effected by dividing the functions of government and the attributes of sovereignty between a central national government and a group of local state governments.

The Aim
of
Federalism.

Federal government, therefore, is essentially a compromise between the two opposite systems of *large States* and *small States*—between the opposing forces of centralization on the one hand, of local independence on the other. The word ‘federal’ may be used in a stricter or a wider sense, but the fundamental idea is always that of a *twofold sovereignty*—the sovereignty of the national government for national purposes; the sovereignty of the provincial or ‘state’ governments for provincial purposes.² The

¹ Dicey, *Law of the Constitution*, p. 133.

² The words ‘Province’ and ‘State’ are commonly used interchangeably to describe a component State of a federal Nation. The governments of the Nation and the States are spoken of respectively as the ‘federal government’ and the ‘provincial’ or ‘state governments.’

co-existence of these two sovereignties within the limits of the same territory constitutes the federal idea.

This federal idea may be made clearer by contrasting it with the two systems into which it shades off on either

Illustrated by Contrast. hand, but which are themselves non-federal. We may take, on the one hand, a 'unified' State, in which many of the functions of

government are delegated by the central governing body to local governing bodies. The British Parliament, for instance, delegates a great and increasing number of powers to the several county councils. But these powers are merely *municipal*; they are the gift of the sovereign Parliament, and can be taken away by the sovereign Parliament at its pleasure. The local councils have no sovereignty, but merely a delegated authority; they can do only what Parliament sanctions their doing; and while this is so—while the local bodies exercise their powers on sufferance—the local government, however complete and important it may be, is municipal only. There is no local sovereignty, and therefore no federalism.

Or, again, we may take a mere league or alliance of independent States which have combined for common purposes, such as commerce, defence, and so forth. Here there is no doubt about the local sovereignty of each several State, but the central authority of the league is on sufferance only; it may be broken up by mutual consent, or even by the secession of a single member. There is no central sovereignty, and therefore no federalism.

We are now in a position to define a federal government more exactly. We have seen that the aim of

Definition. federalism is to reconcile national unity with local independence, and that its fundamental idea is divided sovereignty; and we have distinguished it from the non-federal systems which border it on either hand. We may then apply the word 'federal,' in its widest sense, to 'any union of component members, where the degree of union between the members surpasses that of

mere alliance, however intimate, and where the degree of independence possessed by each member surpasses anything which can fairly come under the head of merely municipal freedom.¹ The central authority must, within its own sphere, be independent of the local authorities, otherwise the whole is merely a collection of States acting in concert. There must be a limit to the sphere of the central authority—a class of affairs in which it cannot meddle with the state governments—otherwise it is a ‘unified’ or ‘consolidated’ State which delegates certain powers to local bodies.

The above definition includes every form of union which contains what may be called the germ of federalism; but the word is usually used in a somewhat narrower sense to describe an approach, in greater or less degree, to what Freeman calls the ‘federal ideal’—to a form of government, that is, in which the members of the union are wholly independent in those matters which concern each member only, whilst all are subject to the central power in those matters which concern the whole body of members collectively. A federal commonwealth, in this sense, may be defined as one which forms a single State for purposes of common concern, and especially in relation to other nations, but which consists of many States for purposes of local concern. What nearness of approach to this ideal—what degree of completeness in the distribution of local and central authority—is necessary to entitle any particular government to be called federal, is a question to be decided according to taste.

The federal system, as we shall see, is capable of such infinite variety that the classification of its different forms is as difficult as the definition of the system itself. A well recognized distinction has however been drawn which is based on the mode in which the authority of the central government is enforced. Federal governments are thus divided into two classes: the weaker *Confederation*, which the Germans expressively

Classification.

¹ Freeman, *Federal Government*, p. 2.

call *Staatenbund*, or 'System of States;' and the stronger *Federation*, which answers to the German *Bundesstaat*, or 'Composite State.'

The characteristic of the Confederation, or *Staatenbund*, is that the central government deals only with the governments of the several States, not with the individual citizens. Its activity is chiefly legislative; it confines itself to giving orders to the States to do its bidding; to supply men or money for federal purposes, or perform other tasks required of them. As long as these demands are such as the federal authority can properly make, it is the duty of the States to obey; failing this, the only remedy of the central government is to use coercion against the refractory States. In a Confederation, therefore, there is no complete national government, and there is no real national citizenship. The unit for national purposes is not the citizen, but the State; the central government is a 'sovereignty of sovereignties,' not a nation of citizens.

On the other hand, in a true Federation, or *Bundesstaat*, the central authority acts directly on each individual citizen of each State, who is also a citizen of the union; it has its own administrative officers, who enforce federal demands upon these citizens without reference to the state governments; it has its own executive, judiciary, and all the departments of a complete national government. Each citizen has a double citizenship and a double allegiance; his political rights and duties fall into two bundles, the one referable to his particular State, the other to the Nation. In a true Federation, therefore, the Nation and the States are equally real, equally complete, and equally independent: the central government acts in federal matters as though the state governments did not exist: whilst the state governments act in provincial matters as though the federal government did not exist.

To the first type belonged all the ancient federal leagues (except, perhaps, the Achæan and Lycian) and

also all the mediæval confederations. The United States (from 1781 to 1789), Switzerland (until 1848), and Germany (until 1870) also belonged to the weak confederate type; but since the dates men-
Examples.
 tioned these three nations have been examples of the strong federal type of union. The same form has been followed by Canada (a dependent Federation under the British Crown) and by quite a host of Central and South American republics, living and dead. The only Confederation now existing is the particularly weak form of union entered into by some of the Australian colonies under the Federal Council Act of 1885. The union thus constituted is a mere legislative Confederation of the very weakest kind, with no pretence to executive or judicial powers.

The confederate type has almost uniformly proved a failure as soon as the immediate emergency which led to union has passed; and indeed even during such emergency it has seldom acted satisfactorily. Experience has shown that direct control over the citizens is necessary to enable a federal government to perform its functions effectually, and that dependence on the help of the state governments is a constant source of weakness. State resistance to an unpopular demand is likely at any moment to burst into disruption, and thus the peace and unity of the nation is continually endangered. Disobedient citizens may usually be coerced by the ordinary peaceful forms of legal process; but the disobedience of a State is a far more serious matter, and can only be overcome by threats or violence.

We may now consider more in detail the place of federalism as a compromise between two opposite systems. Government now-a-days is territorial; and
Federalism
 the establishment of a State involves the
as a
 definition of the boundaries of its territory.
Compromise.
 Many considerations help to determine this: geographical features, race, language, institutions, political sentiment, commercial convenience, safety from attack. But there are always two conflicting tendencies: towards local

independence, and towards centralization. The first of these is due to the desire of every district, every town, to manage its own affairs; the second may be due either to national sentiment and a desire for the political and commercial strength afforded by union, or to the compulsion of a strong and ambitious central government. The preponderance of one or other of these tendencies—these centrifugal and centripetal forces, as they may be called—turns the scale in favour of small independent States or large centralized States. Speaking generally, the former is the prevailing system of antiquity, the latter of modern times. The two tendencies, however, to localization and centralization, always exist, however much one or the other may preponderate; and the federal system is due to an attempt to reconcile them as far as possible.

The advantages and disadvantages of the opposite systems of small States and large States have been admirably summed up by Freeman,¹ who balances the gain and loss, and gives judgment, as between the two, in favour of the modern system of large States. A small State gives the individual citizen a greater and more direct share of political responsibility, and raises the average standard of political education. It kindles an intense patriotism, calls forth every power and every emotion of man's nature, and gives the fullest scope to human genius; 'it produces an Æschylus and a Demosthenes, a Dante and a Macchiavelli.' But it pays for its brilliancy by its shortness of life; it is tempted to constant and cruel warfare with its neighbours; its very virtues lead to excesses; patriotism degenerates into the lust of empire, political enthusiasm into bitter party hatred.

The merits and faults of large States are the negatives of these. Internal peace is secured over a large territory, and greater permanence and stability is attained. The intensity of patriotic and party feeling, with all the excesses of war and political strife, are diminished. But

¹ *Fed. Govt.*, pp. 14-68.

the standards of political education and often of political morality are diminished in proportion; and solidity is attained at the cost of brilliance.

Such is a summary of Freeman's contrast between 'the city-commonwealth, which sacrifices everything else to the full development of the individual citizen, and the great modern kingdom, which sacrifices everything else to the peace, order, and general well-being of an extensive territory.' Federalism he describes as a system 'intermediate between the two, borrowing something from each of them, and possessing many both of the merits and of the faults inherent in a compromise;' a system 'which will probably attain neither object in the perfection in which it is attained by the system which aims at it singly, but which may at least claim the merit of uniting the two in a very considerable degree.' It must however be remembered that federalism on a modern scale is usually a question, not between small States and large States in Freeman's sense, but between large States and larger States. But the difference of scale, though it may alter the degree in which particular Federations approach one extreme or the other, does not alter the position of Federations generally as a class intermediate between the two extremes.

§ 2. *When it is Suitable.*

It must not be supposed that the federal compromise is suitable for all times and all places. It is possible for a compromise between two extremes to combine all the bad points, and none of the good points, of both, and so to be worse than either. Federalism itself has its advantages and disadvantages,¹ which must be weighed against the advantages and disadvantages of the opposite systems which it is intended to reconcile. As compared with a system of small independent States, it has most of the advantages of

Not
Universally
Applicable.

¹ See Hart, *Introd. to Fed. Govt.*, §§ 15, 16.

complete unification, but it has them in a somewhat weaker degree. As compared with a single centralized State, it has many of the advantages of a group of small States, but again in a weaker degree. And as compared with both, it has the disadvantage of greater complication. It cannot be said universally that federalism is the best or highest form of government; but only that it is the best adapted to certain circumstances; that it is a system 'suited for some times and places and not suited for others, and which, like all other forms of government, may be good or bad, strong or weak, wise or foolish, just as may happen.'¹ We must therefore inquire into the conditions suitable for its growth.

The conditions favourable to the development and maintenance of the federal system are three:—(1) There must be among the people of the federating States some community of origin or history, to form a basis for the common national life. The 'crimson thread of kinship' is not absolutely essential (witness Switzerland and Canada), but greatly helps the welding of the nation. Neighbourhood of geographical situation is also necessary, except perhaps in the case of loose international Federations for the purpose of commerce and foreign relations only, such as the suggested Federation of the British Empire. (2) There must be the 'federal sentiment'—a proper balance between the wishes of the people for union and for independence. The people of the States 'must desire union, and must not desire unity.'² Without this balance of centripetal and centrifugal force, either the centralizing tendency will ultimately carry all before it, and produce a unified State, or 'state rights' will encroach upon the sphere of the central government, and tend towards disruption. (3) There must be a high degree of political capacity, and a habit of observance of law. The complexity of the federal machinery, and the necessity of obedience to two sets of political authorities,

¹ Freeman, *Fed. Govt.*, p. 70.

² Dicey, *Law of the Constitution*, p. 132.

make the system unsuitable for people of immature political development.

Other conditions used to be postulated, which history has now shown to be unnecessary. Thus it used to be said that federalism was out of place except when it appeared in the form of closer union—except when it was approached from the side of separation. The well-established federal republic of Mexico, however, was created by a process of decentralization; so was the recent Brazilian Federation. Even in the case of Canada, federal union involved the separation of Upper and Lower Canada, which had been unified for 27 years. And federalism has been seriously proposed for England, Scotland, Wales and Ireland, in lieu of the present complete union. It remains true, however, that federation is usually, though not invariably, a step from disunion towards union. To secure the permanence of the federal form, it is desirable that the division into States should have some historical basis; but even this is not essential. The boundaries of many of the States of the American Union—especially the newer States—are mere arbitrary parallels and meridians; and of course in decentralized Federations like Mexico the sentiment of local state patriotism is purely an artificial product of federalism, not an antecedent condition. Under such circumstances, state government and state citizenship are obviously at a disadvantage.

§ 3. *Its Essential Characteristics.*

We have taken a general view of what federalism is and what it aims at effecting; it remains to consider the constitutional machinery applicable to it. The details of this subject will be dealt with in subsequent chapters; here it is only intended to point out those essential characteristics of federal government which follow necessarily from the nature of the system. These essential characteristics may be shortly described as:—(1) The supremacy of the Federal Constitution. (2) The distribution, by the

Constitution, of the powers of the Nation and the States respectively. (3) The existence of some judicial or other body empowered to act as 'guardian' or 'interpreter' of the Constitution.

Mention has already been made of the 'twofold sovereignty' in a federated nation. Though this phrase is

Supremacy
of the
Constitution.

strictly accurate,¹ it may possibly be misunderstood. It is true that, in a Federation, attributes of sovereignty are possessed both by the Nation and by the States; but it is obviously impossible that either the legislature of the Nation or the legislatures of the States should be sovereign in the absolute sense in which, for instance, the British Parliament is sovereign. The British Parliament—consisting of King, Lords, and Commons—has, legally speaking, supreme and unlimited power throughout the whole Empire. It can pass what laws it pleases, and no law that it passes can be overridden by another body, or treated by the Courts as unconstitutional and void. No British statute has legally a higher sanctity than any other. The Habeas Corpus Act, or the Act of Union, might, if Parliament chose, be repealed in the ordinary course of legislation as easily as a Dairies Act.² The whole British Constitution is legally at the mercy of Parliament. It is in fact nothing but a collection of statutes, customs, and conventions, every line and every letter of which Parliament may modify or repeal at its pleasure. English writers express this by saying that the British Constitution is *flexible*, Continental writers (*e.g.* De Tocqueville), who are used to a more or less *rigid* constitution, say that there really is no British Constitution at all.

In a centralized State, then, the constitution may be rigid or it may not; the legislature may have limited powers, as in France and Belgium, or absolute powers, as

¹ See Freeman, *Fed. Govt.*, p. 11; Dicey, *Law of the Constitution*, pp. 129-168; Hart, *Introd. to Fed. Govt.*, pp. 12, 19.

² A great part of Magna Charta was in fact repealed some years ago by a Statute Revision Act without the British public being any the wiser.

in England; but in a Federation the central and local legislatures must be limited and the constitution must be more or less rigid. A federal constitution is in one aspect a compact between certain high contracting parties—the States and the Nation; and such a compact would lack stability if one of the parties could alter it at will. If the Congress of the United States could amend the Constitution at pleasure, there would be no sufficient security for ‘state rights.’ Congress might at any time abolish the sovereignty of the States, and change the Federal Union into a Unification.

To say that the constitution is ‘supreme’ or ‘rigid’ does not mean that it is incapable of amendment, but only that it is a fundamental law which has a higher sanction than ordinary acts of legislation, and which the legislature, acting in its ordinary capacity, cannot modify or repeal. It is thus contrasted with a *flexible* constitution, which recognizes no fundamental laws, and does not limit the amending power of Parliament. But even under a *rigid* constitution there may be, and usually is, a body empowered to amend the constitution. It may be the ordinary legislature or legislatures, speaking by an unusual majority; it may be an assembly or combination of assemblies convened for that special purpose; it may be the whole people voting by referendum. The rigidity is usually not absolute, but comparative; it means that amendments of the constitution—of the fundamental law—are hedged round with extra formalities and precautions. In a Federation it is usual to require, for a constitutional amendment, the assent, in some form, of the Nation, as well as of a certain proportion of the States. The importance of the amending power is obvious when it is remembered that it is the one power which is supreme over the federal constitution. The amending power (when it exists) is in fact the real legislative sovereign which presides directly over the constitution, and so indirectly over the dual sovereignty of the Nation and the States. There are, if we may express it so, three

tiers of sovereignties: first and lowest the limited and co-ordinate sovereignties of the national and state governments respectively; above these the superior sovereignty of the constitution, and above all the supreme sovereignty of the amending power. But, of course, when (as in America) the amending power requires unusual majorities, it is, in Dicey's phrase, 'a monarch who slumbers and sleeps.' The American sovereign needs a civil war to wake him, and is on ordinary occasions 'a monarch who does not exist.'

It has been said (p. 25, above) that a federal constitution is in one aspect a compact *between the States and the Nation*. This is a figure of speech which, perhaps, must not be taken too literally. At any rate, it must not be confounded with the totally different proposition that a federal constitution is nothing but a compact *between the States*—a proposition which does not seem adequately to recognize the nature of the national government or the national citizenship in a Federation. This is the 'treaty' or 'compact' theory of federalism, as opposed to the more generally accepted 'constitution theory' which holds that a Federation is something more than a 'perfected alliance,' and is, in fact, a completely organized 'State' or 'Government.' The difference is largely one of words; and perhaps the chief importance of the 'treaty theory' is its bearing on the doctrine of secession.¹ In its extreme form, it assumes that sovereignty remains with the several States, which are, therefore, free to withdraw from the union when they please. A union, however, of which this was true would hardly be a Federation, or even a Confederation; it would rather be that looser form of union to which the term 'Confederacy' is sometimes applied, and which is nothing but a more or less intimate *alliance* of sovereign States. As Dr. Hart points out,² 'perhaps the most striking support

¹ See p. 34, below.

² *Introd. to Fed. Govt.*, p. 18.

of the constitution theory is the power of amendment without unanimous consent which resides in most modern federal governments.'

The indispensable function of a federal constitution is to distribute the powers of the Nation and the States—to draw the line between what the national government may do and what the state governments may do. We can conceive of a federal constitution which should go no farther than this, and should leave the structure of the national government to the free choice of the Nation itself. That is to say, it is conceivable that the federal legislature might be given full power to alter the machinery of the federal government—to remodel the federal legislature, executive, and judiciary—though powerless of course to step outside its national powers and encroach upon the powers of the States. That would be reducing the 'supreme' or 'rigid' constitution to a minimum, and adopting, as far as federally possible, the 'flexible' or 'no constitution' system of the British pattern. But in practice the framers of a federal constitution always regard the mode in which federal powers are exercised as being equally important with the extent of the powers themselves, and accordingly the constitution not only enumerates the subjects entrusted to the federal government, but dictates, to a certain extent, the form of federal institutions and the basis of federal representation.

In fact, as Dicey points out,¹ 'the principle of definition and limitation of powers harmonizes so well with the federal spirit that it is generally carried much farther than is dictated by the mere logic of the constitution.' Accordingly the constitution often contains restrictions and prohibitions which have nothing to do with federalism proper. Thus the Swiss Constitution teems (after the Continental fashion) with 'guaranteed rights;' the American Constitution contains numerous special restrictions on the Nation and the States, and even then some States refused

The Division
of
Powers.

¹ *Law of the Constitution*, p. 142.

to join till it was promised that a 'Bill of Rights' should be added by amendment, which was soon afterwards done.

Wherever there is a body with limited powers, some test is needed to decide whether or not in any particular case it is exceeding those powers. As it is always possible that difference of opinion may exist as to the meaning of any term in a federal constitution, and as to whether a law passed or a thing done by the government of a State or the Nation is within the constitution, it is important that there should be some authority whose decision on every such point is final. The question is properly a judicial one, and ought to be submitted to an impartial and independent tribunal. In this respect the European Federations seem faulty, owing to a want of clear distinction between judicial and executive or legislative acts. The best types are found in the United States and Canada, where the duties of 'guardian' of the constitution are entrusted to a federal Supreme Court, which is created and whose independence is secured by the constitution itself, and which pronounces and enforces its decision without fear or favour. This duty is cast upon the Court, not by any express provision of the constitution, but by a well-known principle of British common law that where a body with limited authority (whether it be a school-board or a Federal Parliament) exceeds that authority, its action is simply void.

The 'Guardian' of the Constitution.

§ 4. *Other Characteristics.*

Apart from these essentials, it may be asked, what is the best pattern of government for a federated people to adopt? The question in this general form, ignoring as it does the different political habits, instincts, and circumstances of different peoples and different epochs, admits of no complete answer. There is no such thing as one stereotyped perfect model of

Model of Government.

federal government; the highest perfection of a federal government, or any other government, is perfect adaptation to the wants of the people. The principle and the spirit of federalism are everywhere the same; the form and the details depend upon an infinite variety of circumstances, and will everywhere be different. Each new federal union, therefore, must design its own political machinery: keeping the central principles of federalism in view; profiting, of course, by previous examples; but not slavishly imitating them, without due regard to difference of circumstances. The best test of suitability is experience; and it follows therefore that the framers of a federal constitution should model their work as closely as possible on the existing state constitutions over which it is to preside—constitutions which have grown up with the people, which have stood the stress of time and weather, which the people understand, and to which they are accustomed. If federal history teaches any one lesson, it is this: that where constitution-makers in their wisdom have devised or invented any new piece of political machinery, or imported any unfamiliar device from abroad, they have usually failed; where they have merely adapted materials already stamped with the people's approval, they have usually succeeded. If we look at the great Federations of to-day, we shall see that their several constitutions have their roots deep down in history, and that the differences between them are largely due to the soil in which they have grown. Everywhere we shall find that invention plays a very small part in constitution-making; and the reason is that, human faculties being what they are, originality in a constitution is apt to be a defect rather than a merit. The framing of a federal constitution is one of the most difficult and delicate tasks to which a statesman can be set, requiring judgment, discrimination, and critical insight of a very rare order; and it is no disparagement of the office to say that it should give little scope for the inventive faculties.

There is no necessary connection between federalism and republicanism. It is true that the governments of Federal Republics, and of the States composing Federal Republics, have usually taken a republican form; but this is not invariable, nor is it necessary either for the realization of the federal ideal or for the practice of federal principles. Canada is an example of a Federation under the forms of a constitutional monarchy; and the German Empire since 1870 has been a true monarchic Federation. Nor is it necessary that the governments of the States in a Federation should be uniform with one another or with the Federal government. The German Federation, to take an extreme case, is made up of four kingdoms, eighteen grand duchies, duchies, and principalities, and three little city republics. It is true that the Constitution of the United States guarantees to every State in the Union a republican form of government, but from a purely federal point of view this was not necessary. It is indeed desirable for many reasons that the constitutions of the States in a Union should approximate to one type; but the constitution need not, and generally does not, prescribe to the States any form of internal government.

But amid all the variety of federal institutions, and in spite of all the elasticity of the federal system, a few special features emerge which, though perhaps not absolutely essential to the system itself, are yet found so constantly associated with it that they may fairly claim to be typical. Chief among these is the system of two Legislative Chambers, and the basis of representation upon which the two Chambers are founded.

The existence of two Houses of Parliament in England, rather than one, or three, or four, is, as Freeman has pointed out, more or less a historical accident. But the bi-cameral system, so admired in its British prototype, has taken a firm hold not only of English-speaking peoples, but of a great part of the civilized world; and in the absence of hereditary

aristocracies all sorts of devices have been resorted to, in the British colonies and elsewhere, to obtain a counterpart of the English Upper House.¹ All these devices have been more or less artificial, and more or less unsuccessful; to federalism alone belongs the credit of having found a rational basis for the bi-cameral system. Whatever may be the case in a centralized State, the system of two Houses has a special fitness in a Federation, owing to the existence of two units of representation—the citizen and the State. The great compromise of the American Union, and one which has profoundly influenced modern federalism, was the device by which two great representative principles—the equality of citizens and the equality of sovereign States—received full and separate recognition in the two Houses of Congress. A Federation is for some purposes a Nation of individual citizens, each jealous of his equality before the law. For other purposes it is a union of sovereign States, each likewise jealous of its equal rights. The American compromise secured to every citizen—great and small, rich and poor alike—his equal representation in a Council of the Nation; it secured to every State—great and small, rich and poor alike—its equal representation in a Council of the States; and it constructed out of these two Councils the two branches of the federal legislature. The names, indeed—States' Council and National Council—we owe to Switzerland; but the thing itself is the great contribution of America to the cause of Federation.

Since 1787 this double principle of representation has never been ignored in the framing of a federal constitution. All the federal legislatures constituted since then have had two Chambers; in one the national basis of representation has always prevailed, whilst in the other, though the principle of state equality has sometimes received only a partial recognition, state representation has invariably been the

¹ The question of the 'reform' of the House of Lords itself on a representative basis is puzzling British statesmen to find a second principle of representation.

basis. In Canada, for instance, the two small 'Maritime Provinces' were thrown together and treated as one for the purpose of representation in the Senate¹; whilst in Germany, owing to the extreme disproportion between the States, the representation in the second Chamber is based on a compromise between equality and proportional importance. In Switzerland, however—and, it is believed, in all the Central and South American Federations—state equality in the second Chamber has been absolutely adhered to.

The scale upon which federalism may be practised is as elastic as every other part of the system. There have been complete Federations which could be swallowed up by the smallest State in the American Union; and doubtless the possible limit of size has not yet been reached. The earliest Federations were merely tribal; and the Achæan League—the only ancient Federation that reached national proportions—was small as compared even with Switzerland. This century has seen the extension of federalism to what we may call a continental scale, and the possibility of a future international Federation, and even of an ultimate World Federation, is spoken of seriously, not only by poets and dreamers, but by practical statesmen and sober political philosophers.²

It is obvious, however, that with every extension of size the character of federalism becomes modified, the enumeration of 'central' and 'local' subjects being greatly influenced by variations of scale. What is proper for federal and what for state control depends of course on the circumstances of each case. Until quite modern times, federalism was chiefly a question of defence, foreign relations, and mutual commerce. The great Federations of to-day, however, recognize many important functions of internal government which are of common concern, with regard to which unity of adminis-

¹ See pp. 85, 128, below.

² See, for instance, Bluntschli, *Theory of the State*, Bk. I. ch. ii.

tration is convenient and economical, and which are therefore suitable for control by the federal government in its legislative, executive, and judicial departments. On the other hand a great international Federation, supposing it to be feasible, would certainly only concern itself with international relations. The proper delimitation of central and local powers, with due regard to the best interests of all concerned, is one of the most important points to be worked out in the formation of a federal union.

A Federation need not necessarily be an independent nation. It may be in a position of dependence, real or nominal, upon some outside power: as is the case with Canada, which is federated 'under the Crown' of the British Empire. The Swiss Confederation long recognized allegiance to the Holy Roman Empire; and the Dutch United Provinces did not at first contemplate absolute independence. Or a Federation may, it is conceived, be itself a State in a larger Federation. History gives no example of a Federation within a Federation; but the semi-federal character of the British-colonial Empire suggests such a system, which is quite consistent with federal theory.

It has often been said that the federal tie is a weak tie, and therefore federal government means weak government. To a certain extent this is true; a federal government is apt to be neither so prompt in action, so effective from a military or diplomatic point of view, nor so secure against secession and disruption, as a completely unified government. But it must be remembered that the alternative to federation is usually separation, and that federalism is out of place where a stronger tie is possible or desirable. The merit of federalism is that it affords a moderate degree of union in cases where a closer union is either impossible or undesirable. Besides, the weakness of federal government has been exaggerated. In respect of the regular business of administration it is in many respects far stronger than a

unified government would be, seeing that it attains unity of organization without the unwieldiness of absolute centralization, and distributes the different functions of government to their appropriate levels.

Secession from a Federation is likely to be easier than secession from a unified State: firstly, because a State

Secession. which wishes to break away has already the political machinery required by an independent State, and is therefore better able to stand by itself; and secondly, because the central government of a federal union is likely to offer less resistance to dismemberment than the government of a consolidated State. But it must be remembered that a seceding State always has the Union to reckon with. No right of secession can be admitted by the Union, because such an admission would destroy its strength. A federal union must in terms be *perpetual*, else it contains within itself the seeds of its own dissolution, and is merely a partnership by mutual consent. Secession, then, is revolt, and must expect to be dealt with as revolt. This happened in America, when the Southern States deserted the Union and set up a Confederacy of their own. The United States fought and defeated them, and compelled them to return to their allegiance. It was then established at the sword's point that there was no right to secede; and the same thing was soon afterwards solemnly decided by the Courts. The opposite opinion rested on the argument that the Constitution was silent on the subject of secession, and gave no power to coerce a rebellious State. But it was held, and has ever since been undisputed law, that the Union is 'an indestructible Union of indestructible States,' and has power to do what is necessary to assert its indestructibility.

But suppose that the continuance of the Union, at least from the point of view of one or more of the States, seems undesirable. What is the remedy? It may in some cases be possible to amend the Constitution, by the prescribed means, so as to allow the Union to be dissolved

or the discontented State to separate. Otherwise the only alternative to continuing the undesirable union would be the revolutionary step of secession. Revolutions are sometimes right; and it is clear that circumstances might arise which would make secession right. The federal tie, though legally it is perpetual, becomes useless or worse than useless when it ceases to be voluntary; and though a seceding State may be conquered, and may be made subject to the Union, it cannot, unless it consents, be made to take its share in the government of the Union—to send representatives, or help to elect presidents. ‘A Federation, though legally perpetual, is something which is in its own nature essentially voluntary: there is a sort of inconsistency in retaining members against their will.’¹ Fraternity and equality—without which federalism is impossible—cannot be enforced at the sword’s point. In a case where secession was really necessary, this step, though technically a revolution, would probably meet with little resistance—with less, indeed, than under any other form of government.

A federal government, then, is like every other government in this: that in legal theory it is perpetual, in actual practice it is not necessarily so. Permanent or Transitive? And it has sometimes been urged that federalism, being dependent on the continuance of the ‘federal sentiment’—the balance of centrifugal and centripetal forces—is not likely to be durable, but is merely a stage of transition from separation to unification, or *vice versa*. According to this view, federalism is a position of unstable equilibrium, and cannot rank as a permanent form of government. ✓

As a matter of fact, history hardly affords us enough material for comparing the permanence of federal and other governments. We cannot, of course, point to any federal constitution which has lasted many centuries. The Achæan League preserved the federal form for about 100 years; the United Netherlands for upwards of 200 years;

¹ Freeman, *Fed. Govt.*, p. 91.

many other Federations have been born, lived, and died, in far less time. But no general rule can be deduced from these examples. Change is the portion of all governments, and centralized States have had their share of revolution, disruption, and absorption. Besides, the four great Federations of to-day have every sign of a long life before them. One of them has already celebrated its hundredth year, and its adhesion to federalism seems to be growing stronger, not weaker. If the federal system is merely a transition it is certainly a slow one.

But even assuming that one, two or three hundred years hence the United States may forsake federalism in favour of unification or separation, that would be no argument against federalism, either in general or in that particular instance. It would still be true that for several centuries America had enjoyed by federation a government which suited her better than any other system yet devised; the forsaking of the system would only show that its fitness was past. The excellence of a government is proved, not by its duration, but by its usefulness while it lasts. Governments, like all human institutions, must move with the times; and it has yet to be proved that federalism, as compared with other forms of government, is wanting either in elasticity or in stability. In the opinion of some, it is not merely a transient symptom of the present age, but the ultimate political compromise towards which the whole world is slowly but finally moving, and which will—centuries or millenniums hence—complete the political organization of mankind with one vast system of Federations upon Federations, crowned by ‘the Parliament of man, the Federation of the world.’

Without attempting, however, such distant forecasts as these, we may note one fact which seems to be not without significance as bearing on the future of federalism. Its marvellous modern development has been almost exactly coincident with the development of representative institutions. We have seen that a

representative system is necessary to federalism on a large scale ; and it is certainly a sufficiently remarkable phenomenon that, in the very century which has first seen representative government spread over the civilized world, federal government should have established itself in so many citadels. If we tabulate the representative governments of the world, separating the federal from the non-federal, we reach the astounding result that federalism (which last century was nowhere) already embraces half the population and more than half the area.¹ It is at least a plausible supposition that—whether federalism will ultimately be universal or not—its scope is at all events much wider than is generally supposed ; and it would be rash to prophesy any limits to the extent to which representation and federalism, hand in hand, are destined to modify the political ideas of the world.

¹ Representative governments (federal and non-federal together) may be taken to include roughly all Europe (except Russia and Turkey), North and South America, Australia, and the civilized States of South Africa. Federal governments include the United States, Canada, Switzerland, the German Empire, Mexico, Brazil, the Argentine Confederation, and Venezuela. We then get approximately the following figures :—

Population under representative government	...	316,000,000
" " federal	...	152,000,000
Area under representative government	...	20,000,000 sq. miles
" " federal	...	12,500,000 "

PART II.

FEDERAL GOVERNMENTS.

The history of federalism, unfortunately, is still unwritten. Freeman began it, but after writing one valuable volume on Greek Federations, with a chapter on Italy and a fragment on Germany, he deserted this subject for the Norman Conquest. Dr. Albert Bushnell Hart, of Harvard University, in the preface to his monograph,¹ promises a more elaborate work in which he hopes 'more fully to study the development of federal ideas.' Perhaps others are also in the field. Meanwhile the materials for a history of federal governments are scattered and incomplete. The chapters which follow do not pretend to be even a historical sketch, but rather a series of glimpses at the most important phases of federal development and an outline of the chief federal systems of the world.

¹ *Introduction to the Study of Fed. Govt.*, Boston, 1891.

CHAPTER I.

EARLY FEDERATIONS.

The beginnings of federalism are lost in the mists of antiquity. Its position as a compromise between the systems of large and small States makes it probable that it did not appear till both had Origin of
Federalism. been tried; certainly it made no great stir in history till after we hear of both huge central empires and brilliant city commonwealths. But as far as we can trace back the political history of Greece and Italy, we find the germs of small federal systems: groups of cities leagued together by a tie of whose nature we have sometimes only the vaguest scraps of knowledge, but which was evidently closer than an alliance, and not close enough for complete unification.

These early glimpses have a special interest to the student of federalism because of the curious parallels existing between ancient and modern federal institutions—parallels which are the more striking because of the great diversity of circumstances, and also because there can be little direct relation of cause and effect. They therefore help to an understanding of what is essential and what accidental in the federal system; and they tend to show that the system itself is not merely the outgrowth of a single epoch, but has a rational basis in political conditions which may arise in any age and in any country.

§ 1. *Greek Federalism.*¹

Political conditions among the Greek cities were in some respects very favourable to federalism. They had a

¹ See Freeman, *Fed. Govt. in Greece and Italy* (2nd ed.), 1893.

common race, language, and religion; they met together for Panhellenic games and religious festivals, and even sent delegates to common 'lay synods,' such as the Amphictyonic Council. As against foreign 'barbarians,' too, all Greeks were brothers, and would ally themselves together to repel invasion. On the other hand, centralization was checked by the broken and mountainous nature of the country, which made for local independence and local patriotism. The centripetal and centrifugal forces were both strong; it would seem just the soil for the federal compromise between unity and disunion.

There were, however, obstacles to federalism making any great progress. The political ideal of the Greeks was pure democracy—government by the whole people; and the idea of representation of the people by means of elected assemblies had not yet occurred to them. In a typical Greek democracy the whole body of citizens, assembled together in the market-place, exercised direct and sovereign power—was 'King, Minister, and Parliament all in one.' There were, indeed, magistrates elected yearly, but they were little more than servants of the popular will; the 'Government,' even from day to day, was the people itself. A pure democracy of this kind, where the citizens assemble almost daily, must evidently be on a tiny scale; it is the apotheosis of the 'small state' system. It is no wonder that the *city* became the unit of Greek politics, and the absolute independence of each city the Greek political ideal. No wonder that the problem of democratic federalism proved hard to solve, without the idea of representation.

Nevertheless, there were small tribal unions between neighbouring cities, in which the germ of the federal idea was more or less present. Freeman thinks that 'some sort of federal union must have been rather common than otherwise in those parts of Greece in which the city-system was never fully developed.' But the 'brilliant' period of Grecian history left federalism behind, as something quite inconsistent with the dignity of a sovereign city. It was

not till after the decay of Grecian splendour, when the pride of the great cities was humbled, that the federal system received its first notable development.

The history of the first real Federation begins about B.C. 280. The glory of Athens, Sparta, and Thebes had long since faded, and Greece was at the feet of Macedonia. The great Alexander was Achæan League. dead; but under his successors the Macedonian mastery of Greece continued, and was not only a name but a reality. Macedonian garrisons were quartered everywhere; towns were governed by tyrants in the Macedonian interest, or retained a nominal independence by inglorious submission. The fortunes of Greece were at a very low ebb when the turn came. The attention of Macedonia was momentarily distracted by a Gaulish invasion from the north, and the opportunity was seized by the ten little cities of Achæa, in the north-west of the Peloponnese, to unite to establish their independence. It was probably the renewal of an old Achæan league which had been broken up by Macedonian influence; but it was destined to rise to national importance. The admission of the Dorian city of Sicyon in B.C. 251 was the first step from a tribal league to a national Federation; other great cities followed suit, expelled their Macedonian garrisons, and joined the League; and before long the whole Peloponnese, excepting the kingdom of Sparta, formed a free and democratic Federation.

No formal constitution of the League has survived, but Freeman conjectures that some public document must have existed. The government of the League was Constitution. modelled on the government of the cities composing it—on the model, that is, of Greek democracy—with such differences as were made necessary by the increase of scale. The organ of popular will was still the Assembly of all the citizens; but (unless specially convened) it only met half-yearly, and then only for a few days; so that it had to leave far greater power and discretion in the hands of the magistrates whom it elected than

was the case in a city commonwealth like Athens. Democracy was thus tempered in the direction of *representation*; the magistrates were necessarily responsible governors as well as servants. Another unconscious step towards representation was made in the way the votes were taken in the Assembly. The assembled citizens voted, not as individuals, but *by cities*, each city having an equal vote. This device was necessary to prevent the preponderance of the city in which the federal Assembly happened to sit, and which would of course be more numerous represented than the others. The distance to be travelled in order to attend the Assembly seems further to have tempered the democratic principle in the direction of aristocracy, by practically disfranchising those citizens who were unable to make the journey.

The federal magistrates were all elected annually by the Assembly. The chief of them was the General, or, as we should call him, the President, who governed with the assistance of ten Ministers, all elected at the same time and holding office for a year. His exact relations with his Ministers are not known, but his position seems to have been that of the usual General of a Greek democracy: absolute commander-in-chief of the military forces and (subject to control of the Assembly, and, perhaps, to the advice of his Ministers) the civil head of the League.

There was also, as in all Greek democracies, a Senate, which was practically a Committee of the Assembly, and consisted of 120 members. This Senate was in no sense a second Chamber; its duties were chiefly preliminary, to arrange the business for discussion by the Assembly; after which its members of course took part in the business of the Assembly itself. There is reason for believing that the Senate consisted of members chosen from each city, to secure the representation of the city in the Assembly. If so, this comes curiously near the invention of a representative system.

The constitution thus outlined was strictly federal. It was more than an alliance; it even seems (unlike the earlier Greek Confederations) to have been more than a *Staatenbund*—to have been a A True
Federation real *Bundesstaat* or Federation. Polybius, the contemporary historian, writes:—‘Many have attempted in past times to lead the Peloponnesians to appreciate their common interests, and none have succeeded, because they cared more for their own supremacy than for a liberty in which all should share. But in our time this policy has made such progress that not only is there a union of political friendship and alliance, but they all have the same laws, the same weights, measures, and coins, the same magistrates, senators, and judges; and in a word the whole Peloponnese differs from a single city only in this—that its inhabitants are not included within the same walls.’ But though the central government was complete in itself, and seems to have exercised direct authority over the citizens, it did not interfere with the local affairs of the several cities, but occupied itself only with matters of common concern—chiefly, that is to say, with matters relating to war and commerce. There was of course a federal revenue; how raised we do not know, but probably by levies on the several cities—a system which, considering the comparative simplicity of ancient public finance, would not be open to so many objections as at the present day.

The chief structural defects of the constitution were two: the union of civil and military power in one person, which led to several disastrous defeats of the Achæan army under an incompetent general; Its Defects. and the equal voting power given to large and small cities alike, which caused a great deal of internal friction. In addition to, and perhaps partly owing to, these defects, the old instinct of city independence was never sufficiently subdued to give the union a proper degree of coherence.

The Achæan League had been at once successful in throwing off the Macedonian yoke and establishing its

independence. Only two things were now wanting to its highest ambitions: the addition of Sparta, which would have brought the whole Peloponnese under one government; and the addition of Athens, which would have completed the conception of a Federal Greece. But Athens preferred the shadow of independence, under Macedonian protection, to the real freedom offered by the League; the remembrance of her ancient dignity stood in the way of her acknowledging a federal bond, and she could never be prevailed on to join the League, though she willingly allied herself with it. The attempt to annex Sparta by force led, through bad generalship, to disaster and defeat; and the League, to rescue itself from disruption and Spartan domination, became, in the sixtieth year of its existence, a dependent ally of Macedonia. It still retained its federal institutions and its nominal independence. Afterwards, in the wars between Rome and Macedonia, it wavered in its support, and finally chose to side with Rome. By way of reward for this service, Achæa was engulfed into the Roman Empire, and reduced to the condition of a Province; the democratic constitutions were abolished and the League itself was dissolved. This was in B.C. 146; and it was the end of Greek federalism. 'For a hundred and forty years,' Freeman points out, 'the League had given to a larger portion of Greece than any previous age had seen, a measure of freedom, unity, and general good government, which may well atone for the lack of the dazzling glory of the old Athenian democracy.'¹

The Achæan League is interesting for its striking similarity to the modern American and Swiss Federal Republics—a similarity the more striking because there was certainly no conscious imitation. Between Greek federalism and modern federalism there is no direct historical sequence, and the curious resemblances, in spite of widely differing surroundings,

¹ *Fed. Govt.*, p. 553.

show that federalism is not the artificial product of a few constitution-makers or of a particular epoch, but develops naturally out of the political conditions which are suitable for it.

The Achæan League was one of many Greek leagues; its special importance lies in its having been the only one which reached national significance. Of the others, only the Lycian League¹ need be mentioned here. It had existed from very early times, but was remodelled, from a study of the Achæan League, into 'probably the best constructed Federal Government that the ancient world beheld.'² Its specially remarkable feature was that it dealt with the conflicting claims of large and small cities by a system of proportional votes—giving the larger cities two or three votes, instead of one. The Achæan and Lycian plans respectively show the difficulty which was felt, for want of a representative system, in apportioning influence among unequal members of a Federation.

§ 2. *Italian Federalism.*³

The germs of federalism were present in Italy, as in Greece, but they succumbed sooner to the overmastering power of Rome. In the early days, tribal Federations, or leagues of cities, seem to have been not uncommon. The most important was the famous league of the Thirty Cities of Latium, which probably for a time included the infant city of Rome, and which, as Rome grew to imperial power, passed through descending stages of alliance with and subjection to Rome until every spark of federalism was crushed out by the conquering city. Rome could not stoop to a federal union with smaller Italian cities, and she took care to discourage any union amongst her dependent allies; so in the fourth

¹ The Lycians, a people of Asia Minor, were Greek by civilization, though not by race.

² Freeman, *Fed. Govt.*, p. 163.

³ Freeman, *Fed. Govt.*, pp. 557—617.

century B.C. the Latin League was killed just as, two centuries later, the Achæan League was killed. The Twelve Cities of Etruria, and the mountain League of Samnium, had a similar fate.

But though the Roman domination was in fact fatal to federalism everywhere, it is curious to trace in the Roman system the several factors of federalism, which, had they blended properly, might have produced something like a Federal Empire. Rome did not govern the world by military force alone; she tried to incorporate her conquests. To this end she extended among her dependent allies first the embryo Latin citizenship, then the full Roman citizenship, with the franchise, or right of voting at Roman elections. But this franchise, for want of a representative system, was, of course, ineffective beyond the immediate neighbourhood of Rome, and the political cohesion was therefore incomplete. Again, the Roman Provinces—something like the British colonies before they were given responsible government—were allowed a certain measure of municipal self-government; and were, perhaps, not often interfered with in their internal affairs. But this independence was only a matter of grace, and was at the mercy of the long arm of the Roman administration. Neither national citizenship nor local self-government was fully effective; 'the Roman Constitution was neither Representative nor Federal, but it trembled on the verge of being both.'¹

§ 3. *Mediæval Federalism.*²

As it was, federalism disappeared for upwards of a thousand years. The wreck of the Roman Empire in the fifth century was followed by the Dark Ages, in which for several centuries no settled political system can be traced. The Teutonic invasion—the fusion

¹ Freeman, *Fed. Govt.*, pp. 572-6, where the quasi-federal elements of the Roman system are fully discussed.

² Hart, *Introd. to Fed. Govt.*, ch. III.

of a rude and vigorous barbarism with a corrupt civilization, of German customs with Roman institutions—make up a chaos from which the Feudal System at length emerges. Feudalism seems to be a product of the Roman system of military tenure of land combined with the Teutonic institution of homage, or personal service to a superior lord. Its fundamental principle is a double ownership of the soil—ownership by the feudal lord, and by the feudal tenant, under a custom which secured to each certain rights, and required of each certain duties. This double ownership has obviously a federal aspect; it is in fact the application of the federal principle to territorial sovereignty—to sovereignty in its relation to the ownership of land. Freeman accordingly points out¹ that ‘the relation of lord and vassal between sovereign princes, if strictly carried out, would produce something very like a kingly Federation.’ Feudalism did not, however, produce anything of the sort: partly because it was primarily a social and legal rather than a political system, and its semi-federal aspect did not extend to the general functions of government; partly because the balance was unstable, and feudal vassals either lost their local independence, as in France, or threw off their vassalage and became independent sovereigns, as in Germany.

Federalism in the Middle Ages really grew, not out of feudalism, but in opposition to it. The old towns and trading centres had been destroyed by the Teutonic invasion. The feudal system which followed was a rural and agricultural system; and commercial and industrial progress was hindered by the lawless plundering habits of the barons, and by the fiscal exactions of the great sovereigns. But in time, wherever opportunity occurred—wherever feudalism weakened its hold, or temporary security could be found—industrial arts and habits found an outlet, and towns established themselves. Their wealth exposed them constantly to plunder, and their

¹ *Fed. Govt.*, p. 74.

first necessity was self-defence. They fortified themselves; from time to time they bargained for charters and privileges of various kinds; often groups of them formed leagues for mutual protection and to secure commercial privileges. Such were the Lombard League in the twelfth century, the Rhenish League and the Hanseatic League, both dating from the thirteenth century, as well as many other groups of German Imperial and Free Cities. This tendency was common to all Western Europe: Spanish towns had their leagues; so had Scotch burghs; and in England the Cinque Ports were a commercial and defensive union of the same kind. These leagues banded together not for independence, but for mutual assistance; they did not, as a rule, dispute their allegiance to their feudal lord, but they claimed to defend themselves against lawless aggression and oppressive taxation.

These city leagues were rather commercial than political; and though they had a good deal of the federal spirit, the federal form was defective, and in
 Not Really Federal. no case did a permanent Federation result. There was usually a central Assembly of delegates, with power to determine questions of military and commercial policy; there was sometimes the germ of a central executive and even of a central judiciary, but there was no real political unity. The political systems of the day were not yet ripe for federalism. Classical democracy was long since dead, and representative institutions were not yet born, so that there was no basis for federal government to build upon. The mediæval city leagues usually broke up when the immediate necessity ended, and none of them survived as the nucleus of a permanent political union.

These industrial protests against lawlessness and absolutism were not confined to the cities; the union of
 The Swiss Confederation. Swiss Cantons¹ was a somewhat similar protest on the part of a rural population

¹ Adams, *Swiss Confederation*; Vincent, *State and Federal Govt. of Switzerland*.

against the absolute dominion of the German King. The three mountain Cantons which first leagued together in 1291 really claimed a constitutional right of internal self-government. The union which they formed amongst themselves for this purpose contained the germ of Swiss Federation; but the claim itself involved, as we shall see, the wider question of the decentralization, and in fact the ultimate federalization, of the German Kingdom.

The Swiss League defended its claim bravely, and prospered apace; it was soon joined by the rich cities of Zurich, Berne, and Lucerne, and afterwards by other cantons and cities which completed the 'League of the Thirteen Places.' Like the town leagues, it was chiefly defensive, and its federal organization was at first very imperfect. The only central authority was a Federal Diet of delegates, which was rather a consultative council than a real government. The articles of union, however, gradually developed, thus laying a basis for the later Confederation. Meanwhile, the League's dependency on the Empire dwindled by degrees till it became little more than nominal; and by the Peace of Westphalia, which closed the Thirty Years' War in 1648, the independence of the Swiss Cantons was recognized.

The same tendency to dispute the absolute authority of the Emperor of the Romans, which we have seen in the case of the city leagues and the Swiss Can-
The Holy Roman Empire.
 tons, led to the disintegration of the Holy Roman Empire¹; which, founded as a world-empire by Charlemagne, and revived by Otto the Great 'on the narrower but firmer basis of the German Kingdom,' gradually sank from a strong feudal monarchy to a lax Confederation. 'The Emperors were compelled slowly to yield charters, privileges, and exemptions to cities and princes, who gradually became territorial sovereigns.'² Though the central authority dwindled till it became

¹ Bryce, *Holy Roman Empire*; Freeman, *Fed. Govt.*, pp. 618-633.

² Hart, *Introd. to Fed. Govt.*, p. 44.

almost nominal, there still remained an elective Emperor, chosen by an oligarchy of German princes, and also the common Diet of the Empire, representing, not the German people, but the German governments. 'But when that Diet came to consist mainly of sovereign, though nominally vassal, princes, it became far more like a Federal Congress than a National Parliament.'¹ By virtue of successive partitions and subdivisions, the number of States eventually reached upwards of 300, varying in extent from great monarchies to little free cities. The Confederation had been practically dead long before the formal dissolution of the Empire in 1806. Its federal interest lies solely in its bearing on the modern Federation of Germany.

§ 4. *The United Provinces of the Netherlands.*²

We come to the verge of modern history for the first approach, since the Achæan and Lycian Leagues, to a real federal union. In the Netherlands, as elsewhere, the feudal system had taken a firm hold; but it had been displaced by the growing power of the towns more rapidly than elsewhere: partly owing to the enterprising and industrious spirit of the people, and partly because the flat country offered no natural strongholds to the barons. But the liberties which the people had won from feudalism they had afterwards to defend against absolutism in the person of the Spanish King. Their union, and their brave struggle against tyranny, are brilliant chapters in the history of nations, for they were the first to vindicate the rights of the people against the wrongs of kings. Their importance in the history of federalism is far less, for the Dutch political institutions of the sixteenth and seventeenth centuries were too far removed from our own to make constitutional comparisons or contrasts of very great value.

¹ Freeman, *Fed. Govt.*, p. 629

² Motley, *Dutch Republic*.

The Netherland Provinces (roughly Belgium and Holland) were at the beginning of the sixteenth century some seventeen disunited States owning allegiance to the Duke of Burgundy, but enjoying a large share of self-government under divers old charters and constitutions which they had wrung from successive dukes. They were practically little trading republics, whose strength consisted in their wealth. The governing power lay, not with the people—for the people, in Motley's phrase, had not yet been invented—but partly with the nobles, partly with the rich and powerful corporations existing in each city. These corporations, though not representative in any modern sense of the word, did in practice represent fairly well the popular interests; and as the corporations were in turn represented in the Estates, or Parliament, of each Province, the Provinces enjoyed a fair mediæval substitute for popular government.

About this time the Duchy of Burgundy became united by descent with the Kingdom of Spain, and thus the Netherland Provinces became Spanish dependencies. Just then the Reformation was spreading rapidly through Europe, and found special support in some of the Dutch Provinces. The Catholic King of Spain endeavoured to suppress the new religion, and thus under Charles and his son Philip—that Philip who sent the Armada against England—began the long struggle between Spain and the Netherlands. All the horrors of the Inquisition were forced upon the refractory Provinces; all charters and constitutions were ruthlessly broken; and it was to assert their constitutional rights and to protect their lives and liberties against Spanish violence that the isolation of the Provinces was broken down, and seven of them formed a league which originated for purposes of defence, but which endured as a Confederation for general purposes.

All the Provinces, Catholic as well as Protestant, resented the interference of Spain, and an unsuccessful

attempt was made to unite them all in resistance. But by the Union of Utrecht¹ in 1579 five Provinces, ^{Union of Utrecht.} soon afterwards made up to seven, agreed to remain 'eternally united, as if they were one Province.' At the same time each was to 'retain its particular privileges, liberties, laudable and traditionary customs, and other laws,' and the 'cities, corporations, and inhabitants of each Province were to be guaranteed as to their ancient constitutions.' The Provinces were to defend one another with life, goods, and blood against all force brought against them in the King's name or by foreign powers; such defence was to be controlled by the 'generality' of the Union, and the expenses were to be met by certain imposts and excises to be equally assessed and collected. No peace was to be concluded, no war declared, and no federal impost levied without the *unanimous* consent of of the Provinces; on other matters the majority was to decide—votes in the Estates-General being counted by States. Where a unanimous vote was required and could not be obtained, the question was to be referred to the Stadtholders (*i.e.*, Governors) of all the Provinces; if they could not agree, they were to appoint arbitrators, whose decision was to be binding. No Province was to make outside treaties without the consent of the Union. Neighbouring Provinces might be admitted by the unanimous consent of the Provinces. There was to be freedom of religious worship and a common currency. The articles of union could only be added to or amended by unanimous consent.

The machinery of this Confederation was of the simplest possible kind. It consisted merely of the Estates-General—a sort of Federal Council representing the nobles, the corporations, and sometimes the clergy in each Province. They voted, not individually, but by Provinces; and they represented the Provinces, not the people.

It is noteworthy that this simple document—which formed the basis of the Dutch Confederation—did not

¹ Motley, *Dutch Rep.*, Part VI., Chap. 1.

contemplate the establishment of an independent Commonwealth. There is not a hint of repudiating the authority of the King of Spain, and no such repudiation was intended. The Provinces did not dream of denying the King's claim to their allegiance; they only denied his right to trample on their constitutions. The Union was a Bill of Rights; it was not a Declaration of Independence. When, two years later, the continued aggression of Spain forced them to renounce their allegiance, they laid the sovereignty at the feet, first of France, then of England; and only when they had failed to find a Great Power for their constitutional sovereign did they become a republic in spite of themselves.

A Bill of Rights.

Moreover, the Union made no provision at all for a central executive. There was no single executive head standing to the Estates-General in the same position in which the provincial Stadtholders stood to the Estates-Provincial. The reason is simple. Each Province was a dependency of Spain; its Stadtholder was appointed by the King, as our colonial Governors are appointed. The Provinces admitted the King's sovereignty, and did not claim to dispose of any part of it. If there were to be a Federal Stadtholder, he would have to be appointed by the King, as long as the King's authority was recognized at all. It was only when the King was renounced that the need for a federal executive became apparent, and then the Estates-General filled the gap by electing a State Council which was practically a Federal Executive Board.

The patriotism of the people held the Confederation together during the glorious struggle for liberty; but when their independence was secured and the bond of a common danger was loosened, the weakness of the structure was apparent. The Union had stopped short of making a Dutch nation. There was no common citizenship, and no direct control by the central government over individuals; the Union was a mere *Staatensbund* or Confederation. Moreover, the powers of the Estates-

Weakness of the Union.

General were very limited. The States were so loosely hung together and state rights were pushed to such extremes that only a common danger could preserve the cohesion of the Union. The requirement of unanimity for all important matters made united action practically impossible; and the want of a proper representative system made the Estates-General drift farther and farther from the ideal of a Federal Assembly in proportion as the wealth and prosperity of the Provinces increased, and commercial rivalry gradually undermined the federal spirit.

The Dutch Republic had a career of upwards of two centuries, ending only with the disturbances caused by the French Revolution. Long before that, however, the Union had dwindled into a loose Confederacy of rich and prosperous trading Republics. The greatness of Holland was commercial rather than political; and indeed her political systems were so crude and the union so weak and ineffective as only to be tolerable owing to the peace-loving and practical character of the Dutch, who managed to get along with very imperfect political machinery. After the heroic struggle against Spain, their later history is a disappointment. They were 'a living example of the perils besetting a Confederacy which dared not become a Union.'¹ Hamilton, in 1788, writes of the Dutch Republic: 'What are the characters which practice has stamped upon it? Imbecility in the government, discord among the Provinces; foreign influence and indignities; a precarious existence in peace, and peculiar calamities from war.'²

¹ Motley, *Dutch Republic*.

² Federalist, XX.

CHAPTER II.

MODERN FEDERATIONS.

Though the principles of federalism are the same to-day as 2000 years ago, the federal governments of to-day have special characteristics which distinguish them clearly from their early prototypes. Most of these follow from the conditions of our social life: the greater completeness of modern political institutions, the greater complexity of modern commerce, and the annihilation of distance by modern means of communication.

The special features of modern as compared with early federalism may be summed up as follows:—

(1) It is based upon a complete *representative* system, which was lacking in all the early Federations, and which gives a national cohesion unattainable by other means. Moreover the special federal application of the representative system, in connection with a federal legislature of two Chambers, representing respectively individual citizens and individual States, supplies the fundamental compromise between larger and smaller States without which union would usually be impossible.

(2) All modern Federations are of the strong or *Bundesstaat* type, whereas early Federations were almost invariably of the weak or *Staatenbund* type: were—in the English terminology now in vogue—Confederations merely. Experience has shown the need for a complete federal government, acting directly on

individual citizens, and able to enforce its own decrees without calling in the aid of the state governments.

(3) The scale of federal government has increased beyond anything that was conceivable before the days of representation, steam, and electricity. Early

Scale.

Federations were mere unions of cities or cantons; but federalism has now reached a continental scale, and a single State in a Federation is often comparable in size to a great European kingdom.

(4) The sphere of federal authority has increased, and the whole system become vastly more complex. Foreign relations and commerce used to comprise the

Complexity.

whole sphere of federal activity. Now, however, the increased freedom of intercourse makes uniform federal legislation desirable in respect of many matters of internal government which have little or nothing to do with commerce; as, for instance, naturalization and aliens, immigration, marriage and divorce, quarantine, and in some cases the whole criminal code. Moreover the extent and complexity of modern commerce greatly extend the range of subjects more or less directly connected with it, and therefore suitable for federal control; as for instance, shipping, banking, bankruptcy, copyrights and patents, railways, and so forth.

The four great examples of modern federalism are the United States of America, the Swiss Confederation, the Dominion of Canada, and the German Empire. There are many others which may be grouped together as minor Federations: minor, because, although some of them are of great size, they are of little political importance.

§ 1. *The United States of America.*¹

Modern federalism begins with the foundation of the United States of America; and in order to understand the American Constitution it is necessary to outline the circumstances under which it was framed.

¹ Bryce, *American Commonwealth*; Stevens, *Sources of the Constitution of the U.S.*

Before the Declaration of Independence in 1776 there were thirteen British colonies along the east coast of what is now the United States. Their only political connection was their common dependence upon the Empire. Their constitutions, mostly shaped and developed from the old trading charters, bore a close resemblance to one another, and were copies on a small scale of the British Constitution as it was then understood. They all had elective Assemblies; most of them had also nominee Councils; and they had Governors appointed for the most part by the Crown.¹ But it must be remembered that in none of them was there anything like a 'responsible Ministry.' Responsible government, so far from having been introduced into the colonies, was hardly as yet beginning to be recognized in England. The American colonies were in fact 'Crown colonies;' they had local legislatures empowered to pass local laws, but the whole executive power was vested in the Governor, and was not controlled in any way by the legislature. 'The colonial governorship itself was of a personally executive character. For though the cabinet system is generally found in the present colonies of England, not one of the older colonies possessed it; their local constitutions having been copied from hers before its invention.'² Upon the Declaration of Independence, the only tie between the thirteen colonies, then claiming to be States, was the 'Continental Congress' of delegates, which had issued the Declaration in the name of 'the people of the United States,' and which took upon itself the control of the war, but which had no defined powers. This Continental Congress drew up 'Articles of Confederation and Perpetual Union,' which were ratified by the last of the State Legislatures in 1781, and which established a loose confederation of the thirteen States.

¹ Connecticut and Rhode Island elected their own Governors; and in Pennsylvania, Delaware, and Maryland the appointment of Governors was vested in hereditary lords proprietary.

² Stevens, *Sources of the Constitution*, p. 151.

These Articles of Confederation vested certain common powers in a Congress of delegates appointed yearly, and voting by States. This Congress was hardly more than the deliberative head of a league. The weakness of the union was apparent even while the war lasted; and after the peace of 1783, when there was no longer any immediate need for self-defence, it was, as Washington said, no better than anarchy. Nothing could be done without the consent of nine States—a requirement which alone well nigh blocked legislation. There was no power of taxation, and no means of enforcing requisitions made on the States. There was utter commercial disunion, and a bitter war of tariffs continued between the several States; the coinage was hopelessly complex and debased, and commerce was at a standstill. No amendment of the Articles was possible except by unanimous consent of the States. The Union was discredited both at home and abroad, when the Philadelphia Convention, appointed by the State Legislatures to revise the Articles, boldly exceeded its instructions and drafted an entirely new Federal Constitution, which, after a fierce conflict, was adopted by the Legislatures of the requisite number of States, and brought into existence the United States of America.

The Constitution of the United States is an adaptation to their own circumstances of the political principles with which its framers were acquainted. It is, first and foremost, a copy of the British Constitution, as that Constitution was then understood. The Americans of 1787 drew their observations of the British Constitution from several sources. First of all, from the working of the British Government itself, as they saw it in England under George III., and as they themselves came in contact with it by reason of George III.'s colonial policy. Secondly, from the colonial copies of the British Constitution which had been working in each of the thirteen colonies, and were retained by the

thirteen States. Thirdly, from standard political literature, especially Blackstone's *Commentaries on the Laws of England* and Montesquieu's *Spirit of the Laws*, both of which works had an immense influence on the form of the American Constitution.

The federal form of the Constitution was determined by circumstances. Seven years' experience of the loose Confederation proved the need of a strong central government; whilst the memory of the yoke which the colonists had just cast off made them jealous of entrusting unlimited power to a central government. They had not escaped from one tyranny merely to fly into the arms of another. National unity together with state rights was what they wanted, and what nothing but the federal system could offer them. And in framing the Federal Constitution they got little assistance from any historical precedents. Of the closest parallels—the Greek Leagues—they had no exact knowledge; and they were thrown back on their own practical common sense and political sagacity. That sagacity is best shown by the closeness with which they kept to familiar institutions, and by their avoidance of invention and experiment.

On declaring their independence, the States had kept their old colonial constitutions, in many cases making no change except to provide a method of selecting their own Governor. Hence the type of state constitution has the same source as the Federal Constitution, and the general likeness of the state constitutions to one another and to the Federal Constitution is easily explained. The States of course modify their constitutions from time to time, but the general uniformity is still remarkable.

The federal government exercised jurisdiction over the vast territories stretching westward from the States, and these territories have from time to time been carved into new States, which were admitted into the Union. The Union now comprises 45 States, and there are still portions of territory unincorporated.

The legislative powers of the Union are vested in a Congress of two Chambers—a Senate and a House of **The Federal** Representatives. The framers were familiar **Legislature.** with the bi-cameral system, not only in the British Parliament, but also in the American colonial legislatures; and the device by which they adapted this system to the federal idea—making one Chamber representative of the States, the other of the Nation—is one of the crowning triumphs of their work.

The House of Representatives is elected every second year by the people of the several States, in proportion to population—each State being allowed one member for every 30,000 citizens. The House of Representatives thus practically represents the Nation as a whole—the people of the United States. There is, however, no uniform federal franchise, the qualification of electors in each State being that required for electors of the popular branch of the state legislature.¹

The Senate is composed of two Senators from each State, chosen by the Legislature thereof for six years. They retire in rotation, one-third of the Senate being renewed every two years. The Senate, therefore, represents the principle of continuity as well as the principle of state equality.

Congress must assemble at least once in every year. It is not subject to premature dissolution—an expedient belonging to the cabinet system, with which, as we shall see, the constitution-makers of the United States were not familiar. Revenue bills must originate in the House of Representatives, but may be amended by the Senate. The President has a veto on bills passed by Congress; but his veto may be overridden by re-passing the bill with a two-thirds majority in each House. Members of both Houses are paid for their services, and must not hold any public office. The House of Representatives has the power of

¹ But if in any State the suffrage is denied to any male adult citizens the basis of representation in that State is proportionally reduced.—Amendment XIV.

presenting impeachments against public officers, which must be tried before the Senate.

Obviously, the Senate and the House of Representatives correspond respectively to the British Houses of Lords and Commons—or to the colonial Legislative Councils and Assemblies, which are themselves copied from the British Houses of Parliament. But the Senate fulfils a special federal function by becoming *representative* of one of the federal units—the several States composing the Union. A Federation is in one aspect a Nation of individual citizens, in another a group of individual States; and it was the happy device of the Philadelphia Convention to adapt the bi-cameral system to federalism in such a way as to recognize the state-unit in one branch of the federal legislature, and the citizen-unit in the other. The principles of ‘one State one vote’ and ‘one man one vote’ receive equal recognition; and thus is solved, by an ingenious compromise, the problem which had puzzled the founders of all previous Federations: how to reconcile the claims of larger States to predominance with the claims of smaller States to equality. The American example has had a profound influence on all subsequent Federations, and seems to have established the proposition that a federal legislature should consist of two Chambers, one representing the Nation, and one the States.

The executive power of the union is vested in an elected President, who holds office for four years. The chief limitations on the personal exercise of his powers are that he cannot make treaties The Federal Executive. without the concurrence of a two-thirds majority in the Senate, and that he needs the consent of the Senate to all public appointments—a consent which by constitutional practice is now never refused. He is, indeed, provided with a so-called Cabinet; but this consists merely of official heads of departments, whose advice he is free to accept or reject at his pleasure. With the exceptions mentioned, all the executive powers which the Constitution vests in the

federal government are exercisable at the personal will of the President, subject to no control by any Cabinet, and only controllable by Congress to the extent to which laws may be passed over his veto—an event which, owing to the great majorities required, very seldom occurs.

It is easy to recognize in the President a copy of the English King writ small, or—which is much the same thing—of a colonial Governor writ large. The Philadelphia Convention wanted a single executive head, and they modelled it on the patterns known to them. A hereditary King was of course out of the question; but the election of State Governors was already familiar to them. The most original part of their work was the system of indirect election by an elected college: a system on the ingenuity of which they prided themselves, and which they thought would obviate the evils of direct popular election, but which has proved a singular disappointment—showing how hard the work of the constitution-maker is when he deserts experience and trusts to invention. It was thought to limit the power of the personal ruler by making him dependent on the suffrage of the people, and by limiting his office to four years. It was not seen that in trying to copy the English King they gave the President a personal power far greater than the English King had even then, and immensely greater than the English King was soon to have. They did not know that in England the real executive power was even then passing into the hands of a parliamentary committee, or 'Ministry,' and that the personal will of the King was becoming more and more dependent on the will of his advisers. They got no hint of this from Blackstone or Montesquieu; no such process was at work in the colonial constitutions which they regarded as true copies of the British Constitution; and they were blinded to its operation in England by the accidental circumstance of the strong personal influence of George III. The American President is therefore a copy of what an American colonial Governor really was, and of what in

American eyes King George III. appeared to be. Theoretically, the President is the highest servant of the people: practically, during his term of office—and of course in respect of national matters only—he has the personal powers of the Governor of a Crown Colony; the powers of an English King before the days of responsible government.

One of the deepest political convictions of the time was the doctrine of Montesquieu, which ascribed the excellences of the British Constitution to the separation of the legislative, executive, and judicial functions. Montesquieu had not seen, and his disciples of 1788 did not see, the very intimate connection which was growing up in England between the legislative and executive departments: by which the real executive power was being transferred to a committee of the legislature, dependent from day to day on the confidence of one Chamber of the legislature; and by which on the other hand the executive or Cabinet, so long as it possessed that confidence, controlled the general business of legislation. Consequently the Convention did all they could to separate the President from Congress, and to make each independent of the other. The President is not chosen by Congress, and is not responsible to it; and neither he nor his Ministers can sit in either Chamber. The executive and the legislature work independently, and without consulting one another; and the consequence is the curious congressional system. There being no Ministerial committee to control legislation, Congress has been compelled to resort to a system of Standing Committees in order to get through its work. The result is that the unity of legislation is altogether destroyed. Each committee goes on its way regardless of the rest, and Congress, having neither time nor inclination to reconcile the patchwork, generally adopts what is recommended to it. Perhaps the most curious illustration is that of finance. With us, the Ministry, who have to spend the money, make their own estimates of expenditure, and propose the necessary taxation. In

America, one Committee raises revenue, without knowing how much is wanted; another appropriates expenditure, without knowing how much is available; and the executive, which is not represented on either Committee, is expected to make both ends meet. Of course the President may, and does, give evidence before the Committees; but neither Committee nor House is under any obligation to adopt his recommendations. This extraordinary system of finance has only been tolerable because the revenue of the federal government has always been greatly in excess of its needs; the difficulty has been, not to find money, but to spend it.

Even the American system, however, has not succeeded in entirely separating the legislature from the executive. The President's veto is a negative legislative power; the assent of Congress to a declaration of war, and the assent of the Senate to appointments, are executive acts. Moreover, Congress by minute laws and regulations has managed to encroach a good deal on the functions of the executive; and some of the Committees of Congress deal with matters which are really administrative. But the separation has been so far effective that it has prevented the possibility of anything like the British 'cabinet system' developing in America.

The judicial power of the Union is vested in a Supreme Court, and in certain inferior courts which Congress is empowered to establish. The independence of the judges is secured by their holding office during good behaviour, and by their receiving a salary which cannot be reduced during their continuance in office.

The federal courts have both an original and an appellate jurisdiction, but only in regard to matters of a federal or inter-state nature. This jurisdiction extends to all cases arising under the Federal Constitution, or federal laws and treaties; to cases affecting ambassadors and other public ministers; to Admiralty and maritime cases; to cases in which the United States are a party; to cases between different States or the citizens of different States,

&c. The Supreme Court is not—as the British Privy Council had been before the Declaration of Independence—a general court of appeal for the States. In cases between citizens of one State, where only the law of that State is invoked, the decision of the highest Court of the State is final, and no appeal lies to the federal courts. The jurisdiction of the latter is founded strictly on the federal principle that the States are not interfered with in purely domestic matters.

The Federal Supreme Court has a special duty as what is called ‘guardian of the Constitution.’ It must be remembered that Congress—unlike the sovereign British Parliament—is a creature of the Constitution, endowed by it with limited powers of legislation. Acts of Congress derive their validity from the Constitution alone; and if Congress steps outside the prescribed limits its acts are simply void—just as the bye-laws of a municipality are void if they are *ultra vires*, or if they conflict with the statute law. Just as an English or Australian court pronounces on the validity of a bye-law, so the Supreme Court of the United States pronounces on the validity of an Act of Congress: it tests the Act by the Constitution, and, if the Act appears to contravene the Constitution, pronounces it unconstitutional and void. The Supreme Court has this power, not by virtue of any express provision in the Constitution, for the Constitution says nothing about it, but by virtue of a fundamental principle of common law—that any Act done by an agent in excess of his authority is void. Congress is merely an agent of the Constitution; any of its Acts which are not authorized by the Constitution are unconstitutional, and must be pronounced so by the Supreme Court when the question arises for its decision.

The Constitution, of course, limits the powers not only of Congress, but also of the State Legislatures; and as each State, in imitation of the Nation, has also a ‘rigid’ Constitution, each State Legislature is further limited by

this. Consequently there are in the United States four distinct grades of law :—(1) The Federal Constitution ; (2) Federal Statutes ; (3) State Constitutions ; (4) State Statutes. A law in any of these grades has to be tested by the grades above it, and is void if it contravenes a law of higher efficacy. Complex though this system seems, it is quite simple in practice. The principle, indeed, is perfectly familiar in these colonies, where our colonial statutes have to be tested by their conformity to Imperial statutes.

The duty of the Supreme Court, therefore, as ‘guardian of the Constitution,’ is the purely judicial one of interpreting the law. To do this, it has to test the validity of a lower law by a higher ; and thus it preserves the balance of the Constitution by preventing the central government and the state governments from unauthorized encroachment.

The American Union is not only a sovereign Nation, but a collection of sovereign States ; and the sovereignty
 Nation and of the States survives except so far as it has
 States. been expressly surrendered, by the Federal Constitution, to the national government. In matters of domestic government the States are quite independent. They have complete control over their own constitutions, except that the United States must guarantee to every State a republican form of government. And the range of subjects controlled by the state governments is so wide that Bryce declares that an American may, through a long life, never be reminded of the federal government save when he votes at presidential and congressional elections, lodges a complaint at the post office, or has his luggage opened at the custom house. Most matters that touch the domestic life of the citizen—from his schooling to his hanging—are dealt with by the States ; and a recent American writer points out that nearly all the great questions which have agitated England during the last sixty years would, in America, have come within the sphere of

state legislation. The line between federal and state functions is strictly drawn. The federal government administers its own laws through its own officers; and it does not interfere with the administration of state laws by state officers. Both sets of institutions are complete in themselves, and work independently in their several spheres; whilst the federal courts preside over questions of conflict.

Direct relations between the Nation and the States are very few. The state constitutions and laws must not transgress the federal constitution. The federal government must protect each State against invasion, and also, on the application of the State itself, against domestic violence. And it is now agreed that the federal government has authority—though not expressed in the Constitution—to prevent the secession of a State. But for the most part the dealings of the federal government—like those of the state governments—are with the citizens direct.

The federal government has a general power of taxation for federal purposes, subject to the limitations that 'all duties, imposts, and excises shall be Finance uniform throughout the United States;' that 'no capitation or other direct tax shall be laid, unless in proportion to the census;' and that 'direct taxes shall be apportioned among the several States . . . according to their respective numbers.'¹ It has exclusive control of customs, the States being forbidden to levy import or export duties; and it is from this source that the bulk of the federal revenue is derived. Direct taxes were levied for a time after the civil war to reduce the war debt. Recently, by the Tariff Act of 1894, Congress tried to resort again to direct taxation, but the Supreme Court declared the Act to be unconstitutional—a decision which shows that the federal powers of direct taxation are very materially restricted by the rigid words of the Constitu-

¹ Art. II., secs. 8, 9; Art. I., sec. 2.

tion.¹ These powers, such as they are, do not of course affect the concurrent power of the States to levy direct taxes for state purposes.

A remarkable feature of the American system is that federal and state finance are absolutely unconnected. Under the Constitution the United States took over all the debts of the old Confederation, including the war debt. For the state debts, however, the federal government has no responsibility whatever; nor need it hand over surplus revenues to the States. The federal government has no financial dealings at all with the States except in the way of contract—buying, selling, and bargaining as the parties may agree.

This complete separation of federal and state finance has the advantage of making the States absolutely self-reliant, but it has led to unforeseen difficulties. In 1787 the customs revenues were small and the war debt was large; and the framers of the Constitution may be excused for overlooking the possibility of an excessive federal revenue, and for failing to supply a safety-valve. Latterly, however, the huge revenue and the impossibility of spending it have been a constant source of embarrassment to the federal government. Extravagant expenditure and a wasteful system of finance have only partly met the difficulty; and not long ago Congress made a voluntary refund to the state governments in order to reduce its unmanageable surplus. The national coffers are overflowing, whilst the state governments have to resort to heavy direct taxation to meet their obligations. Worse still, the virtual impossibility of amending the Constitution makes the evil hard to cure.

¹ The decision was, in effect:—(1) that a capitation tax and a land tax are 'direct taxes,' and must therefore be apportioned among the States according to population; (2) that a tax on the income from land is in effect a tax upon the land itself, and is therefore a direct tax; (3) that income from bonds of States and municipalities is not subject to federal taxation; and (4) that the unconstitutional provisions of the Act form so integral a part of its policy as to invalidate the whole.

The Federal Government deals with the citizen, not through the medium of his State, but directly. Every citizen of a State, in fact, is also a citizen of the United States. He has a double allegiance—to his State and to the Nation. It is the latter allegiance which appeals more strongly to his sentiment, and which must prevail where the two conflict; it is the former which comes closer to his everyday life.

The citizens of each State are entitled to the right of citizens in all the States. A person charged in any State with crime and found in another State must be delivered up on demand. The 'Bill of Rights' contained in the first ten constitutional amendments gives the sanction of the Constitution to certain standard popular liberties, and of course makes it unlawful for the government of a State, or for the federal government itself, to infringe those liberties.

Congress by itself is powerless to amend the Federal Constitution. That is a power which is vested jointly in the people of the Nation and the peoples of the States, speaking in certain specified ways. Amendments may be proposed either (1) by a two-thirds majority in both Houses of Congress, or (2) by a Convention called by Congress on the application of two-thirds of the State Legislatures. They must be ratified in three-fourths of the States, either by the Legislatures or by Conventions, as Congress shall determine. But no State may, without its consent, be deprived of its equal representation in the Senate. Hitherto, the Convention method has never been used, but all amendments have been proposed by Congress and submitted to the State Legislatures. The large majority required makes amendment almost impossible, except when peculiar conditions prevail. Only fifteen amendments in all have been made; of which one batch of ten were made immediately after the adoption of the Constitution, and another batch of three in the excitement following the civil war. There has

been no amendment since 1870. Though rigidity in a federal constitution is desirable, it seems that the rigidity of the American Constitution has been somewhat overdone.

But without actual amendment, the Constitution has to a certain extent developed with the times. Judicial interpretation has filled in its outlines by applying its broad principles to an infinite variety of facts and cases. Federal legislation has gradually spread over the field assigned to it, and so supplemented the Constitution by a mass of statute law, which, when authorized by the Constitution, is of equal authority. And lastly, usage has introduced conventional rules, or unwritten laws, which have no other sanction than general consent and long habit, but which practically have the force of law.

§ 2. *The Swiss Confederation.*¹

The Swiss Federal Republic, the second of the great modern Federations in point of date, is specially interesting by way of comparison and contrast with the United States. In respect of area, density of population, political ideas, and antiquity of institutions, it differs widely from the United States. Nevertheless, the present Constitution is an adaptation of Swiss ideas and institutions in the light of American experience, and the points of resemblance are at least as remarkable as the points of difference. In some respects it marks a higher degree of federal development, as well as a nearer approach to democratic ideals. Among its most interesting features are the specially Swiss form of Executive, and the direct popular voice in legislation by means of the Referendum and Initiative.

Until 1798 the successive phases of union between the Cantons amounted only to leagues or alliances, without any real central government.² Then suddenly came the change, forced on by French influence, to the unitary Helvetic

¹ Adams, *Swiss Confederation* ; Vincent, *State and Federal Govt. of Switzerland*.

² See p. 48, above.

Republic, in which the sovereignty of the Cantons was temporarily destroyed, and they became mere administrative departments. This was totally opposed to the dominant Swiss passion for local independence; the Helvetic Republic soon fell apart, and was followed by various phases of confederation, in which the sovereignty of the Cantons was restored. In all these changes foreign interference was more or less manifest. At last in 1848 the Swiss Diet produced and the people adopted a new Federal Constitution, which, though revised from time to time, still forms the basis of the Swiss Confederation.

The Confederation is composed of 22 States, or Cantons, as they are called, of which three are divided into 'half-Cantons,' so that there are 25 local Swiss governments, whose constitutions are The Cantons. of great antiquity. Three languages—German, French, and Italian—are spoken in different parts. Each Canton and half-Canton, considered by itself, is a little Republic. Six of them are pure democracies, in which the whole people assemble together in 'folk-moot' for legislative purposes, just as did the freemen of a Greek city or a Teutonic tribe. Of the others, only one is 'strictly representative,' in the sense that it delegates legislation *absolutely* to a legislature; the rest, though possessing representative legislatures, are 'democratic' in various degrees, inasmuch as the people, by means of the Referendum, retain some measure of direct control over legislation. As expressed in the Constitution of Zurich, 'the people exercise the law-making power with the assistance of the state legislature.' Even in the 'folk-moot' Cantons there is a representative Council, whose duty it is to arrange and prepare the business for the assembly of citizens; and the cantonal legislature, where it exists, is simply a development of this Council, and consists of a single Chamber.

The Referendum, which exists in all but one¹ of the

¹ And in that one (Freiburg) it is used for constitutional amendments, though not for ordinary legislation.

Cantons in which the people do not legislate directly, is a popular vote by which the people accept or reject laws passed by their representatives. It is, in fact, **Referendum and Initiative.** a popular veto. In some Cantons it is *compulsory*, and no law is valid until accepted by the people; in others it is *optional*, and a vote is only taken when demanded by a certain number of citizens. The Initiative, a more recent institution adopted in some of the Cantons, is a popular power of *introducing* legislation, which must then be dealt with by the legislature.

The cantonal executive is uniformly a committee or council, elected either by a popular vote or by the legislature. The number of members varies from five to thirteen; the term of office from one to five years. There is always a chairman or president of the Executive Council, but he has no single executive authority; administration is vested in the Council as a whole. The Councillors may attend and speak in the cantonal legislature, but they are usually debarred from voting or being members.

The above sketch of the cantonal constitutions is necessarily incomplete, attention having only been directed to those features which are necessary to explain the Federal Constitution. In that Constitution we shall find cantonal institutions reproduced, with such adaptations as are suggested by the federal system, and especially by the example of the United States.

‘With the reservation of the rights of the people and the Cantons, the supreme authority of the Confederation is **The Federal Legislature.** exercised by the Federal Assembly,’ consisting of two Chambers—the National Council and the States’ Council. These correspond to the American House of Representatives and Senate, but are more appropriately named.

‘The National Council is composed of representatives of the Swiss people, chosen in the ratio of one member for each 20,000 persons of the total population.’ But each Canton and half-Canton is to have at least one member,

and no federal electoral district may be formed out of parts of different Cantons. The cantonal suffrages are adopted provisionally, but the Confederation has the right to establish by law a uniform franchise. Members are elected for three years, and are paid out of the federal Treasury.

It will be seen that the national character of the House is more clearly expressed than in the American Constitution. It is spoken of as representing 'the Swiss people' as a whole, and the Cantons are only mentioned as affecting the division into electoral districts. The federal control of the suffrage, too, shows that it is regarded as an attribute of national citizenship, not of cantonal citizenship.

The States' Council consists of two representatives from each Canton, or one from each half-Canton. The mode of election, term of office, and amount of payment are left to the several Cantons. The result is that some members are elected by popular vote, others by the legislatures; and the term of office varies from one to three years. This want of uniformity to some extent affects the dignity and influence of the States' Council, and helps to throw the centre of gravity into the National Council.

For legislative purposes the Chambers sit separately, and their powers are co-ordinate; any bill may be introduced in either Chamber, and must of course be passed in both Chambers before it becomes law. Any of the three national languages may be used in debate; and laws must be printed in all of them. But the Federal Assembly has also certain administrative and judicial functions, which are exercised by both Chambers sitting together. Thus in joint session they elect the Federal Cabinet, the Federal Judges, and the Commander-in-chief; and they sit jointly as a court of justice to decide on complaints against the federal executive and conflicts of jurisdiction between federal authorities.

The executive has no veto on legislation, but the people have a veto by means of the federal Referendum. For **Referendum and Initiative.** ordinary federal legislation the Referendum is *optional*, and is only taken if demanded by 30,000 voters or by eight Cantons. If no such demand is made within 90 days the bill becomes law. If a Referendum is demanded, the bill is accepted or rejected by a majority of the votes. Constitutional amendments are submitted to a *compulsory* Referendum, and do not take effect unless approved by a majority of votes and by a majority of all the Cantons. Recently a Federal Initiative has been introduced, which enables 50,000 citizens to compel the Federal Assembly to consider legislation on any subject. Indeed, it goes further than this: it gives the 'initiating' citizens 'the right to draft the new article themselves, and to require that it shall be submitted directly to the people and the Cantons.' The law so drafted must then be submitted to a Referendum; though the Chambers may submit at the same time an alternative proposal of their own. The dangerous nature of the Initiative in this form is admitted by Swiss statesmen. It amounts to this: that a law drafted by an irresponsible demagogue may be passed in the heat of a popular agitation without revision of any kind by the responsible representatives of the people.¹

The Swiss executive body is the Federal Council, or Cabinet, elected by the two Houses sitting together. It **The Federal Executive.** comprises seven members, elected at the beginning of each term of the National Council, and holding office for three years. Each Minister must come from a different Canton. Ministers are usually chosen from the Federal Assembly, but cannot continue to be members of it, though they may speak in either Chamber. One of the members of the Cabinet is annually elected by the Assembly to be President, but he has no

¹ See an article by M. Numa Droz, *Contemp. Review*, March, 1895. The Initiative is further dealt with below, p. 138.

single executive authority; his position is merely like that of chairman of a board. Administration is vested in the Cabinet as a whole, and all decisions are decisions of the whole body.

The relations between the executive and the legislature are intermediate between the American and British systems. As in America, the executive cannot dissolve the legislature, nor can the withdrawal of the confidence of the legislature force the executive to resign. But the relations between the two are far more intimate than in the United States. In the first place, the Swiss Cabinet is elected by the legislature (as is indirectly the case in England); in the next, Ministers may introduce bills in the Assembly, and speak on them, and thereby exercise a powerful control over legislation, though they have no vote. Again, the corporate nature of the Swiss Cabinet distinguishes it from the so-called 'Cabinet' which advises the American President, but which has no real share of executive power. Unlike the British Cabinet, however, it need not consist of men holding the same party views, and it does not hold itself responsible for the rejection of bills which it has recommended.

The whole executive system is based on ancient Swiss institutions, and is an almost exact imitation, with the necessary modifications, of the system familiar to every Swiss citizen in his own Canton. Compared with the executive systems of other Federations, it affords an excellent illustration of how the principles of federalism may be adapted to the most varied institutions, and how federal machinery can be shaped to suit the habits and traditions of different peoples.

Continental judicial systems are so different from British, and from our point of view so inferior, that the Swiss federal judiciary need be very shortly noticed here. The Federal Court has a civil and criminal jurisdiction in matters of federal concern, both in the first instance and on appeal. The independence

of its judges is insufficiently secured. They are elected by the Assembly for six years, and being re-eligible, are not independent of political favour. The judgments of the Federal Court are executed, not by the Court itself, but by the Federal Council. The federally important point, however, is that the Swiss Federal Court is not, like the Supreme Court of the United States, the 'guardian of the constitution;' it has no power to question the constitutionality of federal laws. Sir F. O. Adams ascribes this to the fact that all federal laws, either tacitly or through the Referendum, obtain the sanction of the Swiss people, to which the Federal Court must bow. It might be answered that the Cantons, as well as the people, are interested in the question of constitutionality, and that federal laws are not necessarily accepted by a majority of Cantons, and have not therefore full federal sanction. The real explanation of the fact that Swiss federal laws cannot be questioned by the Court is probably to be found in the Continental notion that 'administrative disputes' (*i.e.*, disputes affecting matters of state) are too important to be trusted to the ordinary tribunals, and should be reserved for the decision of the Government.¹ The constitutionality of a federal law is an 'administrative' question, coming within the competence of the Federal Assembly, which is thus the sole judge of the validity of its own laws. To our notions, this entrusting of a judicial decision to a non-judicial body is not without danger. 'According to any English standard, Swiss statesmanship has failed as distinctly as American statesmanship has succeeded in keeping the judicial apart from the executive department of government; and this failure constitutes a serious flaw in the Swiss Constitution.'²

'The Cantons are sovereign, so far as their sovereignty is not limited by the Federal Constitution; and as such

¹ See Dicey, *Law of the Constitution*, pp. 303-330.

² Dicey, *Law of the Constitution*, p. 159.

they exercise all the rights which are not delegated to the federal government.'¹ That is to say, in Switzerland as in the United States the presumption is in **Confederation** favour of state sovereignty, and the federal **and Cantons.** government has only such powers as are expressly conferred on it by the Constitution. Nevertheless the range of federal legislation in Switzerland is much wider than in the United States, owing to the fuller and more detailed enumeration of subjects in the Constitution. This is a natural result of Swiss circumstances, the Swiss Constitution being the development of a union which had already had a growth of centuries. It is obvious, too, that uniformity of legislation on certain subjects can wisely be carried further in a compact country like Switzerland than over an immense territory like the United States. But the wider scope of the Swiss Constitution is rather a matter of legislation than of administration. The national matters which are exclusively administered by the Swiss government are comparatively few. The Confederation has the sole right of declaring war and peace, and generally of making foreign alliances and treaties; it has the control of the army, and of posts, telegraphs and telephones; it has the sole right to impose and collect customs duties. But in many cases the administration of federal laws is entrusted partially or wholly to the Cantons; the federal power 'is limited to a general controlling supervision';² the Confederation makes the laws, and the Cantons execute them. Thus the Cantons share even in the organization and maintenance of the army; they are allowed (exceptionally) to make minor treaties with foreign governments, and so forth. A marked contrast is thus offered to the United States, where the functions of State and Nation are more strictly defined, and 'the powers given to the federal government are wielded by it exclusively.'³

¹ Swiss Constitution, Art. 3.

² Adams, p. 35.

³ Vincent, p. 33.

The Confederation has authority over the Cantons in certain respects. Thus it guarantees to each Canton its territory, its sovereignty, the liberties and rights of its people, and the powers delegated to its authorities. These provisions give the Confederation large powers of interfering in cantonal disturbances. Again, the Confederation guarantees to the Cantons their constitutions, provided: (a) that they do not contravene the Federal Constitution; (b) that they assure the exercise of political rights according to republican forms; (c) that they have been ratified by the people, and may be amended on the demand of a majority. Greater uniformity is thus enforced than by the United States Constitution, which merely guarantees to every State a republican form of government. When Cantons revise their constitutions, the revision does not take effect until both Houses of the Federal Assembly have agreed that it contains nothing contrary to the Federal Constitution. This of course is merely an example of the 'administrative' jurisdiction of the Assembly to act as sole interpreter of the Constitution.

In the matter of finance, the Nation and the States have more points of contact than in America. This is partly due to jealousy of the central power, whereby the Confederation was not given general powers of taxation, but a kind of compromise was arrived at. The Confederation has the sole right of levying customs duties on exports and imports, and these are the chief source of federal revenue. The large income from the post and telegraph department also belongs to the Confederation, but is almost balanced by expenditure. The income from federal property, the proceeds of the federal powder monopoly, and one half of the gross receipts from the military exemption tax (collected by the Cantons, which retain the other half), are other sources of revenue. For any further revenue, the Confederation may call for direct contributions from the Cantons, to be 'determined by federal legislation with special reference to their wealth

and taxable resources.' This contribution is a financial reserve which has never yet been called for. It is a relic of the old 'confederate' ideas which objected to the direct taxation of individuals by the central government.

The largest item of federal expenditure is the army. As regards general expenditure, it is hard to draw a hard and fast line between federal and cantonal responsibilities, the central and local governments often sharing in the expense of public works and institutions of various kinds.

Though styled, in Continental fashion, a 'Confederation,' the Swiss Republic is, of course, a true Federation or *Bundesstaat*, exercising direct authority over individual citizens. Confederation
and Citizens. 'Every citizen of a Canton is a Swiss citizen,' with all the privileges and liabilities conferred by the Constitution. As a Swiss citizen he votes (or is voted for) at federal elections, takes part in the federal Referendum and Initiative, and is brought into direct contact with federal laws and federal officers. He is guaranteed a number of rights: equality before the law; freedom to move from one Canton to another; the enjoyment of local rights of citizenship; and many liberties and privileges expressly mentioned.

The Swiss Constitution is more easily amended than that of the United States. Revision is effected by the Federal Assembly. If one House passes a Amendment of
Constitution. resolution in favour of amendment, and the other House does not agree—or if 50,000 voters demand amendment, and the Assembly does not agree—a Referendum is taken on the question of whether the Constitution should be amended; and if the vote is in the affirmative, both Houses undergo re-election and proceed to the work of revision. Revision takes place 'through the forms required for passing federal laws.' The amendment is then submitted to a compulsory Referendum, and does not take effect unless approved by a majority of citizens and also by a majority of Cantons. Amendment of the Constitution is, therefore, a more difficult process than ordinary federal

legislation, the Referendum being compulsory instead of optional, and the assent being required of a majority of States as well as a majority of citizens. Nevertheless, the superior sanctity of the Constitution is ineffectually guarded, seeing that an ordinary federal law, once passed, cannot be challenged by the Courts; and therefore it is conceivable that the Constitution may virtually be amended by the easier process of ordinary federal legislation. The necessity for the consent of a majority of Cantons may be thereby evaded; though not, of course, the consent of their *representatives* in the States' Council. The want of the judicial test of federal laws by the touchstone of the Constitution opens a door to the possible encroachment of the federal government.

§ 3. *The Dominion of Canada.*¹

The Canadian Federation is specially interesting because it touches us closely in two respects: it illustrates the federal union 'under the Crown' of a group of practically self-governing British colonies; and it illustrates also the application to federalism of the British cabinet system.

Canada was a French colony till 1763, when it was ceded to Great Britain. After the cession the French civil law and many French institutions (such as **Early History.** land tenure) were retained—the population being almost entirely French. But the English minority rapidly grew, and was dissatisfied with its French surroundings, till in 1791 a division was effected into Upper Canada, where English law and tenure were introduced, and Lower Canada, which retained French institutions. Each Province had a legislature of two Chambers—an elective Assembly and a nominee Council; but as yet of course neither legislature had control over the Governor's policy or the choice of his advisers; the government in each case was that of a Crown colony. The colonies were kept in leading-strings and governed from Home. The

¹ Bourinot, *Fed. Govt. in Canada*; Munro, *Constitution of Canada*.

lesson of the American war had not yet been fully learned, and English statesmen still thought that the fault of their colonial policy had been in giving *too much* liberty. The Canadians soon became discontented with the autocratic nature of their government, and the legislature in each Province kept up a continuous quarrel with the executive.

At last Lord Durham's report in 1838 helped to bring about the great turning-point in British colonial policy—the change to a system of real colonial self-
government. Lord Durham recommended Responsible Government.
the introduction to the colonies of *responsible government*—the transfer of real executive authority, in local matters, to a committee of Ministerial advisers responsible to the Legislative Assembly. He also recommended the re-union of the two Canadas. They were accordingly re-united by the Act of Union in 1841, with a legislature composed of an elective Assembly and a nominee Council, which in 1854 was replaced by an elective Council. The great change towards Ministerial responsibility was made gradually by remodelling the Governor's instructions from time to time. The Governors were at first instructed 'to administer the government in accordance with the well-understood interests and wishes of the people.' In 1847 Lord Elgin, Governor-General, was instructed 'to act generally upon the advice of his executive council, and to receive as members of that body those persons who might be pointed out to him as entitled to do so by their possessing the confidence of the Assembly.' In this way Imperial influence was gradually withdrawn in favour of local responsible advisers. By 1848 the responsible system had been extended to the newer Provinces of Nova Scotia and New Brunswick.

The union of the two Canadas, with their respective French and English majorities, had gone too far, and produced fresh irritation. On the other Federal Influences.
hand the isolation of the other mainland
Provinces was complete. None of them could exercise

jurisdiction over the vast North-West Territory, outside the provincial boundaries. The neighbourhood of the United States emphasized the weakness of their position, and the need for some change. Opinions were divided as to what the change should be. Some few opposed union as tending to weaken the attachment to the mother country; others favoured an independent nation in imitation of the United States; others again, arguing from 'manifest destiny' or from American sympathies, advocated incorporation with the United States—a policy for which Congress on its part was openly and even indiscreetly eager. But the great majority were loyal to the Empire, and hostile to the United States, with whom there were continual border bickerings, to say nothing of the memories of old hostilities. The prospect of being swallowed up in the great American Republic had no charms for them. They wanted union; they wanted virtual independence; but they did not want to sever their connection with the Empire. The racial line of cleavage between the two Canadas, and the independent spirit of all the Provinces, suggested a federal union rather than unification, and the neighbourhood of the great Federal Republic familiarized the suggestion. They were not, however, so jealous of a central power as the American States had been; whilst at the same time a certain prejudice against American institutions—and especially against 'state rights,' which had recently been discredited by the civil war—tended to prevent a close imitation of the American Constitution. These were the chief influences which moulded the coming union.

The federal movement gained a firm hold, and in Canada a coalition government was formed, pledged to federation. A convention of delegates from all the provincial governments met at Quebec in 1864, and unanimously adopted a set of 72 resolutions embodying the terms of a federal union. These were submitted to the several legislatures, and, after certain amendments, were adopted by

resolutions in the form of addresses to the Queen. The task of framing a Constitution Act out of the resolutions was performed in London, with the assistance of 16 delegates from the four mainland Provinces. The British North America Act was duly passed, and came into force on the 1st of July, 1867, when the Dominion of Canada was established.

The mainland Provinces, just before the federation, had been three: Canada (formed by the union of the two Canadas in 1841), New Brunswick, and Nova Scotia. The British North America Act first redivides Canada into the original two Provinces (under the names of Ontario and Quebec), and then unites all four into a federal dependency. The Act, therefore, besides being a Federal Constitution, is to some extent a Constitution Act for the two new Provinces.

Ontario chose to have a legislature of one Chamber only—an elective Assembly. Quebec preferred the more usual legislature of two Chambers—an elective Assembly and a nominee Council. The other two Provinces already had two-chambered legislatures, with nominee Councils, which remained unaltered. Each of the four was administered under the responsible system, by a Ministry possessing the confidence of the popular Chamber. But instead of a Governor appointed by the Home Government each Province now had a Lieutenant-Governor appointed by the Governor-General in Council. Under the provisions of the Act the colony of Prince Edward Island (which has an elective second chamber), and also the new colonies of British Columbia and Manitoba (with single-chambered legislatures), have since been admitted to the Union. The Dominion Government also has full jurisdiction over the vast North-West Territories, which will ultimately be parcelled out into new Provinces. At present the Territories have a Legislative Assembly and a Lieutenant-Governor, but

without responsible government; they are, as it were, a Crown colony of the Dominion.

The Constitution of the Dominion is stated in the Act to be 'similar in principle to that of the United Kingdom.'

The Dominion. It provides for a Governor-General, the representative of the Queen; a Privy Council to advise the Governor-General; two Houses of Parliament—a Senate and a House of Commons; and federal courts of justice.

The executive authority of the Dominion is vested in the Queen, and is exercisable by the Governor-General, **The Federal Executive.** either with the advice of his Privy Council or personally as the case may require. The Governor-General corresponds exactly to the ordinary Governor of a British colony, and has the double capacity of representative of the Queen in the Dominion, and constitutional ruler of the Dominion. His Privy Council—or, more accurately, 'the Queen's Privy Council for Canada'—consists nominally of present and past Cabinet Ministers; but the membership of ex-Ministers is purely honorary, and for practical purposes the Privy Council (like our Executive Council) is identical with the Ministry. The relations between the Governor and his Council are precisely those with which we are familiar in these colonies. Practically, the Ministry, while they possess the confidence of the House of Commons, have the real executive power.

The House of Commons corresponds to the American House of Representatives, and consists of representatives **The Federal Legislature.** of the Dominion chosen by the electors of each Province in proportion to population. Quebec has the fixed number of 65 members, and the other Provinces are represented proportionately. The House is elected for five years, subject, however, to dissolution at any time by the Governor-General, according to the British system. The Parliament of Canada was empowered to introduce a uniform federal franchise; but meanwhile the federal elections were to be conducted in each Province

under the franchise used for the provincial Assembly. Not until 1885 was a uniform federal franchise adopted. There was then introduced a complete set of federal electoral machinery, distinct from that of the Provinces.

The Senate, like the American Senate, is meant to represent the States, but it does not do so as effectually as its American prototype. In the first place, state equality is very imperfectly recognized. The British North America Act created three divisions for the purposes of the Senate : Ontario, Quebec, and the Maritime Provinces ; each division being represented by 24 Senators. The Maritime Provinces, originally two, and now including Prince Edward Island, are thus lumped together as equivalent, for purposes of representation in the Senate, to each of the larger Provinces. This apportionment recognized the principle of equality, while it infringed it;¹ but in the subsequent allotment of Senators to new Provinces there has been no pretence of equal representation, a compromise having been made between equal and proportionate representation. A still more serious defect of the Senate, however, as a representative body, is that its members, instead of being elected, are life nominees—and nominees not of the Provinces, but of the Dominion Government. A Senator must indeed be a freeholder and a resident in the Province for which he is appointed, but his appointment rests with the Governor-General in Council—practically, that is, with the Dominion Cabinet. Bourinot says² that the Quebec Convention were influenced in favour of a nominee Council by Canadian experience of an elective Council since 1854, by the expense of elections in a thinly populated country, and by fear of deadlock. But Canadian 'unitary' experience was not applicable; the expense of elections might have been avoided by making the provincial legislatures elect the Senators; and deadlocks are as likely with a nominee Council whose numbers are *fixed* as with an elective Coun-

¹ See page 128, below.

² *Fed. Govt. in Canada*, p. 97.

cil. The real reason both for the nominee basis and for placing the nomination in the hands of the Dominion seems to have been the then current prejudice against 'state rights.' The Canadians recognized that they must have a 'Council of the States,' but they determined to make it weak and not strictly representative of state interests.

The powers of the Senate are those of the usual Upper House on the British model. It cannot initiate money or revenue bills, and usage does not allow it to amend them; in other respects it has co-ordinate legislative powers with the House of Commons. But though it is a dignified and capable body, it shows, according to Bourinot, 'the weakness of an Upper House under the British system, and none of the prestige that attaches to an ancient body of hereditary legislators.' It halts between two ideas—'state rights' and nomineeism—and lacks weight because of its illogical basis.

Members of both Houses of Parliament are paid for their services at the rate of £200 a session, and 10 cents a mile travelling expenses.

The government of the Dominion, like that of the Provinces, is conducted on the British parliamentary system, **Parliamentary System.** by a Cabinet of responsible advisers who form the link between the executive and legislative departments. The Governor-General of Canada, like the Governor of an Australian colony, chooses advisers who have the confidence of the lower House, and accepts their advice while they retain that confidence, subject, of course, to his instructions from the Queen; and the Ministers not only conduct the executive work of the Dominion, but also guide the legislative work of Parliament.

Under the powers given to establish federal courts, the Supreme Court of Canada has been created, to which (with **The Federal Judiciary.** certain exceptions) an appeal lies from the courts of final resort in the Provinces. Its appellate jurisdiction is therefore far wider than that of the Supreme Court of the United States, to which no appeal

lies from the state courts except in cases of a federal or inter-state nature. But it is a 'general court of appeal for Canada' in a limited sense only, since the existing right of appeal from the provincial courts direct to the Privy Council has been left untouched. Nor is it a *final* court of appeal, since the Privy Council entertains appeals from its judgments. There are not in Canada (as in the United States) federal courts established in the Provinces; but the judges of the provincial courts are (for the most part) appointed and paid by the Dominion government.

The Supreme Court of Canada, like that of the United States, acts as 'guardian of the constitution' by deciding upon the constitutionality of federal and provincial laws. But it is not (as the United States courts are) the sole judge of this question; the Governor-General in Council, as we shall see, has a right to disallow provincial bills, and in exercising this right he takes into consideration the question whether, in the opinion of his advisers, the bill is constitutional. His assent to a bill, however, does not prevent the Supreme Court from afterwards deciding that the Act is unconstitutional.

An independent Federation involves only two sets of governments; but in Canada, which is a dependent Federation 'under the Crown,' we have to deal with three sets—those of the Empire, the Dominion, and the Provinces. The relation between these three, and the division of the sum total of political functions into three degrees, needs careful consideration.

The relation of the Dominion to the Empire is the ordinary colonial relation of *dependency*, differing in important respects from the federal relation between the Provinces and the Dominion. It is of course true that the Dominion is practically self-governing in matters which concern Canada alone, and that in matters of Imperial concern the British Parliament legislates for the whole Empire—Canada included. So far, there is something resembling a federal distribution of

Empire, Dominion and Provinces.

Empire and Dominion.

functions. But the resemblance is only superficial; there is really no definite line drawn between the Dominion and Imperial governments. The powers of the Dominion government are indeed strictly limited by the British North America Act, but there is no limit fixed to the powers of the British Parliament. No one would of course deny that Canada has to-day a real constitutional right of self-government, and that any interference by the Empire with the domestic concerns of a Canadian Province, or of the Dominion itself, would be 'unconstitutional'—quite as unconstitutional (for instance) as the refusal of a defeated Premier to resign. At the same time, this constitutional right is unwritten, and therefore indefinite. It is a matter of constitutional morality rather than law: and though—to take an extreme case—it would be utterly unjustifiable for the Imperial Parliament to tax Canada (as it once taxed the American colonies), and it is inconceivable that it will ever do so; yet, if such a tax were imposed, it would be impossible to contend that it was *illegal*, in the sense that any court in Canada, or even the Privy Council itself, could refuse to give effect to it. Canadian self-government (and indeed colonial self-government generally) cannot be measured as a matter of law; it depends, in theory, on the discretion of the Crown and of the Imperial Parliament. The sovereign British Parliament is bound by no rules, and can override colonial laws and constitutions at its pleasure; and there is no colonial Act which the Queen cannot veto. As a matter of usage, however, the limits of colonial self-government are broadly, if vaguely, defined, and are never transgressed. Usage, which has ripened into a constitutional right, thus gives a federal aspect to colonial relations, and veils the fact that the real relation—owing to the supremacy of the British Parliament and the non-representation of the colonies therein—is the very different one of dependency.

The relations between the Dominion and the Provinces are mainly federal; though, as we shall see, the distinction

between the federal and dependent relations has not always been adhered to, and the Provinces in some respects appear in the light of dependencies of the Do- **Dominion and** minion rather than States in a federal **Provinces.** union. This is due partly perhaps to a desire to give symmetry to the series—*Empire, Dominion, Provinces*; but chiefly to that horror of state rights which has already been mentioned.

The division of powers between the Dominion and the Provinces is effected by an opposite method to that adopted in any of the other great Federa- **Division of** tions. The provincial legislatures have **Powers.** only the powers expressly given them by the Federal Constitution; everything else belongs to the Dominion Parliament. For this peculiarity the state-right bogey is chiefly responsible; but the special circumstances of a dependent Federation may also have had something to do with it. In a Federation under the Crown, as in any other Federation, the powers of Province and Dominion can be fenced off from one another; but with the present system of colonial dependency no definite fence can be erected between Dominion and Empire. Between Province and Dominion the definite federal relation was to exist; between Dominion and Empire the indefinite dependency relation. It may have seemed simpler to enumerate the powers of the Provinces, which had only to be fenced off from above, than those of the Dominion, which were sandwiched between rival powers above and below, and incapable, above, of clear delimitation.

Provincial powers include generally 'all matters of a merely local or private nature in the Province.' The Provinces have full power to amend their **Lieutenant** own constitutions, 'except as regards the **Governors.** office of Lieutenant-Governor'—a limitation of considerable importance. The Lieutenant-Governor of a Canadian Province is a federal officer, appointed and paid by the Dominion Government, and acting under instruc-

tions from the Dominion Executive. He is called the representative of the Queen, but he is only so at second-hand. He is really the representative of 'the Governor-General in Council'—of the Governor-General acting in the capacity of constitutional ruler of Canada, and therefore with the advice of the Dominion Executive; not in the capacity of representative of the Queen, under Imperial instructions. The Lieutenant-Governor is responsible to the Dominion Government. Under its instructions he can veto Acts of the provincial legislature, or reserve them for the assent of the Governor-General. The Governor-General—always 'in council'—has the same right of vetoing provincial laws as the Queen has of vetoing Dominion laws. In short, the Lieutenant-Governor stands to the Governor-General just as the Governor-General stands to the Queen; and the Provinces are to a certain extent made dependencies of the Dominion, just as the Dominion is a dependency of the Empire. To quote a Canadian authority: 'The Dominion Government now occupies those relations towards the provincial governments that England, before the confederation, held with reference to the Provinces, and still does in the case of all colonies outside of Canada.'¹ This is altogether opposed to federal principle, which requires that the Union shall have no control over the domestic government of the States, and which makes the courts, as interpreters of the Federal Constitution, the only arbiters between the laws of the States and of the Union.

This false extension of the dependency principle into the relations between Provinces and Dominion is seen **Dependency** in other directions. Thus, the judges of **of Provinces.** provincial courts are appointed and paid by the Dominion Government, which also appoints, as we have seen, Senators for each Province. But notwithstanding these departures from the federal system, the Provinces are not mere administrative divisions of a unified colony, but are States in a colonial Federation.

¹ Bourinot, *Fed. Govt. in Canada*, p. 59.

The duties of a provincial legislature, though more circumscribed than in the case of an American State, are sufficiently important. It has the raising of great part of the provincial revenue, and the spending of all of it; the management and sale of lands; the control of municipalities, local works, education, and the administration of justice; and legislation on many important subjects and generally on all local matters.

Contrary to the American system, federal and provincial finance in Canada have many points of contact. The Dominion, at its foundation, took over the public debts of the Provinces, and also the greater part of the public works. A large share of the provincial revenue and expenditure was thus bodily transferred to the Dominion. The Dominion moreover was given full power to raise money by any mode of taxation, whilst the Provinces were restricted to direct taxation for local purposes. The question of provincial finance gave the framers of the Constitution much trouble. Customs and excise had hitherto been their chief sources of revenue; but these were now turned over to the Dominion, and the prospect of direct taxation for provincial purposes was unwelcome. It was accordingly provided that the Dominion should grant annual subsidies to the Provinces for the purposes of provincial government; and the amount of these subsidies, based on population, debts, financial position, and other factors, was fixed by the British North America Act.¹ This settlement, however, has since been disturbed:

¹ These subsidies consist chiefly of (1) an annual subsidy to each of the four original Provinces equal to 80 cents per head of the population as ascertained (in the case of the two Canadas) by the census of 1861, and (in the case of Nova Scotia and New Brunswick) by each decennial census until the population of each of those two Provinces reaches 400,000, at which rate the grants are to remain. (2) A specified allowance to each Province for the support of its provincial government and legislature. (3) An allowance of interest at the rate of 5 per cent. on the amount by which the indebtedness of each Province assumed by the Dominion falls short of the stipulated amount. Similar subsidies and allowances are granted (under Dominion statutes) to Provinces admitted since 1867.

first by the demand of Nova Scotia for 'better terms,' and afterwards by the admission of new Provinces and the adjustment of their claims.¹ At present a great part—in some cases the greater part—of the revenue of the Provinces consists of these federal subsidies. It must be noticed that this subsidy system is not a mere division among the Provinces of the surplus federal revenue, if any; definite sums are specified which the Dominion is bound to raise and hand over to be spent by the Provinces.

The wisdom of this arrangement was questioned at the time, and has often been questioned since. It is said to have encouraged provincial extravagance, since the provincial legislatures have only to spend, and not to raise, these sums. The amounts of these subsidies, too, though fixed by the Constitution and by statute, are not beyond the possibility of increase; the Dominion Government must pay the stipulated sums, but it may, if authorized by Parliament, pay more. The result is much jealousy and friction; whilst the habit of getting revenue from other than local sources has caused exorbitant demands, backed

The following are a few of the figures relating to the original adjustment (for further particulars see J. H. Gray, *Confed. of Canada*, Toronto, 1872) :—

Province.	Popul., 1861.	Funded Debt, 1863 (less Sink- ing Fund).	Revenue, 1863.	Debt allowed by B.N.A. Act.
Ontario ...	1,396,091	\$60,355,472	\$9,760,316	\$62,500,000
Quebec ...	1,111,566			
Nova Scotia	330,857	4,858,547	1,185,629	8,000,000
N. Brunswi'k	252,047	5,702,991	899,991	7,000,000

¹ The 'better terms' granted in 1869 to Nova Scotia were in 1873 extended to the other Provinces, and were chiefly in the nature of additional allowances calculated on increased amounts of debt as compared with those stipulated by the B.N.A. Act. See Bourinot, *Fed. Govt.*, p. 73; *Statistical Year Book of Canada*, § 43; *Can. Rev. Statutes*, c. 46.

by political manœuvring, for federal subsidies in aid of many works which are really of a provincial kind.

The same disinclination to burden the Provinces with direct taxation has led to the payment by the Dominion of the salaries of certain provincial officers—such as Lieutenant-Governors and provincial judges.

The Dominion government has never yet exercised its power of direct taxation; the receipts from customs and excise, and from the public departments, having sufficed for all its needs.

The Canadian Constitution contains no general provisions for its amendment. Being an Act of the British Parliament, it can of course be amended by that Parliament, and recourse has thrice been had to that procedure. But the Canadian people are unable, except in a few particulars, to amend their own Federal Constitution directly; they can only express their wishes to the British Parliament. The Provinces, as already mentioned, can amend their constitutions except as regards the office of Lieutenant-Governor, and subject, of course, to the Dominion right of veto.

§ 4. *The German Empire.*¹

The last of the great Federations of to-day is the German Empire. It is none the less a true Federation because of the predominance of one of its States—the Kingdom of Prussia. It is remarkable as the only instance of a real monarchic Federation—for Canada, though under monarchic forms, is, like Great Britain itself, a veiled republic. It is remarkable too as having risen upon the ruins of feudalism, and also for the great variety, both of size and of forms of government, exhibited by the States; but perhaps its chief interest centres in the commercial aspect of the union.

¹ Bryce, *Holy Roman Empire* (1892); Woodrow Wilson, *The State*; Hart, *Introd. to Fed. Govt.*

At the beginning of the present century Germany consisted of the two great rival kingdoms of Austria and Prussia, and a multitude of principalities and free cities in the west. The Holy Roman Empire, though still existing, was only a nominal bond of union. Disintegration, however, had reached its limit. Napoleon helped to re-organize the western States into fewer and larger units; and in 1806 he severed them from the Empire and formed them into the Confederation of the Rhine, with himself as 'Protector'—which really meant Dictator. This Confederation was pledged to help France in all her wars—even against the Fatherland. The spirit of German nationality was so utterly wanting that these minor States preferred a dependent alliance with France, and the doubtful 'protection' of Napoleon, to the prospect (perhaps not altogether a cheerful prospect) of Prussian or Austrian domination. Thus was completed a triple division of German interest; and the formal dissolution of the Empire a few months later was a superfluous ceremony. The obstacles to union were insuperable except by a deep conviction of national unity; and that was wanting. Though there was common kinship, there were no common sympathies. 'Germany,' said Goethe, 'is not a nation.'

All this was changed within a few years by Napoleon's aggressive wars, which at last aroused German patriotism.

The National Idea. A united Germany began to be looked to as the only possible defence against foreign powers, and the idea was also hailed by the liberal parties in all the States, who saw in it promise of deliverance from the absolutism of the German princes, and realization of the hopes inspired by the French Revolution. The forces of federalism and liberalism—of national unity and constitutional liberty—were combined. The chief difficulties were the bitter rivalry of the two great kingdoms, and the despotic claims of princes great and small. The history of German federation is there-

fore the history of constitutional reform and Prussian ascendancy.

When Napoleon was driven back across the Rhine in 1813, the Confederation of the Rhine fell to pieces; and in 1815 (a few days before Waterloo) the first instalment of union was obtained by the German Confederation. Its thirty-nine members comprised practically the whole German people—Austria, Prussia, and the western States both north and south of the Main. This union, such as it was, lasted till 1866. It was a lax *Staatenbund*, with a Diet consisting of delegates appointed by the several rulers, and presided over by Austria. There was no attempt at popular representation; there was no real executive and no judiciary: unanimity was required for all important matters; and, in short, the Diet was little more than a congress of ambassadors. The union was chiefly for defence and foreign affairs; but it proved too weak to be of much use, though it was strong enough (under Austrian guidance) to hold the liberal movement in check. The Act of Confederation had promised constitutional government to all the States, but the promise was not kept.

In the revolutionary period of 1848 a real attempt at union was made. Amid great popular excitement, a representative National Assembly was elected and convened at Frankfurt. Though this body was revolutionary in origin, its authority was recognized by the rulers; it superseded for a time the old Federal Diet, and proceeded to frame a new German Constitution. The claims of Austria, however, proved an insuperable difficulty. Besides wanting the headship of Germany, she insisted on bringing into the union the Austrian Empire as a whole—including her vast non-German population. These claims were rejected; a constitution was framed, and the title of Emperor offered to King Frederick William of Prussia. He refused it; partly because it was offered not by the princes but by the people

German
Confederation
1815-1866.

Frankfurt
National
Assembly.

—was, in fact, too ‘revolutionary’ in origin and character—and partly because he was not prepared for a quarrel with Austria. The movement collapsed, and in 1851 the Diet of the old Confederation was revived.

Meanwhile the federation of Germany was being approached from another direction—that of commercial, instead of political, union. Commerce was being crushed by all the evils of disintegration—by an inconceivable medley of tariffs, coinage, weights and measures. Prussia even had some 60 internal district tariffs within the Kingdom; but in 1818 she led the way to reform by abolishing these, and thus making her ‘commercial and political boundaries conterminous.’ In 1828 the Kingdoms of Bavaria and Würtemberg formed a Zollverein, or Customs Union. The Prussian and southern unions afterwards coalesced, and gradually drew in most of the German States, except Austria. The basis of the union was the abolition of customs duties between members; a uniform tariff on the frontier, only alterable by general consent; the proceeds to be collected by the Union and divided among the States in proportion to population; an annual congress of ambassadors to attend to the affairs of the Union. This Customs Union was purely *fiscal*, and involved no political combination. Even war between the members was not thought inconsistent with its terms. It was quite distinct from the German Confederation, which continued to exist independently of it, and which was not even conterminous with it in area. The Confederation, for instance, included Austria, whilst the Customs Union did not.

The commercial supremacy of Prussia was already established; and the war with Austria in 1866 established her political supremacy also. As a result of that war, the Confederation of all Germany was replaced in 1867 by the North German Confederation, consisting of 21 members: the kingdoms of Prussia and Saxony, together with all the western States

north of the Main. Austria, for her sins, was excluded from all share in German politics, and the four South German States were left out for the present—partly because they were not yet ready for union, partly to avoid offending France. This, though restricted in area, was the first real Federation of German States. It had a real Federal Parliament, consisting of a Diet elected by manhood suffrage and a Federal Council representing the governments of the States. Important executive powers, too, were vested in the King of Prussia, who was President of the Confederation.

At the same time the Customs Union—which still remained independent of political combinations—was re-organized on a new basis. In place of the old Congress of ambassadors there was established a real Customs Parliament of two chambers, one representing the people of the Union, and the other representing the States. In the old congress unanimity had been required; in the new Parliament a majority of both Houses could decide. The Customs Union included the Southern States: but Austria, of course, was still kept out.

There thus existed independently a political Federation of North Germany and a commercial Federation covering the wider extent of what is now the German Empire. Both institutions were strictly federal in spirit as well as in form, and both reflected clearly the influence of American and Swiss ideas. The peculiarity was that the Customs Union, instead of being the effect of political union, was its precursor. The first federation of Germany was commercial, not political.

The idea of a united Fatherland was now thoroughly in the air, and Bismarck's genius was devoted to its realization. Commercial union being already complete, he directed his efforts towards military union. To this end he made secret treaties of alliance with the South German States, and further prevailed on them to assimilate their military systems to that of Prussia. When the Franco-Prussian

war broke out, the Southern States unhesitatingly stood by Prussia in a firm defensive and offensive alliance; and it was during the national enthusiasm aroused by the success of the German arms that the political federation of Germany was at last achieved.

The Constitution of the German Empire is thus the combined offspring of a series of political Confederations,

**The Federal
Empire,
1871.**

and also of the Customs Federation. Its machinery is mainly that of the North German Confederation, with the necessary modifications, and with some special concessions to the great kingdoms of Bavaria and Würtemberg. Bavaria, in particular, retains 'a control over her army, her postal, railway, and telegraphic system, and her general legislation, which leaves her in a position of great comparative independence.' In spite of many anomalies (especially the unavoidable predominance of the State of Prussia), it is a true Federation. It is 'a very peculiar federation, which, as respects the North German members, is a strict one, conceding to them few and unimportant state rights; but, as regards the two greatest, Bavaria and Würtemberg, is extremely loose, amounting to little more than a close defensive and offensive military alliance, with a joint foreign policy, a common commercial system, and a common legislation on a few topics.'¹

Before describing the Federal Constitution it will be well to glance at the States composing the Empire. They

The States are—besides the 'Imperial territory' of

Alsace-Lorraine—twenty-five in number: four kingdoms, eleven grand duchies and duchies, seven principalities, and three free cities. These States vary greatly in size: from Prussia—which has two-thirds of the area, and three-fifths of the population, of the whole Empire—to tiny States not a thousandth part as large. Their local constitutions are no less varied. The free cities are little republics; the other States are all monarchical in

¹ Bryce, *Holy Roman Empire* (ed. 1892), p. 434.

form, but differ widely in respect of the mode and degree of constitutional control to which the prince is subject. In 1848, or soon after, all the States obtained some kind of parliamentary system, more or less imitated from the British model. Their constitutions are thus a fusion of old German institutions with the work of later parliamentary reformers.

The Constitution concludes 'an eternal alliance for the protection of the territory of the Confederation and of the laws of the same, as well as for the promotion of the welfare of the German people;' and it creates the necessary machinery of the federal government.

The legislative power of the Empire is vested in a legislature of two Chambers: the *Reichstag* or Diet, and the *Bundesrath* or Federal Council. The Diet consists of representatives of the whole German people, on the basis of one representative to each 100,000 inhabitants. No electoral district may cross a state boundary, and States with less than 100,000 inhabitants return one member. The Diet is elected upon a uniform manhood suffrage, and has a term of five¹ years, subject, however, to earlier dissolution by the Emperor upon the advice of the Federal Council. Members are not allowed to draw any salary or receive compensation.

The Federal Council represents the governments of the several States, and is really a body of accredited ambassadors. The extraordinary inequality of the States makes equal representation out of the question; so the votes are apportioned on an arbitrary basis of compromise between state equality and proportional importance; the larger States having most votes, but not nearly in proportion to their size. Thus Prussia has seventeen votes; Bavaria, six; Saxony and Württemberg, four each; Baden and Hesse, three each; Mecklenburg-Schwerin and Brunswick, two each; the other seventeen States, one vote each. Each State may appoint as many delegates to the Council as it

¹ Originally three.

has votes; but the votes of each State must be cast as a unit; and a State can cast its full vote whether or not its full number of representatives are present. Each member of the Council has a right to speak in the Diet, to represent the views of his government.

In structure and functions the Federal Council differs widely from other federal second chambers. In its *legislative* capacity, indeed, it is in the ordinary position of an Upper House; but it also has important administrative duties which will be dealt with later on.

Bills may be introduced in either House, and require the sanction of an absolute majority of votes in each. The Emperor has no veto.

The 'Presidency' of the Empire belongs to the King of Prussia, who has the title of German Emperor. As **The Federal Executive.** Emperor, he is a 'constitutional president' rather than a sovereign; his powers rest upon law, not upon prerogative. Those powers, however, are very wide. He summons and adjourns the federal legislature; he appoints the Imperial Chancellor; and he co-operates with the Federal Council and with the Chancellor in many important acts of government. Moreover, he is commander-in-chief of the Imperial army, and controls the foreign affairs of the Empire.

The real Imperial sovereignty resides, not in the Emperor, but in 'the union of German federal princes and the free cities.' The Federal Council, as representative of the princes and cities, is therefore, 'the organ through which the sovereignty of the Empire is expressed.'¹ The Federal Council has a general *oversight* over administration. It makes such general provisions and regulations as are necessary for the execution of the laws of the Empire, and supplies their defects. It has a voice in the appointment of many Imperial officers; and its consent is necessary to a declaration of war (except in case of invasion), to a dissolution of the Diet, and to other important executive

¹ Woodrow Wilson, *The State*, p. 255.

acts. Most of its administrative work it does through the medium of eight Permanent Committees chosen at each yearly session.

The centre and source of Imperial administration is the Chancellor, who is appointed by the Emperor and is removable at his pleasure. This officer—
The Chancellor ‘has no counterpart in any other constitutional government,’ and is, perhaps, best described as a constitutional Grand Vizier. Whilst in office, he is virtual head of the Empire, ‘standing between the Emperor and the Reichstag, as the butt of all criticism and the object of all punishment.’ He is ‘the Emperor’s responsible self’—responsible, that is, not in the English parliamentary sense of being dependent on the confidence of the Diet, but in the sense of being answerable to the Emperor and to the laws. ‘An adverse vote does not unseat him. . . . He does not represent the majority in the Reichstag, but he must obey the law.’¹ The Chancellor is, moreover, a single administrative chief; the other Ministers are his subordinates, not his colleagues, and his responsibility shields them as well as the Emperor. He is thus a curious blend between an American President and an English Ministry: resembling the former in relation to the other Ministers and the legislature; resembling the latter in relation to the Sovereign. If we can imagine the American President appointed and removable by an Emperor, instead of being elected for a fixed term by the people; or if we can imagine an English Ministry consisting of one man, and independent of the confidence of the Commons: we have a fair idea of the German Chancellor.

The Chancellor also presides in the Federal Council. In this capacity he is a Prussian, not an Imperial, officer; he represents not the Emperor, but the King of Prussia.

An Imperial Court of Appeal has been established; and the Empire prescribes the constitution and procedure of the state courts. It does not appear, however, that the

¹ Woodrow Wilson, *The State*, p. 264.

courts can ever question the constitutionality of a federal law. The Continental idea of 'administrative law' stands in the way of the courts being regarded as 'guardians of the constitution' in the American sense. And generally, the boundary between judicial and executive functions is by no means as clear as according to English notions it ought to be.

As in Switzerland, the federal government has a vast legislative field, and of course exercises a general oversight over the administration of federal laws, but leaves to the States a great part of the actual work of administration. The army, for instance, is composed of contingents raised, equipped, drilled, and for the most part officered, by the several States; but subject in every detail to Imperial laws and regulations. Many of the other Imperial departments, such as posts and telegraphs and customs, are partly officered and administered by the States under federal supervision.

Many federal duties being thus cast upon the state governments, some means of enforcing their performance is necessary. The Constitution accordingly provides that, if the States do not fulfil their constitutional duties, they may be compelled to do so by execution, which shall be ordered by the Federal Council and carried out by the Emperor.

The Empire has legislative power in respect of customs duties, and 'such taxes as are to be applied to the uses of the Empire.' It has never, however, levied direct taxes. Its chief sources of income are customs and excise duties, and the profits of the posts and telegraphs and other Imperial departments. Any deficiency is made up by contributions levied from the States in proportion to population.

There is a common citizenship for all Germany, every citizen of a State being also a citizen of the Empire. There is, however, no Imperial naturalization law. Imperial citizenship is obtained through

state citizenship, but state citizenship is regulated by each State for itself. But though the Imperial citizenship is indirect in its origin, it is direct enough in its effects. The citizen owes allegiance to the Empire as well as to his own State.

The Federal Constitution may be amended by the ordinary process of legislation; the only restrictions being: (1) that an amendment is considered as **Amendment**, rejected if 14 votes are cast against it in the Federal Council; and (2) that rights secured to particular States can only be modified with the consent of the States affected. The 'rigidity' of the Constitution is thus slight, and the federal legislature approaches somewhat closely to a sovereign parliament. The restrictions, however, though slight, are real; and the distribution of votes in the Federal Council¹ enables Prussia by herself, or various combinations of the 17 small States by themselves, to veto an amendment. The stability of the Constitution is thus fairly well assured.

§ 5. *Other Federations.*²

Besides the four great examples this century has produced a plentiful crop of minor Federations; of which some few have been inconspicuous successes, and the rest must be written down as federal failures. Since failure often teaches more than success, and small examples than great, a brief account of these federal attempts may not be out of place.

The Confederate States of America, formed by the union of the Southern States which seceded from the United States in 1860, copied the United **Confederate States** Constitution almost word for word. The government, however, never came into full existence; the Southern States were soon conquered and re-admitted into the older Union. The Confederacy has no history and

¹ See page 99, above.

² Payne, *European Colonies*.

teaches no lessons ; its sole importance is that it shows that the quarrel of the South was not with federalism as a principle, but only with the action of a particular federal government. 'They seceded from one federal government only to set up another.'¹

The story of the many federal governments in Central and South America is simply a warning against the transplanting of foreign political ideas into soil wholly unprepared to receive them. The wonder is, not that most of these systems have failed, but that a few of them are in a fair way to succeed.

At the beginning of this century nearly the whole continent of America south of the United States was held by Spain. Mexico, Central America (except British Honduras), and the whole of South America (except Brazil, the Guianas, and the no-man's-land of Patagonia) were Spanish colonies. These vast possessions had been kept in a state of absolute subjection ; taxed unmercifully and arbitrarily, crushed by an official and military despotism, and refused the slightest voice in their own government. Revolt was natural ; one by one the Spanish colonies, following the example of the United States, declared and won their independence, which was finally recognized in 1825. They had fought bravely for liberty, but they did not know how to use it. Intoxicated with the idea of self-government, they had no self-governing capacity. Their one idea was to imitate the United States. They summoned conventions, and patched up constitutions which were invariably a crude farrago of American and French ideas, and which had no reference at all to their own existing institutions. Whereas the United States Constitution was firmly rooted in the past, the Spanish-American constitutions had no roots at all ; they were thrust bodily into foreign soil to strike root for themselves.

Worse soil for any federal system could hardly be imagined. The political education of the people was of the

¹ Freeman, *Fed. Govt.*, p. 72.

lowest; they were unfit for any kind of popular government—most of all for so complex a kind as the federal. Their idea of federalism, too, was not to unite all the Spanish-colonial States under one flag, but to split each State arbitrarily into a bundle of federated Provinces. Federalism, to them, mostly meant decentralization, not union. What Spanish America needed was a set of strong central governments able to keep revolutionary tendencies in check, and to watch over the political improvement of the people. There was indeed a centralist party in each State, but it was unfortunately identified with the old official aristocracy. The history of South American revolution is mostly the record of a contest between the Liberal party, striving to understand an imported political mechanism, and the Conservative party, representing the old officialdom, struggling to regain its oligarchic supremacy. The Liberals have been identified with federalism, the Conservatives with centralization; and political progress has, therefore, been slow.

South American annals are strewn with the wrecks of dead Federations. Of these, only two were efforts in the direction of union: the short-lived Confederation of the five little Central American States, which, however, soon fell apart, and in spite of repeated attempts at reunion remain isolated to this day; and the huge Federal Republic of Columbia, built up by Simon Bolivar out of New Granada, Venezuela, and Quito (Ecuador). Its founder, finding that the new federal constitution would not work of itself, tried to keep it going by a military dictatorship, but it soon split up. The rest is decentralization; federalism in its weakness, not its strength. When Bolivar's great Federation fell apart, Venezuela carved herself up into a federal republic which, with two revisions, has managed up to now to survive the test of revolution. Ecuador more wisely remained 'unified,' but did so much homage to federal appearances as to establish non-sovereign administrative Provinces. New

Granada tried several federal constitutions, but at last (in 1886) abolished the sovereignty of the Provinces, and reduced them to mere departments.

The most successful of the Spanish-American Federations is Mexico, which, after its share of revolutions, is being coddled up, under United States patronage, into moderate stability. The **Living Federations.** States, however, are mere artificial divisions; local patriotism and independence are of slow growth, and the federal form rather hinders than helps progress. Next in importance comes the Argentine Republic, in which the federal spirit is now fairly developed, though its working is somewhat interfered with by the dominance of the capital, Buenos Ayres. Venezuela, which has already been mentioned, comes third, and a bad third at that.

Brazil, with its vast area and its mixed population of 14,000,000, is the newest Federation of all, dating only from 1891. Brazil was a Portuguese possession, and its government was never so official or so centralized as that of the Spanish colonies. When it gained its independence (in 1824) it was therefore better able to govern itself. A constitutional Empire was proclaimed under Pedro I., of the royal house of Portugal. A revolutionary attempt to set up a federal republic, to be called the Federation of the Equator, failed. A centralized constitution was adopted, but subordinate provincial assemblies were created, with local powers of legislation and taxation. In 1834 the government was 'decentralized,' and the duties of the central and provincial governments apportioned somewhat on the United States model. The result was not federal, because the Provinces did not acquire sovereignty; it was a municipal system on the federal pattern. The progress of provincial politics under this system does not seem to have been very encouraging; but it gave the Provinces some measure of self-reliance, and helped to prepare the way for federalism. In 1889 the Emperor was dethroned by revolution, and two years

later a federal republic was proclaimed under the name of the United States of Brazil. The Constitution is modelled on that of the United States of America. It has had a more gradual and natural development than any other South American Federation, but it can hardly be hoped that the political capacity of the people is yet equal to the demands of federalism.

The Leeward Islands, in the West Indies, have since 1871 constituted a miniature Federation of a curious kind under the British Crown.¹ Each of the The Leeward Islands. islands was formerly a separate Crown Colony; but, after the abolition of slavery, they were no longer able to bear the expense of separate establishments, and so federated for economy's sake. The peculiarities of this Federation result from its purpose, from its tiny size, and from the fact that each of the five Provinces (or Presidencies, as they are called) is an island or group of islands. The general government consists of a Governor, a Legislative Council (half elective and half nominee), and an Executive Council, the administrative system being that of a Crown Colony. The General Legislature has power (though not *exclusive* power) to make laws on a wide range of specified subjects, many of which (*e.g.*, the law of real and personal property, criminal law, administration of justice, police, education, &c.) are of a kind not usually regarded as of federal concern. Each island legislature, however, has power (with the Governor's assent) to make laws for the island; but such island laws, if they relate to subjects within the competency of the General Legislature, are void so far as they are repugnant to any federal laws. Whilst the general powers of the central government are somewhat more than federal, its financial system, curiously enough, is of the weak confederal type. It has no powers of taxation, but can only draw on the Treasury of each Presidency, in a fixed proportion, for the federal expenses.

¹ See the Leeward Islands Act, 1871; Imp. Stat. 34 and 35 Vic. c. 107.

The duty of raising revenue belongs solely to the island governments.

The government of New Zealand from 1852 to 1876 is sometimes spoken of as federal, but was not really so. **New Zealand, 1852-1876.** In the early days of that colony, owing to the isolated position of the several settlements and the difficulty of communication, it was impossible for a completely centralized government to satisfy local requirements. Accordingly, the Constitution Act of 1852 divided New Zealand into six Provinces (afterwards increased to nine). Each Province had an elective Superintendent and an elective Council, both chosen for four years, but subject to dissolution by the Governor of the colony. The Provincial Councils had power (with the Governor's assent) to make laws for the Provinces, except on certain specified subjects. The central government consisted of the Governor, an Executive Council, and a General Assembly of two Chambers (a nominee Legislative Council, and an elective House of Representatives). These central and local governments have at first sight a federal appearance; but the Provinces were not really States in a federal union. Their powers were not sovereign, but merely municipal,¹ existing only on sufferance of the General Assembly. The Provincial Councils were limited to local subjects, but the General Assembly was not limited to general subjects; it had full power to make laws for the good government of the colony—even to the extent of altering the Constitution. Laws made by a Provincial Council on purely local matters were null and void if they were inconsistent with any Act which the General Assembly might choose to pass. The unfederal nature of the provincial system was illustrated by its end. When it was found desirable to abolish the Provinces, this was done by a simple Act of the General Assembly.

¹ See p. 16, above.

Liberia,¹ a little republic on the Grain Coast of Africa, cannot be taken seriously either as a Federation or as a civilized government. It was founded in 1822 by some American philanthropists, to provide a civilized settlement for freed slaves who might wish to return to their native land, or to escape from the social and political inferiority accorded them in the United States. It is a 'black parody on white man's government;' it is not admired by the barbarous natives in the neighbourhood, and the American negroes seldom emigrate to it. It is therefore isolated, and has little opportunity to improve its second-hand civilization.

¹ *Encycl. Brit.*, sub. tit. 'Liberia;' *Statesman's Year Book*.

PART III.

AUSTRALIAN FEDERATION.

The best field for federalism is among the great groups of British colonies, past and present: a fact illustrated already by the United States and Canada, **The British Colonies.** and likely soon to be confirmed by Australia and South Africa. Not only is federal government specially suited for new countries and rapid development; it is also suggested and led up to by the relations of British colonies to one another and to the mother country. The British-colonial system of to-day is, in practice, of a semi-federal nature. Each, for instance, of the Australian colonies is practically self-governing as regards matters that concern itself alone; whilst in matters that concern the Empire, or that concern more colonies than one, the Imperial government acts for all. The Imperial Parliament can legislate for any part of the British dominions; and many Imperial laws—such as the Merchant Shipping Acts—are in force throughout the Empire, whilst many others are enacted for the colonies generally, or for particular colonies. The Crown, too—the Imperial executive—is represented in every colony, and is a part of every colonial legislature. Though there is no legal limit to these Imperial powers of interfering with the colonies, there are broad constitutional rules which limit the exercise of these powers, and in practice it is pretty well understood how far they are likely to be exercised. Thus a division is effected between colonial and Imperial functions which has

a semi-federal appearance. Its unfederal aspect, of course, lies in the two facts: (1) that the colonies are not represented in the Imperial Parliament, and (2) that there is no legal limit to the powers of the Imperial Parliament. Colonial self-government is, technically speaking, merely the gift of the British Parliament, which could—if it would—revoke every colonial constitution to-morrow. Nevertheless, the colonial system has a practical likeness to the federal system; so much so that many federal ideas are already familiar in the colonies. Thus, we have no difficulty in grasping the idea of a legislature whose powers are limited by the constitution and whose acts in excess of its powers are unconstitutional and void; because all our colonial legislatures are of that kind. We have no difficulty in understanding what is meant by a federal court of appeal, because the Privy Council is now a court of appeal for all the colonies. Common laws for all Australia are familiar to us, because such laws are often passed for us by the British Parliament—and, because, moreover, the laws of all the colonies have a common source, and are to a great extent identical. The colonial system has prepared the way for federation, which will involve few ideas altogether strange to us.

But if the British colonies are destined to be the chief home of federalism, in no other group of British colonies is that destiny so clear as in Australia. Union The Aus-
is stamped upon the face of the land and tralian Group.
upon the hearts of the people. We have one origin, one history, one blood; we have kindred laws and institutions; and we have sole possession of a continent in which our greatest distance from one another is small compared with our distance from any part of the civilized world. Our nearest neighbours are the millions of Asia, some of whom desire a closer acquaintance with us than we with them. How can we fail to have political interests in common with one another against the world—interests which need the protection of united law, united policy, and united action?

The great expediency of union, and the absence of serious difficulties, combine to make it a safe prophecy that union will come. The only possible alternatives are between federal and complete union, and there can be little doubt that, as against unification, federalism will win the day. It involves a less violent change, less disturbance of the old order. It gives fuller play to local self-government and makes fuller allowance for local differences of climate, industry, and interest which exist side by side with the general unity of interest throughout Australia. Federated Australia is a foregone conclusion.

CHAPTER I.

HISTORICAL SKETCH.¹

The idea of Australian federation is as old as the fact of Australian division. New South Wales once comprised all Australia east of the 129th meridian² (the eastern boundary of Western Australia), together with the 'adjacent islands' and also Tasmania and (for a short time) New Zealand. The Port Phillip and Moreton Bay districts were settled from Sydney, and continued to be governed from Sydney till the settlers' demands for local self-government led to the separation of Victoria in 1851 and of Queensland in 1859.

From the time when the splitting up of Australia was first mooted, statesmen on both sides of the world foresaw the need of a federal government to deal with common interests, and especially to establish a common tariff. In 1849 a Committee of the Privy Council, appointed at the instance of Earl Grey to advise as to the government of the Australian colonies,³ had recommended that Victoria should become a separate colony with a legislature of its own; but that, notwithstanding such separation, the Governor of one of the colonies should be appointed Governor-General of Australia, with authority to

¹ Barton, *Australian Federation*.

² See *Queensland Parliamentary Papers*, 1861.

³ There were then four: New South Wales; Van Diemen's Land (settled from Sydney, and separated in 1825); South Australia (carved out of New South Wales, but independently settled from England in 1836); and Western Australia.

convene a General Assembly of Australia to legislate on specified subjects of intercolonial interest. These recommendations were embodied in a Bill introduced into the British Parliament in 1850; but the clauses establishing a federal legislature, though agreed to in both Houses, roused so much criticism that they were abandoned; and the Act as passed provided for the complete separation of Victoria, without touching the question of federal union. For some years, indeed, the Governor of New South Wales was given a commission as Governor-General of the Australian colonies; but without a General Assembly this was merely an empty title, and was soon dropped.

Again, 'prior to the grant of Responsible Government to New South Wales and Victoria, the creation of a General

**And Again
Postponed.** Assembly was unsuccessfully advocated by statesmen in both colonies. The necessity for this step was emphasized by the Committees appointed in the two colonies in 1853 to draw up their respective Constitutions; but the Constitution Acts were ultimately passed by the British Parliament without any provision of the kind, the Home Government declaring that 'the present is not a proper opportunity for such enactment,' but promising to 'give the fullest consideration to any propositions on the subject which may emanate in concurrence from the respective legislatures.'¹

During the next few years the federal idea was kept before the Australian Parliaments by a series of select committees, royal commissions, and reports.

**Committees
and
Conferences.** The movement was confined to a few far-sighted statesmen; it had no popular impetus and made no popular impression; but it helped to leaven parliamentary circles, and led to a series of intercolonial conferences, from 1863 onwards, which were prolific in federal resolutions, but led to no definite scheme or direct result.

¹ Despatch accompanying Constitution, sec. 22.

At last, in 1883, some vitality was given to the movement by rumours of French and German designs in the Pacific. At a Conference of all the Australasian colonies, including Fiji, an Act to establish a Federal Council of Australasia was drafted, and this was soon afterwards passed, with slight alterations, by the Imperial Parliament. This Act really provided a federal legislature with very limited powers for such colonies as cared to join the Council, and it has since 1885 been a loose bond of legislative union between Victoria, Queensland, Western Australia, and Tasmania. South Australia also joined for a time, but afterwards withdrew. The Federal Council consists only of two delegates from each colony represented. It has power to legislate for its members upon a limited range of Australian subjects, such as fisheries, intercolonial legal process, the influx of criminals, and questions referred to it by the colonial legislatures. It has, however, no executive or judicial powers whatever, so that it effects not a true Federation, but only a loose legislative Confederation like the first union of the American States. On these grounds New South Wales has always refused to join the Federal Council, which, partly for this reason and partly owing to its want of popular origin and of a really representative basis, has done no important work even within the legislative field mapped out for it.

In 1889 Major-General Edwards, an officer commissioned by the Home Government to inspect the military forces of the Australian colonies, reported in favour of a military Federation, and Sir Henry Parkes took advantage of the opportunity to take the federal movement up afresh. An intercolonial conference was held in Melbourne in 1890, and resulted in the summoning of the Sydney Convention of 1891, consisting of delegates from all the Australian colonies, and empowered to 'consider and report upon an adequate scheme for a Federal Constitution.' The labours of this

Convention produced the 'Draft Bill to constitute the Commonwealth of Australia'—the first complete scheme of Australian Federation. The Convention caught, and crystallized into a definite shape, the vague, floating ideas which had long been in the air; and it thus afforded for the first time a practical standpoint from which to debate the whole subject and upon which to found a national sentiment. In a word, it changed federation from an idea to a formula, from a dream to a policy. The Commonwealth Bill has been criticized from every point of view, and of course there are differences of opinion as to some of its provisions, but the general excellence of its drafting and the statesmanship shown in its construction are universally admitted. Some alterations will doubtless be desirable; some of its provisions—for instance, those relating to finance—will need to be further elaborated in the light of the last few years' experience; but there can be little doubt that a great part of the Commonwealth Bill will form the basis of any Australian constitution that is likely to be framed.

It was intended at the time that this draft bill should be discussed in all the Australian Parliaments, then referred to a second Convention to harmonize any suggested amendments, and lastly submitted in some way for acceptance or rejection by each colony. This process, however, broke down. Few of the Parliaments could spare time in the pressure of provincial politics to discuss the Federal Constitution in detail; the Commonwealth Bill dropped into neglect, and the impetus of the Sydney Convention seemed lost.

At this crisis the federal movement reached a new phase by spreading from the Parliaments to the people.

The Popular Process. The Commonwealth Bill had been a great educational influence, had aroused interest, discussion, and criticism, and had given a definite practical meaning to the word 'Federation.' At the same time the financial and commercial collapse showed the weakness and

folly of provincial disunion, and suggested practical arguments for immediate federation. The cause neglected by the politicians began to be taken up by the public; Federation Leagues were organized, and many other public Associations took up the cause of federal union. Impatience of delay, and the demand for a share of direct popular initiative and control in the work of constitution-making, were the keynotes of the new movement. Thus was evolved a new process, which was first definitely formulated by Dr. Quick, of Bendigo, at the Corowa Conference of 1893—a conference of delegates from Federation Leagues and kindred associations on both sides of the Murray.¹ The gist of Dr. Quick's proposals, as afterwards elaborated, was: that the framing of a Federal Constitution should be sanctioned by Federal Enabling Acts to be passed in each colony on substantially uniform lines, and providing: (1) that the Constitution should be framed by a Convention to be directly elected by the people of each colony for that purpose; (2) that the Constitution so framed should be submitted by a *Referendum* to the people of each colony; (3) that the Constitution, if accepted by a sufficient number of colonies, should be forwarded to the Imperial Government to be passed into law for the federation of the colonies then or afterwards accepting it.

All that was new in these proposals was: (1) the principle of the *direct* popular election of the Convention; (2) the idea of mapping out the whole process in advance by statutory authority. It was intended to supersede, not the Commonwealth Bill, but the Commonwealth *process*; not the work of the Sydney Convention, but the abortive attempts to complete that work. The Commonwealth Bill was admittedly only a draft, to be further considered and revised before adoption. The Sydney Convention itself had already foreshadowed the need for a second Convention and for a final Referendum, and the new proposals make complete provision for these steps, only substituting

¹ See Official Report of the Federation Conference, Corowa, 1893.

a Convention chosen by the people for a Convention chosen by the Parliaments.

The new proposals at once attracted attention. They were criticized, approvingly or adversely, by the press and the public; they were discussed and reported upon by Federation Leagues and kindred associations; and though modifications were sometimes suggested,¹ the general verdict was distinctly favourable. A practical turn was given to the movement by Mr. G. H. Reid, Premier of New South Wales, who took up the scheme, and in January, 1895, convened a meeting of Australian Premiers at Hobart, in order to decide upon a concerted plan of action. A Federal Enabling Bill was drafted, which the Premiers of five colonies² pledged themselves to introduce in their respective Parliaments; and thus the Federal Enabling process was fairly started on its way. New South Wales was again responsible for a short delay; but in December, 1895, the Bill was safely piloted through the Parliaments of the mother-colony and of South Australia. Victoria and Tasmania soon followed suit.

These Acts provide, in substantially uniform terms, for the whole process of the framing, acceptance, and enactment of a Federal Constitution for Australasia. The Constitution is to be framed by a Convention consisting of ten representatives of each colony represented, and is to be in the form of a Bill for enactment by the Imperial Parliament. The representatives of each colony are to be nominated in the prescribed manner, and chosen directly by a vote of the electors. The vote is to be taken in each colony as a single electoral district. Every elector is to be entitled to one vote, and must vote for the full number of ten candidates. The Convention is to meet and frame a Con-

¹ For instance, by the Federation League (Sydney).

² Only Western Australia stood aloof, on the plea that she was not yet ready for federation. The promise on behalf of Queensland, it seems, was qualified.

stitution, and is then to adjourn for not less than 60 nor more than 120 days, during which time the Constitution is to be submitted for consideration to each House of Parliament in each colony represented, and any amendments desired by the several Legislatures are to be remitted to the Convention. On the re-assembling of the Convention, the Constitution is to be reconsidered, together with any amendments that may have been suggested, and is then to be finally adopted by the Convention. As soon as practicable, the Constitution so adopted is next to be submitted to a vote of the electors in each colony represented, who are to vote by ballot 'Yes' or 'No' on the question of its acceptance or rejection. If the Constitution is accepted by three colonies, both Houses of Parliament of those colonies may adopt addresses to the Queen praying that the Constitution may be passed into law by the Imperial Parliament, and such addresses are to be transmitted to the Queen with a copy of the Constitution.

Even Western Australia, though doubtfully enthusiastic about immediate federation, has come to the conclusion that it will do her no harm to take part in the framing of an Australian Constitution, seeing that she—like all the other colonies—will be free, when it is framed, to take it or leave it as she chooses. Accordingly, the Parliament of Western Australia has recently (in November, 1896) passed an Enabling Act on the same lines as the others, except that the representatives of that colony are to be chosen, not directly by the electors, but by both Houses of Parliament sitting together.

As to the co-operation of Queensland alone does any uncertainty exist. There, as in Western Australia, the principle of popular election is not favoured by the Government; and a Bill was introduced providing for the election of representatives by the members of the Legislative Assembly, grouped into three sections corresponding to the three great districts of the colony. The Legislative Council, however, claimed a share

in the election, and on this rock the Bill was lost. Nevertheless, it is still hoped that Queensland may come in, and that the Convention may represent all the Australian colonies. Absolute uniformity of the system of election, though desirable, is not essential. The other colonies would be best pleased if Queensland would agree to the direct popular election of representatives; but, failing that, it would assuredly be better that she should be represented (like Western Australia) in some other manner, than that she should not be represented at all.

The new Convention, of course, is not—and could hardly have been—bound down in terms to take the Commonwealth Bill as a basis to be adopted with such amendments as may be necessary; but it does not follow that the Commonwealth Bill has been thrown overboard or ignored. It would have been unwise to hamper the Convention by definite instructions as to procedure; but it is impossible to suppose that any framers of an Australian Constitution could ignore the Commonwealth Bill, which stands as the definite embodiment of the best wisdom and statesmanship of Australia.

The latest event in the history of the popular movement was a People's Federal Convention held at Bathurst in 1896. This was an important, though unofficial, gathering to which delegates were invited from organizations of all sorts throughout Australia, for the purpose of discussing questions of federal principle. The large and representative attendance (nearly 200 delegates answered to their names) was an encouraging sign of popular interest—an interest which the proceedings of the Convention helped in their turn to stimulate. The chief work of the Convention, which was both educative and deliberative in its aim, took the form of a detailed discussion of the Commonwealth Bill in Committee of the Whole; and the debates not only showed a general appreciation of the federal spirit, but contributed some really valuable criticism—particularly in respect of the difficult question of federal

finance. Perhaps, however, the Convention did best service in dissipating the atmosphere of suspicion which, in the minds of a section of the people, has always surrounded the Commonwealth Bill. That Bill has often—for no very apparent reason—been denounced as ‘conservative’ and ‘undemocratic’; but the Bathurst Convention, though it reflected every shade of political and social belief, found itself able to suggest very little in the way of liberalizing or democratizing the Bill. The fact that the Commonwealth Bill was taken by general consent as a basis for discussion, and the further fact that it came so well out of the ordeal, establish its position, not indeed as a perfect Constitution, but as a draft which is entitled to respect and serious attention, and which must be the basis of all future deliberations.

CHAPTER II.

THE COMING CONSTITUTION.

What form shall the Australian Constitution take? That is a question which must soon be answered; and the answer must be based on the application of federal history to our own circumstances. No constitution can afford to ignore history; and no successful constitution has ever been a slavish copy of historical models.

A representative Convention will shortly be set to frame a Federal Constitution for Australia; but it will not have to begin at the beginning. That Constitution is already half-designed and half-built; its foundations are irrevocably laid by our history, our habits, and our circumstances; and a good deal of the superstructure has been added by the constructive and critical work of statesmen who have given their best faculties to the task.

The aim of this chapter is not to dogmatize upon the details of Australian Federation, or attempt to evolve a brand new constitution out of the author's head. The intention is rather to show how the principles already laid down, and the object lessons from which those principles have been drawn, can be pressed into the service of Australian nationality; how, in other words, political science and federal history can be applied to Australian conditions.

For this task there is abundance of material. The debates of the Sydney Convention (the first practical discussion of the question) are a mine of information, as is also the immense but scattered mass of criticism upon the Convention's work. There are

also many valuable contributions in the shape of essays, articles, and papers dealing with one phase or another of the question. The work of applying federal experience to Australian requirements is therefore not a new one; and some part of the following pages will consist of a summary of results already reached, and conclusions already expounded, by statesmen who have made a thorough study of the national problem.

The Commonwealth Bill is the only complete scheme of Australian Federation that has yet been produced. It is now the classical standard document by reference to which friends and foes, admirers and critics alike, explain their views upon federation; and it will therefore be convenient, for purposes of reference, to treat each part of the subject as nearly as possible in the order of sequence in which it appears in that Bill. This will not of course involve necessary championship of all the principles of the Bill, nor limit the right to criticize it to any extent. Whenever there seems to be a choice between two sides of a question, the case for each will be stated impartially; for it is only by weighing the merits and demerits of rival schemes that a satisfactory outline of an Australian constitution can be obtained.

§ 1. *Form of Union.*

The first question which confronts us is: What relation is united Australia to bear to the British Empire? The Australian Colonies are at present under the British Crown; they are dependencies, practically self-governing, of the British Empire. This relation—a compromise between dependency and independency—cannot be permanent; it is a historical accident, and involves many anomalies. We are dependent, yet self-governing; we are part of an Empire whose central Parliament occasionally legislates for us, declares peace and war in the name of us all, but does not represent us and cannot (constitutionally speaking) tax us. It is a

relation suitable for colonial infancy—suitable, perhaps, for many years to come—but which in the nature of things cannot last for ever. Either one of two solutions may be ultimately possible: an independent Australia, detached altogether from the Empire; or an Australia forming a State in a great British Federation. We are not yet called upon to choose between the two. We are not yet ripe either for independence or for a British Federation: we are ripe for Australian union. We are not to dictate to Australia that she shall or shall not be a part of the Empire. Australia will be able to decide that for herself; and her choice will be freest if we interfere as little as possible with present relations. We need only change our separate dependence into a collective dependence; become, like Canada, a single federal dependency, instead of half a dozen isolated dependencies. In other words, we must federate *under the Crown*—Australia becoming, from an Imperial point of view, one great, self-governing, federal colony. There will be nothing in this derogatory to Australian patriotism or liberty; for Australia, though nominally dependent, will be really self-governing, and whenever she wishes to cast off the privileges and the burdens of the Imperial connection, she will be free to do so.

It follows that the Constitution of Australia—like that of Canada, and indeed of every British colony—must be in the form of a British Act of Parliament, and must, before it can take effect, be forwarded to the Home Government to be passed into law.

As to the type of union required, there can be no doubt that we want, not the unified, nor yet the confederate, but the true federal form. History with one voice agrees in warning us that no effectual union can be attained without a strong central government, complete in all its parts, and able to administer and enforce laws as well as make them. It is useless to stop short at such a mockery of union as the first American Confederation was, and as the Federal Council of Australasia is.

But though the central government must be strong, its powers are not to be unlimited. We do not want to abolish our separate state governments, nor to make them subordinate to the central government. We do not want to make New South Wales, Victoria, and the other colonies mere departments of a great unified Australian government. We want each colony to retain its independence except in matters of common concern, and we want an Australian government empowered to deal with those matters, and with those matters alone. Not a single colony would agree to union on any other terms. The union therefore must be a true Federation; neither a mere Confederation on the one hand, nor an absolute Unification on the other.

In deciding upon 'Federation under the Crown,' we thus get a rough basis for determining two great questions: the relation of the States to the Commonwealth,¹ and the relation of the Commonwealth to the Empire. We can now discuss these relations in greater detail; try to find out the forms of government and the patterns of political machinery best suited for the Australian people; inquire what powers ought to be assigned to the national and what to the provincial governments; and generally travel over the whole ground of a skeleton Constitution.

It must be remembered that the federal system in itself does not commit us to one fixed type of institutions. So far as federal principle is concerned, we have a wide range of choice in the pattern of the national executive, the national legislature, the national judiciary, and the relations between them. In that choice we must be chiefly guided by our own political habits and traditions, and by a study of the special wants which Australian Federation is meant to satisfy.

¹ The word 'Commonwealth,' provisionally chosen by the Sydney Convention as the title of the proposed union, seems to have won general acceptance, and is used throughout this work as descriptive of the Australian nation.

§ 2. *The Federal Legislature.*

The relations of the legislature to the executive, which form so important a part of the British 'parliamentary system,' will be best postponed until we come to consider the Federal Executive. In this section it will be enough to deal with the structure and composition of the Federal Parliament.

The Federal Parliament, undoubtedly, will consist of the Queen and two representative Houses.

The Queen is, of course, a part of every colonial legislature, and will be represented in the Commonwealth by a

(1) *The Queen.* Governor-General, who, since he represents the Queen, will almost of necessity be appointed by her—as is the Governor-General of Canada, and as are Australian Governors at the present time. Other modes of appointing the Governor-General have been suggested—for instance, election by the people of Australia¹—but they involve great difficulties without any corresponding advantage. Appointment by the Queen need not, however, preclude the Australian Government from having an advisory voice in the matter, and is not necessarily inconsistent even with virtual nomination by the Australian people.

There will probably be no difficulty in deciding in favour of a two-chambered legislature, seeing that two Chambers are the rule throughout the British possessions, and that in a Federation there is a special reason for a second Chamber to represent the States. A Federation without such a second Chamber would be unique, and would even run the risk of being no Federation at all, but a Unification.

The constitution of the second Chamber—the Senate, or 'States' Council,' as it may more appropriately be called

(2) *The States' Council.* —raises several important questions. Obviously, it should be elective; for a nominee House, such as the Canadian Senate, can hardly be said to

¹ See speech by Sir George Grey, Debates of Sydney Convention, p. 561.

‘represent’ the States at all. Whether the representatives of a State should be chosen by the people of the State or by the Parliament of the State is an open question.¹ Neither method is wholly free from difficulty. The parliamentary plan involves the question of the share which the several Legislative Councils ought to be allowed in the election; the popular plan involves the choice of one out of many rival systems of voting. Probably the weight of argument is in favour of direct popular election, with some system of preferential voting (*e.g.*, contingent vote or Hare’s system) and each State as one electoral district.

Whether the mode of choice should be fixed by the Federal Constitution or left to the discretion of each State is another open question. In Switzerland,² each Canton chooses its own members of the States’ Council in such manner and for such terms as it pleases. Theoretically, this plan gives the fullest assurance of state rights, because it places the Senator more in the position of an accredited ambassador of his State, and intensifies the distinction between a state representative and a national representative. Practically, it leads to a want of uniformity in election and tenure, and so tends to weaken the influence and dignity of the office.

But the most important point in respect to the States’ Council is the apportionment of representatives among the various States. It cannot be too strongly insisted that in the States’ Council or Senate every State—large and small alike—ought to have an equal number of representatives.³ This contention is supported by principle: it is the fundamental compromise needed to induce small States to throw in their lot with large. It is also supported by experience: for it is not too much to say that the principle of state equality

Principle of
State
Equality.

¹ The Commonwealth Bill adopted the latter alternative; the Bathurst Convention the former.

² See page 73, above.

³ See page 30, above.

in one branch of the legislature has been recognized in every modern Federation—and nowhere more conspicuously recognized than in the two Federations which affirm the principle, but modify its practical application. These two Federations are Canada and Germany. Canada affirmed the principle of state equality by giving twenty-four Senators to each Division; she modified the application of the principle by lumping the Maritime Provinces together as a single Division, whilst Ontario and Quebec each formed a separate Division. The recognition of equality is imperfect, but equality is obviously the guiding principle. That it was not carried to its logical conclusion by counting the Maritime Provinces separately instead of together is probably due to the prejudice against state rights which, as we have seen, seriously interfered with the federal nature of the Canadian union.¹ In Germany, again, owing to the extraordinary inequality of the States, it was obviously impracticable to give full play to the principle of equal representation. Not even in a federal Senate could the little free cities of Lubeck or Bremen be given equal influence with the great kingdom of Prussia. The principle of state equality had to be modified to suit extraordinary conditions, and votes in the Federal Council were accordingly apportioned among the States on a basis of compromise—neither equal representation nor proportional representation, but a mean between the two. If, however, we compare the populations of the States with their votes in the Council we shall see that the compromise thus adopted comes much nearer to the equality principle than to the principle of proportion.²

In Australia there is not, nor is there likely to be, any such extraordinary disproportion of the States as this. True, some of the colonies are many times larger than others, but all are reasonably comparable, and there is no absurdity in their treating with one another—as States

¹ See pp. 82, 86, above.

² See page 99, above.

—on a footing of equality. There is therefore no reason for modifying in any way the principle of equal representation in the Senate; and the example of the United States and Switzerland is in this case the right one to follow.

So many misconceptions exist on this point that it may be well to answer some of the chief objections that have been made to the principle of equal representation of the States in the States' Council.

Objections
Answered.

First and foremost, it is said that the principle is undemocratic; that it contemplates giving the few equal power with the many. Now it may be taken for granted that any possible Australian Constitution must be democratic; that in the last resort *Demos*—the People—must rule. But it must be remembered that in federal Australia we are dealing not with one *Demos*, but with several; first, the great Australian *Demos*, and secondly, the *Demos* of each individual State. Tasmanians are fewer than Victorians, and therefore in the National Assembly—the House which looks upon the one and the other simply as Australian citizens—Tasmania must have proportionally fewer representatives. But the Tasmanian people, equally with the Victorian people, will want to safeguard its own laws, its own lands, its own interests, and will decline to join in any union in which one or two large States could persistently vote down all the others.

It must be remembered, too, that equal representation in one Chamber is balanced by proportional representation in the other. It is in no sense true that the few have equal power with the many; the simple truth is that all federal legislation needs the consent of a majority of the people and also of a majority of the States. A majority in the Senate may conceivably represent a minority of citizens; but such a majority can never compel legislation—it can only prevent legislation. And the legislation which it is likely to prevent is precisely that which, in a Federation, ought to be prevented: legislation, that is to say, which is offensive to a majority of the States. Fears of a deadlock

may of course be conjured up ; but deadlocks exist rather in theory than in practice. The possibility of deadlock is inherent in every constitutional government under the sun ; but safety is found in the reasonable spirit of those who work the constitution. It may, perhaps, in the Australian Constitution, be advisable to guard against the blocking of the routine financial business of the federal legislature ;¹ but a constitution which enabled a bare majority of citizens to force new legislation upon an unwilling majority of States would have little chance of acceptance by the Australian colonies.

It seems to be feared in some quarters that a Senate which represented the States equally would in some mysterious way become a champion of class privileges and monopolies—would in fact be a rich man's Chamber. This fear is hard to understand. It seems to imply that the representatives of small States are likely to be more monopolistic in their views than those of large States. Seeing that the classes are pretty uniformly distributed throughout all the Australian colonies, it is hard to see how any class significance can attach to the question of how many Senators each State shall send. An elected federal Senate need not be credited with the qualities of a House of Lords, a nominee Council, or a Chamber elected on a limited franchise. The representatives of each State can be neither more nor less plutocratic than that State wishes them to be ; and the whole House can be neither more nor less plutocratic than its members make it. The fear of the Senate becoming a 'class' body may also be discounted in another way. With what is called 'class legislation' the Federal Parliament will have little to do. The social

¹ A suggestion made by the Hon. R. E. O'Connor, Q.C., at the Bathurst Convention (and previously in a debate in the Legislative Council ; see *Hansard*, 1893, p. 7195) deserves consideration. Mr. O'Connor thinks that the Constitution should provide that if a Bill granting supplies were thrown out by the States' Council in one session, and could not be agreed on in the next session, the two Houses should sit together, and the joint majority should decide the matter finally.

questions which set class against class will mostly belong, as they do now, to the state legislatures, and be beyond the reach of federal interference.

A federal Senate is sometimes (*e.g.*, in the United States) made to represent another principle besides state equality: the principle, namely, of continuity. This is effected by a system of retirement in rotation, so that the whole House is never renewed at one time. This is not necessary to the character of the House as a States' Council; but as a constitutional device it has many merits. It helps to check sudden and violent changes of policy, without appreciably delaying any change upon which the people's mind is made up. It ensures, too, a more effectual representation, as it guards against the very real danger of the legislature reflecting too thoroughly any mere passing phases of popular opinion or emotion. Lastly, it establishes another point of difference between the two Houses, and helps to prevent the one from being a mere superfluous duplicate of the other—a point which it is not always easy to secure with two elective Chambers. How many members should be elected by each State, how long they should hold their seats, and what proportion should retire at a time, are details which are important, but which need not be discussed here.

The National Assembly—or House of Representatives, as it is called in Canada and the United States—will of course represent the whole people on a population basis, and ought to be constructed as nearly as possible on the familiar model of a Legislative Assembly. One representative to 30,000 citizens is proposed by the Commonwealth Bill; but the exact ratio is a detail. The duration of Parliament will probably, in accordance with Australian custom, be limited to three years, subject, perhaps, to earlier dissolution.

The chief question of principle in connection with the structure of the National Assembly is that of the franchise.

(3) The
National
Assembly.

Is the franchise for the election of federal representatives a matter of provincial concern or of national concern—should it be controlled by the States or by the Commonwealth? The better opinion is that the National Assembly ought to represent the federated people as a whole, independently of the division into States; and that the national suffrage, being an attribute of national citizenship, ought to be uniform throughout the Nation, and ought therefore to be either embodied in the Federal Constitution or controlled by the Federal Parliament.¹ This plan has been criticized as an interference with state rights, on the ground that each State ought to be free to choose its own representatives as it thinks fit; but the answer to this is that the members of the National Assembly—unlike those of the States' Council—represent, not the States, but the Nation. Their election is therefore a matter of national concern, and no state right is infringed by the national control of the federal franchise. The Swiss Constitution on this point is both logical and precise.²

It does not follow that federation necessarily involves a duplication of all the electoral machinery, or the preparation and periodical revision of independent electoral rolls. All this might be required for ideal uniformity, but the expense would be considerable. An economical approach to uniformity may be attained by employing the provincial machinery for federal purposes, with such modifications as may be practicable. For instance a very serviceable substitute for a uniform federal franchise on the basis of 'one man one vote' might be obtained from the existing electoral rolls of the Australian colonies by simply striking out the plural property vote and the women's vote, where they respectively exist. But the proper degree of uniformity,

¹ See the case for and against this proposition stated by the author and the Hon. A. Inglis Clark respectively in the *Commonwealth Magazine*, February, April, May, and June, 1895. See also debates of Sydney Convention, pp. 613-637.

² See p. 72, above.

and the proper development of the suffrage to meet the ideas of successive generations, can only be attained by giving the Federal Parliament power to fix its own franchise, which it can be trusted to do in the best interests of the Nation. The question, for instance, of extending the federal franchise to women can only be dealt with by the Federal Parliament.

It is important, for the proper maintenance of the federal relation, that for purposes of general legislation the two Houses should be co-ordinate and have equal powers. As regards money bills, in Both Houses. deed, it will probably be well to adopt the familiar rule that such bills must originate in the national Chamber, and may not be amended by the other Chamber. It may even be possible to go farther, and make some provision for the ordinary financial business of the Nation to go on, in spite of a difference between the two Houses.¹ But with these exceptions, the principle ought to be adhered to that all new laws should require the consent of a majority of the citizens and of a majority of the States. Neither House ought to be able to dictate terms to the other ; each should be independent, and the free consent of both should be necessary for legislation.

The Queen will be a part of the Parliament, and her assent will therefore be necessary to every law. Nowadays, we know, the Queen's assent is usually given Assent of the Crown. as a matter of course ; in the United Kingdom it has not been withheld since 1707 ; in a self-governing colony the veto is rarely exercised ; and in a great federal dependency, such as Canada is and Australia will be, its exercise is and will be rarer still. It will in fact never be exercised except in cases of laws which affect Imperial interests or obligations. Nevertheless the royal veto can hardly be limited in set terms ; and the Governor-General must have the usual power of assenting in the Queen's name to any law, withholding his assent, or reserv-

¹ See p. 130, above.

ing the law for the Queen's pleasure to be known. Presumably also the usual provision will be inserted allowing the Queen in Council within a limited time to disallow laws to which the Governor-General has assented. But although the power of disallowance must necessarily be general in its terms, well-known constitutional principles will prevent its ever being exercised in respect of purely Australian legislation, or except in the rare cases where Imperial interests are directly involved. Any breach of colonial rights of self-government, if it occurred, would almost certainly provoke a declaration of independence.

The introduction of the Referendum into Australian politics is often discussed, and its suitability as a part of

The our national and provincial law-making pro-
Referendum. cesses mooted. In this chapter we are concerned with it only from the national standpoint, as a possible part of the process of federal legislation or constitutional amendment. So much misconception exists as to the nature of the Referendum, and of the kindred institution known as the Initiative, that a short discussion of each will not be out of place.

The Referendum may be broadly defined as the principle of taking a popular vote for other purposes than
Its Real that of electing popular representatives : the
Principle. principle of deciding by the direct votes of the people some definite question—usually a question of legislation, but sometimes an administrative question, and conceivably even a judicial one. It is an artificial substitute for the old principle of democracy before representative institutions were thought of : the principle of a constituent assembly in which every citizen could appear, vote, and—if he could gain the ear of the meeting—speak. This was only possible in diminutive States ; on a larger scale (as in early England) the democratic theory was tempered by aristocratic practice, owing to the impossibility of assembling the whole Commons of the land. Gradually the problem of democracy on a large scale was solved by the

application and perfection of the *representative* system: a system under which the individual citizen finally and definitely lost all remnants of his direct voice in public affairs, and gained instead an indirect voice—the right of voting for the election of a representative.

It is a discovery of modern politics that the representative system need not necessarily be exclusive of the constituent system; that the people may delegate the legislative and other powers of government to chosen officers, and yet retain some right, not only of expressing approval or disapproval of the conduct of these officers, but of actively interfering in the work of government—especially that part of the work of government which consists in making laws. With the help of the ballot-box and the public press, the citizens of a large democracy can to-day exercise many of the functions of government as directly as did the assembled citizens of Athens more than 2,000 years ago. The taking of a Referendum on any question is, so far as it goes, a reversion to the ideals of Greek democracy. The orator is replaced by the writer, the Ecclesia by a few hundred polling-booths; but the voice of the people cries ‘Aye’ or ‘No’ as clearly as if they were gathered together in a market-place or a Senate House. How far this principle of government directly by the people ought to be applied is a problem of the gravest difficulty: that it can be so applied to any required extent is just now one of the most important elements in the political atmosphere.

If we ask how far the Referendum has already been employed, our attention is directed first to Switzerland—the meeting-ground of large and small democracies, of representative and constituent assemblies—where we find it in several forms. The ‘Referendum’ usually so called is a popular veto on legislation; and its Swiss varieties—cantonal and federal, optional and compulsory—have already been described.¹ But the principle of the Refer-

¹ See pp. 72, 74, 79, above.

endum is not confined to Switzerland. In all but one of the American States it is used to ratify new state constitutions and constitutional amendments ; and throughout the Union it is frequently employed in municipal matters. A municipal Referendum is familiar in this colony and elsewhere under the name of 'local option'—which goes farther than a mere legislative Referendum, because it entrusts an administrative decision to a popular vote. The Federation Enabling Acts recently passed in five of the Australian colonies provide that the Federal Constitution proposed to be framed shall be submitted to a Referendum. Its use has been suggested in many other instances : notably in New South Wales, where it is proposed to apply it to cases of disagreement between the two Houses. This last, though a new application of the Referendum, has a logical basis in a well-recognized constitutional principle—that where the Chambers differ, the will of the people must prevail. The proposal is to ascertain the will of the people by a direct vote on a definite question ; not, as heretofore, by the indirect expedient of a dissolution and a general election.

So much for the meaning and possibilities of the Referendum : we have next to ask how far, if at all, it would be wise to adopt it in the Federal Constitution. Three chief federal uses of it have been suggested : (1) to ratify, or veto, constitutional amendments ; (2) to ratify, or veto, ordinary federal legislation ; (3) to decide cases of disagreement between the two Houses of the Federal Parliament.

The third suggestion may be dismissed shortly. This use of the Referendum as an arbiter between the Chambers is altogether new ; we have not yet adopted it in provincial politics, and a federal constitution—which is notoriously hard to alter—is not the place for experiments. The Referendum cure for deadlocks promises well, but it ought to be tried on a provincial scale before it is deemed worthy to rank as a federal institution.

No one can foretell how a new political invention will work ; and, though experiments must be made, they should not be made in the first instance on too large a scale.

The other two uses deserve closer attention. The Referendum as a veto is better tried and better known ; and as a veto on the amendment of the Federal Constitution—the fundamental law—it seems For Constitutional Amendment. to have a special fitness. It accords with the ‘social contract’ view of the federal system, and helps to emphasize the superior sanctity of the Constitution as compared with ordinary laws. It may now be taken for granted that the Australian Constitution, when framed, will be submitted to a Referendum in each colony for adoption or rejection ; and this fact of itself points forward to a similar process of ratifying subsequent amendments of the Constitution—with the difference, however, that in such subsequent amendments a Nation will be concerned as well as a group of States, and that, therefore, the assent of the Nation as well as the assent of a certain proportion of the States should be required.¹ The Referendum as a veto on constitutional amendment has the express sanction of Switzerland, and would certainly be adopted by the United States (as it has been in the individual States of the Union) were they to recast their Federal Constitution at the present day.

In respect of ordinary federal legislation the need for the Referendum is by no means so obvious. For Federal Legislation. The Referendum, in a great country like Australia, is a cumbrous and expensive engine, for use on rare occasions ; a vote of all the citizens every few weeks, or even once in a session, would be an unnecessary expense and an unbearable nuisance. Discharging it at every trivial piece of legislation would be like shooting sparrows with an eighty ton gun. In Switzerland—whose three millions of souls are crowded into a space not much more than half the size of Tasmania—the

¹ See also pp. 182-184, below.

Referendum is looked upon as the heavy artillery of the Constitution, and is only brought into federal use to deal with constitutional amendments, or on the petition of 30,000 voters. We certainly do not want a *compulsory* Referendum upon every bill; and the *optional* Referendum is pronounced in Switzerland an indifferent success, owing to the agitation required to get the petitioning signatures. Why, then, have any Referendum at all? Seeing that the power of the Federal Parliament will be strictly limited, and that every law will have to run the gauntlet of two sets of representatives—those of the Nation and those of the States—there will surely be no need for any further safeguard in the way of a popular veto.

The Initiative is sometimes called the 'logical counterpart' of the Referendum, but it is really nothing of the kind.

The Initiative. The analogy is a false one, based on a superficial recognition of the fact that 'initiation' is the first step, and assent the last step, towards legislation. It by no means follows that because the people can directly assent to a law they can directly initiate a law; and a little thought will show that the popular Initiative—except on the tiny scale of a Swiss Canton¹—is a fallacy, and a dangerous fallacy. The principle has already been touched upon *apropos* of Swiss institutions. We may now examine more closely the part which it claims to play in the work of legislation.

Law-making, in a parliamentary sense, consists ordinarily of several stages or processes. Every law is
 What it first drafted; then introduced; then
 Means. discussed, and, if necessary, amended;
 and, lastly, passed. Drafting, introduction, discussion, amendment and assent, are five processes which must all have a place in the procedure of any legislative body which

¹ The home of the Initiative is the smaller Cantons, where it is a reminiscence of the old constituent assemblies, in which every citizen had a right to be heard. Its recent extension from the Cantons to the Confederation (the only instance of its use on a large scale) has not been encouraging. See p. 74, above.

would do its work well. The Referendum, as we have seen, entrusts the last of these processes to the people; it involves a simple 'Aye' or 'No,' which can be spoken as readily by the people assembled at the polls as by their representatives assembled in a Chamber. The Initiative goes further; it purports to give the people the right of drafting and introducing bills. Now, it is plain that the people collectively cannot draft a bill; they can only—when a bill has been drafted—vote for or against its introduction. The Initiative, then, means (to begin with) that every citizen has the right of drafting a bill and asking his fellow-citizens for leave to introduce it; and that the citizens, voting collectively, may then grant or refuse such leave. If it stopped there, it would be a harmless engine enough; there is nothing alarming in the mere right of introducing bills into the legislature. But the Initiative goes further: it involves (and must involve, if it is to be effectual) the right to have such bills proceeded with and brought to a final Referendum. Let us suppose that a bill has been duly 'initiated;' the next step shows the weakness of the system. Before that bill is ripe for passing, opportunity should be given for the intermediate processes of discussion and amendment. Whether it can be effectually discussed by the whole people we need not consider; but it is obviously impossible to take it clause by clause through a 'committee of the whole people.' It can only be amended—if at all—by the legislature; but, if the legislature were left a free hand, the whole potency of the Initiative would be destroyed. This dilemma is met in Switzerland in a curious way: the legislature is allowed to frame an alternative bill, and then both bills (the bill as originally initiated, and as amended by the legislature) are submitted to the people, who may accept either or neither at their pleasure. Thus it may happen (as has happened in Switzerland) that a measure framed by a wholly irresponsible draftsman may become law without parliamentary revision of any kind whatever.

The Initiative, in fact, sails under false colours. It purports to be a means of introducing legislative proposals to the notice of the legislature; in reality, it enables a mass vote not only to introduce laws, but to pass them over the head of the legislature, without any opportunity for parliamentary discussion or amendment. Such a contrivance, dangerous anywhere, is specially undesirable in a federal constitution.

§ 3. *Powers of the Federal Legislature.*

The fundamental part of a federal constitution is that which draws the line between the powers of the Nation and the powers of the States. The way in which this is done determines, more than anything else, the real character of the union. The respective spheres of the Federal and State Parliaments must therefore be defined with great care.

As to the *method* of definition, we obviously have choice of two alternatives: either (as in the United States) to
Method of
Definition. enumerate specifically all the powers of the Federal Parliament, reserving to the State Parliaments all powers not expressly taken away from them; or (as in Canada) to enumerate specifically all the powers of the State Parliaments, reserving to the Federal Parliament all powers that are not expressly given to the States.

Of these two alternatives, it seems to be generally agreed that the former is the one for us to choose; that the Federal Parliament should have only such powers as are expressly given to it. We want to interfere as little as possible with the existing constitutions of the colonies, and to have it clearly understood from the first what are the precise powers of the new national government we are going to create. A Constitution on the other basis—a Constitution which arrogated to the Parliament of the Commonwealth all powers not expressly reserved to the States—would leave such wide openings for extending the field of federal legislation that the colonies would be very shy of adopting it.

In deciding this point, it ought to be borne in mind that in a Federation under the Crown we have not two but three levels of legislative authority. There are the State Parliaments, the Commonwealth Parliament, and the Imperial Parliament. In Canada, as we have seen,¹ the general residuum of powers is thrown, under similar circumstances upon the federal government—a result which we have already ascribed to the prejudice against state rights which so seriously influenced the form of the Canadian union. State rights, however, are likely to be the keystone of Australian federation, so that the Canadian example in this respect is no precedent for us to follow.

Having decided that the powers of the Federal Parliament are to be strictly defined, we may now outline broadly what the more important of these powers ought to be ; on what subjects, that is to say, the Federal Government ought to have power to make laws. But first it may be remarked that the power of making laws on any subject may be vested in the Federal Parliament either *exclusively* (so that the State Parliaments are forbidden to make laws on that subject), or *concurrently* with the State Parliaments (so that those Parliaments can continue to make laws on that subject until the Federal Parliament chooses to exercise its power and supersede such laws.

The first requirement of a government is revenue, and therefore the Federal Parliament must have ample powers **Revenue and** of *taxation*. Those powers ought indeed to **Expenditure.** be practically unlimited, both as to amount and subject-matter, because no one can set a limit to the possible needs of the government. The objects of federal expenditure will, of course, be defined by the Constitution ; but who can foretell the amount that may be needed (for instance) for federal defence ? The Federal Government must be entrusted with powers of raising funds to meet any emergency, or it will be weak just when it is most required to be strong. The guarantee that taxation will not be

¹ p. 89, above.

unnecessarily heavy is found in the dependence of both Houses upon the people.

With regard to taxation generally, the powers of the Federal and the State Parliaments will be concurrent: the one will be able to levy taxes for federal purposes, the other for state purposes. But one mode of taxation—duties of customs and excise—must be given to the Federal Parliament exclusively. One of the great objects of federation is to throw down the border custom-houses, and allow perfect commercial freedom from one end of Australia to the other. This will make it impossible for each State to keep its separate provincial tariff against the outside world; seeing that a tariff fence, to be of any use, must be a ring-fence. Scientific protection on the Victorian sea-board would be a farce whilst the New South Wales ports were open and the Murray bridges free. There must, therefore, be one fiscal policy for Australia, and it must obviously be controlled by the Federal Parliament. Duties of customs and excise must be imposed and collected by the Commonwealth alone, subject, of course, to the condition that such duties shall be uniform throughout the Commonwealth, and that there shall be no internal customs barriers between the several States of the union. Exclusive federal control of the customs is necessary for the basis of a commercial union without which federation would be a mockery. Complete internal freetrade, combined with such external fiscal policy as the Federal Parliament shall determine, is the only possible basis for an effective Federation. Whatever the federal fiscal policy should be, it is likely that there would at least be a revenue tariff sufficient, and perhaps far more than sufficient, for ordinary federal requirements. It is therefore unlikely that, except in great emergencies, the federal government need resort to other modes of taxation; but, since emergencies may happen, its powers of direct and indirect taxation ought to be unlimited.

The federal revenue-raising powers would not be complete without a power of *borrowing* on the public

credit for the purposes of the Commonwealth. This of course need not interfere with the powers of the several States to borrow for state purposes.¹

There must also, of course, be power to spend the revenue raised ; and therefore the Federal Parliament must be authorized to appropriate money for federal purposes—for purposes, that is, which come within the scope of the Federal Constitution.

The Federal Parliament must obviously have *exclusive* powers of legislation upon matters relating to those departments of the public service which are placed under federal control. These will probably include (in addition to customs and excise) the following :—Posts and telegraphs, military and naval defence, ocean beacons, buoys, lighthouses and lightships, and quarantine.

Besides the matters already mentioned, there are numerous subjects of legislation on which uniformity throughout the whole Commonwealth is specially desirable, and which ought, therefore, to be assigned to the Federal Parliament. Many of these will involve the creation of executive departments for purposes of supervision, inspection, regulation, the keeping of records, and so forth. Others are matters of legislation alone, needing no executive machinery beyond that which is at the disposal of the judicial department for the purpose of enforcing its decrees. A long list of such subjects is set out in the Commonwealth Bill,² and most of them need no special

¹ The question whether, and how far, the debts of the States should be taken over by the Federal Government is dealt with below, § 7, pp. 165-8.

² Ch. I., ss. 52 and 53. S. 52 gives the Federal Parliament power to make laws with respect to the following matters :—

1. The regulation of trade and commerce with other countries, and among the several States.
2. Customs and excise and bounties, but so that duties of customs and excise and bounties shall be uniform throughout the Commonwealth, and that no tax or duty shall be imposed on any goods exported from one State to another.

mention here. A few debatable questions, however, may be briefly dealt with.

Strong arguments have been adduced for handing over the railways to the federal government. On political and economic grounds, it is said, this would be advisable. It would be advantageous for defence purposes; it would enable a uniform gauge to be established; it would put an end to the war of differential

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3. Raising money by any other mode or system of taxation; but so that all such taxation shall be uniform throughout the Commonwealth.
 4. Borrowing money on the public credit of the Commonwealth.
 5. Postal and telegraphic services.
 6. The military and naval defence of the Commonwealth and the several States, and the calling out of the forces to execute and maintain the laws of the Commonwealth, or of any State or part of the Commonwealth.
 7. Munitions of war.
 8. Navigation and shipping.
 9. Ocean beacons and buoys, and ocean light-houses and light-ships.
 10. Quarantine.
 11. Fisheries in Australian waters beyond territorial limits.
 12. Census and statistics.
 13. Currency, coinage, and legal tender.
 14. Banking, the incorporation of banks, and the issue of paper money.
 15. Weights and measures.
 16. Bills of exchange and promissory notes.
 17. Bankruptcy and insolvency.
 18. Copyrights and patents of inventions, designs, and trade marks.
 19. Naturalization and aliens.
 20. The status in the Commonwealth of foreign corporations, and of corporations formed in any State or part of the Commonwealth.
 21. Marriage and divorce.
 22. The service and execution throughout the Commonwealth of the civil and criminal process and judgments of the courts of the States.
 23. The recognition throughout the Commonwealth of the laws, the public Acts and records and the judicial proceedings of the States.
 24. Immigration and emigration.
 25. The influx of criminals.
 26. External affairs and treaties.
 27. The relations of the Commonwealth to the islands of the Pacific.
 28. River navigation with respect to the common purposes of two or more States, or parts of the Commonwealth.
 29. The control of railways with respect to transport for the purposes of the Commonwealth.

rates ; it would reduce the cost of carriage, increase the efficiency of the service, and add to the convenience of the public. It is contended, too, that the credit of the federal government would be improved by its possession of the valuable railway assets, and that a great annual saving in the national interest bill would thus be effected.

But whilst the financial and other advantages of federating the railways may be admitted, there are serious

30. Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to the State or States by whose Parliament or Parliaments the matter was referred, and to such other States as may afterwards adopt the law.
31. The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States concerned, of any legislative powers with respect to the affairs of the territory of the Commonwealth, or any part of it, which can at the date of the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.
32. Any matters necessary or incidental for carrying into execution the foregoing powers, and any other powers vested by this Constitution in the Parliament or Executive Government of the Commonwealth, or in any department or officer thereof.

S. 53 further gives the Federal Parliament *exclusive* powers to make laws in respect of the following matters :—

1. The affairs of people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community ; but so that this power shall not extend to authorise legislation with respect to the affairs of the aboriginal native race in Australia and the Maori race in New Zealand.
2. The government of any territory which may by surrender of any State or States and the acceptance of the Parliament become the seat of Government of the Commonwealth, and the exercise of like authority over all places acquired by the Commonwealth, with the consent of the Parliament of the State in which such places are situate, for the construction of forts, magazines, arsenals, dockyards, quarantine stations, or for any other purposes of general concern.
3. Matters relating to any department or departments of the Public Service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth.
4. Such other matters as are by this Constitution declared to be within the exclusive powers of the Parliament.

obstacles to this being done, at least for the present. In the first place the railway policy of each State—and especially the policy of constructing new lines—is closely bound up with the land question; and control of the lands will of course be retained by the States. It must be remembered, too, that a very large part of the railway system of each colony consists of suburban and branch lines of a purely provincial character, and that many even of the trunk lines have no federal or intercolonial significance. It is more than doubtful whether any of the colonies would consent to give up the entire control of its railways, as regards either construction, rates, or general administration. Any such proposition would be regarded as an invasion of state rights, and would increase the difficulty of framing a constitution which would be acceptable all round.

The necessities of defence and inter-state commerce can be met by a provision such as that of the Commonwealth Bill, giving the Federal Parliament power to make laws for 'the control of railways with respect to transport for the purposes of the Commonwealth.' If further control should afterwards prove desirable it might be attained either by constitutional amendment or by agreement among the governments.

Should the criminal law be assigned (as in Canada) to the federal government? There are obvious advantages in having one criminal law for all Australia.

Criminal Law. At the same time, there is no pressing need for a change of this kind, and it would be bad policy to overweight the Federal Constitution at the outset with provisions which are certainly not necessary to effective federation, and which add to the debatable matter of the Constitution.

Where there is doubt as to the advisability of giving a power to the Commonwealth or leaving it with the States,

General Principles. the safer course to follow is the course of non-interference. We do not want to attempt too much at the outset, or to endow the

federal government with any powers which are not absolutely necessary for its efficiency. There is no lack of undoubtedly federal subjects ; and to add debatable ones means to increase the atmosphere of jealousy and suspicion which is too apt to attend the preliminary negotiations of such a compact as this. It is better to give the federal government at the outset too few powers rather than too many. It will be easier to increase them afterwards than to diminish them. The Federal Parliament may of course be given a general power to deal with any matters which may be referred to it by the States ; and that, together with the process of constitutional amendment, ought to be enough to meet the requirements of a growing sense of national unity.

§ 4. *The Federal Executive.*

It has already been argued that the British and British-colonial systems of government must in the main be followed as regards the structure of the executive government and its relation with the legislature. According to those systems, the nominal executive power of the Commonwealth—as of every other part of the British dominions—will be vested in the Queen, and the Queen will be represented in the Commonwealth (in her executive as in her legislative¹ capacity) by the Governor-General.

But though nominally vested in the Queen, the executive power will of course be exercised for the most part by the Queen's Australian advisers. On almost all matters of merely Australian administration the *real* executive power will belong to a Federal Executive Council of some kind. *Council*, I say, because the alternative of a 'one man' executive, such as the American President, is clearly out of the question.

What we have to discuss, then, is the structure of this Federal Executive Council : its relation to Parliament and

¹ See p. 126, above.

people, and the manner of the appointment and dismissal of its members. We have seen that the federal system does not prescribe any particular form of executive government; and every federal executive must therefore be constructed to meet the political habits and needs of the time, place, and people. It seems clear that we should adopt in the main—at least for the present—the ‘cabinet system,’ which is the common heritage of the British people: the system of government by Ministers nominally appointed by the Crown, but really dependent on the confidence of a representative Chamber. This system, involving an intimate relation between the executive and the legislature—for the executive holds office at the will of the legislature, and yet, whilst it holds office, controls the course of legislation—is one with which every Australian citizen is thoroughly familiar. There is no need to discuss here the abstract merits and demerits of the British parliamentary system. Its ample recommendation is that we know its strength and its weakness; we understand what it is and how it is worked. We hear it sometimes suggested that we should imitate the Swiss model of a cabinet elected for a fixed term, or adopt some hitherto untried pattern of executive system. The answer to such suggestions is that the experiment would be too rash, and that a nation’s cradle is not the place for any more experiment than is absolutely necessary. The real lesson to be learnt from the Swiss Federal Council, as from every other successful federal executive, is to take the materials ready to our hands. The Swiss Executive Council is an admirable thing—in Switzerland; it was neither invented nor imported, but has grown up with the Swiss Cantons from time immemorial.¹ The American President, again, was not invented by the Philadelphia Convention, nor imported from abroad; he was built out of the everyday politics of the American people.² Our home growth is the cabinet system; its applicability to federalism

¹ P. 74, above.

² P. 61, above.

is proved by the example of Canada;¹ and to forbid its adoption by the national government of Australia would be to court disappointment and failure.

We must not, however, attempt to fix the present pattern of responsible government as a thing to be clung to for all time; we must allow Room for
scope for its development—for its being Development.
moulded to fit the political ideas of each successive generation. Responsible government, as we know it, is a new thing, and a changing thing; it depends largely upon unwritten rules which are constantly varying, growing, developing, and the precise direction of whose development it is impossible to forecast. To try to crystallize this fluid system into a hard and fast code of written law would spoil its chief merit; we must be careful to lay down only the essential principles of popular government, leaving the details of form as elastic as possible. Some fundamental principles must be fixed by the Constitution (subject to a more or less difficult process of amendment); whilst the great mass of merely accidental, and not essential, characteristics of government may be left at large, to be controlled from time to time by the Parliament and the will of the people, as is the case to-day in Great Britain and in every self-governing British colony.

How then is the Federal Executive Council to be appointed, and on what tenure? We know that under the British system—for instance, in England, or Fundamental
in any of the Australian colonies—Ministers Principles.
are nominally appointed by the Queen, and hold office during her pleasure. We know, too, however, that they are really, in an indirect way, elected by the popular House of the legislature, and are dismissed when they lose the confidence of a majority of that House. The Queen, that is to say, ‘sends for’ the leader of the dominant party; he chooses his colleagues; and the persons so chosen are appointed to the head of the great executive departments,

¹ P. 84, above.

and administer the government of the country till they lose the confidence of the representative House—when their resignations are tendered and accepted. The ‘sanction’ of this system—the control of the executive by the legislature—is ensured by the parliamentary ‘power of the purse’; the power of refusing supply to a refractory government. In most constitutions on the British model the fundamental legal rules about the executive council are that its members shall be appointed by the Crown during pleasure; that they *may* (unlike other paid officers of the Crown) sit in the representative House; and that no revenue shall be raised or spent except by the consent of Parliament. Upon these three rules hangs the whole system of parliamentary government, with all its elasticity and adaptability; and in the Federal Constitution it will be enough to lay these rules down, and leave the rest to be moulded by circumstances.

That the parliamentary system for federal purposes may develop special characteristics of its own is not unlikely. Thus the familiar rule that a
Possible Variations. Ministry must retain the confidence of the representative chamber, may, in a Federation—where both Chambers are representative—develop into a rule that the confidence of both Chambers is required. This would mean that executive (as well as legislative) acts should have the support of a majority of States as well as of a majority of citizens. It is possible, too, that premature dissolutions of the Federal Parliament, with the consequent expense of national re-elections, will prove inconvenient and (even if allowed by the Constitution) will be suffered to fall into disuse. This, again, may tend towards the permanence of the Ministry during the life of a Parliament, and perhaps even towards an ultimate approach to the Swiss system of having Ministers elected by Parliament at the beginning of a session. But these are questions with which the framers of the Constitution need not concern themselves further than to leave scope for the development

of whatever system circumstances may require. If they take care that Parliament shall represent the citizens and shall have the 'power of the purse,' the essentials of popular and responsible government will be secured; and the relations between legislature and executive may be left to the political instincts of the people. 'The rule should be to so frame the Constitution that responsible government may—not that it must—find a place in it.'¹

The executive power of the Commonwealth, then, will be *vested* in the Queen, and will be *exercised* for the most part by her representative, the Governor-General, who will be *aided and advised* by a Federal Executive Council. The Constitution, of course, cannot define precisely how the sum-total of authority shall be shared between the Queen, her representative, and his advisers, but the principles of responsible government will do this with sufficient accuracy. The 'advice' of the Executive Council must ordinarily be followed by the Governor-General, unless he can find other advisers possessing the confidence of Parliament. In occasional crises—as when a dissolution is asked for, or a Ministry resigns—he is practically left without advisers, and must act on his own discretion. In cases, again, of Imperial interest, he may occasionally have, under his instructions, to act without reference to the wishes of his advisers. But in all ordinary matters of Australian policy the Executive Council will be—without any express provision to that effect in the Constitution—the real Government of the Commonwealth. These are principles of such everyday familiarity that it seems hardly necessary to call attention to them; but in discussing the framework of a Federal Constitution there is danger lest we should sometimes forget the principles of government that lie at our feet and conjure up imaginary difficulties and objections.

Summary.

¹ Sir S. Griffith, *Paper presented to Parliament*, 1896.

§ 5. *Powers of the Federal Executive.*

So much for the nature of the federal executive : but what are to be its powers and its duties ?

Generally speaking, the executive powers of the Commonwealth must extend to the execution of the **Federal Administration.** provisions of the Federal Constitution and the federal laws. Wherever the Federal Parliament has power to pass laws, the federal executive should have power to give effect to them. It is true that in the Swiss and German Federations the administration of federal law is largely left to the provincial governments ; but this is a system which is alien to our ideas of government, according to which executive and legislative authority go hand in hand.

More particularly, the federal government will at once take over the control of certain executive departments, which will be transferred from the States to the Commonwealth. Thus the departments of military and naval defence, of customs and excise, of posts and telegraphs, of ocean beacons, buoys, lighthouses and lightships, of quarantine, will almost certainly devolve on the federal executive ; and others may possibly be added to the list.

These powers and duties will of course require the employment of a large staff of federal officers, who will be appointed, paid, controlled, and, when necessary, removed by the federal government itself. The administration of the Commonwealth will thus be quite distinct from, and independent of, that of the several States.

§ 6. *The Federal Judiciary.*

No government, federal or other, would be complete without a judicial department. We have seen that the **Federal Courts.** government of the Commonwealth is to be, within its own sphere, complete in itself, and independent of any assistance from the several States. It follows that there must be federal courts, charged with the duty of interpreting and enforcing the Constitution and

laws of the Commonwealth, and perhaps exercising jurisdiction in certain other matters which are of federal concern or which may be more conveniently dealt with by a national tribunal.

The Constitution must therefore create, or empower the Federal Parliament to create, competent federal courts of justice. We shall need a Supreme Court of Australia to begin with, and it would be well to make provision for the establishment of such other courts as may from time to time be required. The independence of the federal judges should of course be secured in the usual way, by giving them fixed salaries and making them removable only for misbehaviour, or upon an address from both Houses of Parliament.

The probable functions of such courts may be discussed under three heads.

(a) The first and most necessary function of the federal judiciary will be to exercise jurisdiction in all cases arising (1) under the Federal Constitution; (2) Guardian of
the
Constitution. under any laws made by the Federal Parliament; (3) under any treaties made by the Commonwealth with other countries. It is by virtue of this jurisdiction that the federal courts will assume the duties of 'Guardian of the Constitution;' that is to say, they will judicially interpret the Federal Constitution, decide as to the validity of federal laws and as to conflicts between state and federal authorities, and enforce their own decrees against individual citizens. Every law that comes before them, whether of the Commonwealth or of a State, they will test by the Federal Constitution, and pronounce it valid or void according as it does or does not come within the scope of the powers allotted to the legislature which enacted it.

(b). It will almost certainly be convenient to give the federal courts jurisdiction, not only when the meaning of the Federal Constitution or the validity of a Inter-state
Jurisdiction. federal law is in question, but also in certain other cases which are of a federal or inter-state nature, or

which concern the governments or the laws or the citizens of different States. Such, for instance, are cases (1) of Admiralty and maritime jurisdiction; (2) affecting foreign Ministers, Consuls, or other public representatives; (3) arising between different States, or between the citizens of different States, or between a State and the citizens of another State; (4) relating to the same subject matter claimed under the laws of different States. All these are cases which may be deemed of common concern, and which therefore fall naturally into the class of subjects to be dealt with by the federal government.

The federal jurisdiction in each of the cases coming under the heads (a) and (b) may be either appellate only, or original as well. Such cases, that is to say, may either be brought originally in the federal courts, or may only come up to those courts on appeal from the Supreme Court of a State. In practice, it will probably be found that the original jurisdiction will only be required in a limited class of cases: in cases, for instance, where the Commonwealth is a party, or where one State is proceeding against another State, or where the representatives of other countries are affected. In other cases it will probably be better to leave the original determination wholly to the state courts, subject to a right of appeal to the Federal Supreme Court.

(c) If we were to follow the example of the United States,¹ the jurisdiction of the federal courts would be

<p>A General Court of Appeal.</p>	<p>confined to the classes of cases abovementioned—cases, that is to say, of a federal or inter-state character. In cases between the citizens of one State, and involving only the law of that State, there would be no appeal to a federal court, inasmuch as there would be no federal interests at stake. That would be guarding the 'state-right' principle as strictly in judicial matters as it is proposed to guard it in legislative and executive matters. It would, in fact, be the logical</p>
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¹ P. 64, above.

application of the strict federal idea—the idea that matters of purely local concern belong wholly to the local governments. If now we look at not only the Commonwealth and the States, but also the Empire, and if we rigidly apply with regard to the judiciary the rule already¹ laid down with regard to the general functions of government—that between Commonwealth and States the federal relation should hold; between Empire and Commonwealth, the dependency relation—the result would be something like this: Cases arising within the Commonwealth would fall into two classes—(1) Those which concern the Commonwealth; (2) those which concern the several States. The first class would be assigned (in the first instance or by way of appeal) to the federal courts, with an ultimate appeal to the Privy Council. The second class would lie from first to last wholly within the cognizance of the state courts: there would be no appeal to the Federal Supreme Court, because federal interests were not involved; and no appeal to the Privy Council, because Imperial interests were not involved.

So much for the strict ‘principle’ of the several jurisdictions in a Federation under the Crown. But an abstract political principle is never conclusive unless it is backed up by solid practical advantages; and there can be no doubt that practical advantage is in favour of having a general Australian (as there is a Canadian) Court of Appeal, with jurisdiction to review any decision of the Supreme Courts of each State. A general appellate jurisdiction of this kind would technically be an interference with state rights; if a dispute is of local concern when tried in the first instance in a State Court, it must still be of local concern when taken, on appeal, to the Federal Supreme Court. But this particular state right is not one of which the colonies are jealous. The independence and impartiality of the Bench is so deep-rooted a part of our institutions that no one would dream of looking on the jurisdiction of a general

¹ See pp. 123-125, above.

Federal Court of Appeal as an interference with state independence. Such a court, without limiting in any way the freedom of state legislation, or the differences which would continue between the laws of the several States, would confer the inestimable advantage of a uniform system of *interpretation* of the law throughout the Commonwealth.

Next, what about appeals to the Privy Council? Ought a right of such appeal to remain, either from the Federal Supreme Court or direct from the courts of each State? These again are questions to be decided upon practical grounds alone. The disadvantages on the score of distance and expense are obvious; whilst the compensating advantages are perhaps problematical.¹ As regards appeals from the state courts, each State might perhaps be allowed to choose for itself whether the right of appeal direct to the Privy Council should remain, or whether appeals should lie only to the Supreme Court of Australia. Whether the decisions of the latter Court should be final, or should in turn be subject to revision by the Privy Council, is a more difficult question. Cases may occasionally arise, affecting large public interests of the whole or some part of the Empire, in which the jurisdiction of the great central Court of Appeal for the whole Empire may usefully be invoked; but in the vast majority of cases it will probably be better for all parties that the decision of the Supreme Court of Australia should be considered final. Probably the most satisfactory plan will be to allow no appeals *as of right* to the Privy Council, but to reserve to the Crown in Council the liberty in certain cases to grant such appeals *as of grace*. This is precisely the footing on which the right of appeal from the Supreme Court of Canada rests, and on which, as respects criminal matters, the right of appeal from our own colonial Supreme Courts is at present based.

¹ See a paper by the Hon. W. P. Cullen, LL.D., M.L.C., on 'A Federal Court of Appeal,' *Australian Economist*, July, 1895.

§ 7. *Federal Finance.*¹

Perhaps the most difficult of all questions connected with Australian Federation is the financial one; and it is a question which until recently—until hard **The Financial Problem.** times showed the importance of the financial basis of the proposed union—has never received due consideration. However, the finances of Federation have lately been, and are still being, closely studied from all sides; the financial provisions of the Commonwealth Bill have been examined and—by the common consent of its authors—found wanting; but the criticism has been constructive as well as destructive, and has helped to show more clearly what are the requirements of an adequate system of federal finance, and how one scheme or another falls short of those requirements.

In this chapter no new scheme and no specially original views will be submitted; but the schemes and views **How Far Solved.** hitherto put forward will be summarized, and will be examined in the light of Australian conditions and of the federal experience of other countries. It will then perhaps appear, not only that the problem is not insoluble, but that it is already in a fair way to solution; that the simmering process of the last few years, so far from being a waste of time, has led through discussion and criticism, and through the recent financial trials of the Australian colonies, to a clearer understanding of the real issues; and that the definition of those issues goes more than half way towards settling the question. It will be found that the conclusions already established are neither so vague nor so unsatisfactory as is commonly supposed, and that some of the outlines of the finance of federated Australia may already be forecast with a fair degree of confidence.

¹ See papers by Sir Samuel Griffith, 1896; by Mr. R. J. Black, *Australian Economist*, March, 1895; by Mr. J. T. Walker, *Report of Bathurst Convention*, 1896 (in preparation).

The great central problem is to adjust the financial resources of the Commonwealth and the States to the obligations which they will respectively have to meet. It involves four questions: (1) What duties and liabilities should be imposed on the federal government, and what left to the state governments? (2) what sources of revenue should be given to the federal government, and what kept by the state governments? (3) what should be the basis for apportioning federal burdens and benefits among the several States? (4) what opening should be left for further adjustment from time to time?

The first two of these questions have been partly answered already. We have seen¹ what departments of the public service, and what general duties of government, are proper for federal control; and, therefore, we have a basis for determining the direct administrative expenditure of the federal government. We have also seen² that the federal government ought to have power to raise revenue by any kind of taxation, direct or indirect; that, as regards direct taxes, the powers of the federal and provincial governments must be concurrent, though the federal government is not likely to resort to direct taxation except in an emergency; but that the power to raise revenue by customs and excise must be given exclusively to the federal government, and forbidden to the States. The importance of this last fact is obvious when we remember that in all the colonies at present—even in the most ‘freetrade’ of them—customs and excise produce the greater part of the taxation revenue, and in some cases almost the whole of it. In the five eastern colonies of Australia,³ out of an aggregate

¹ Pp. 140-147, above.

² P. 142, above.

³ i.e., New South Wales, Victoria, South Australia, Queensland and Tasmania. Throughout this discussion of the finances, the colonies of Western Australia and New Zealand will not be taken into account. New Zealand is not likely to join the Federation at the outset, and West Australian finances are as yet in too transitional a stage to allow of any definite calculations being based upon them. If the latter colony were to

taxation revenue of some £8,000,000, more than £6,000,000 is derived from these sources alone.

Perhaps the best preliminary survey of the question can be obtained by an illustration in round figures. At the foot of this page¹ is a table showing, under a Preliminary few general heads, the aggregate revenue Illustration. and expenditure of the five eastern colonies for the year 1895-6. Let us now assume such a Federation of these five colonies as has already been sketched out: a Federation in which the federal government would take over the customs and excise, posts and telegraphs, military and naval defence, ocean lights, &c., and quarantine, with such general legislative, executive and judicial powers as are given by the Commonwealth Bill, but without any transfer of public debts, and without any further financial adjustment what-

join the Federation at once, special concessions would probably have to be made to her, for some years to come, in the matter of finance. The inclusion, however, of either or both of these colonies would not materially affect the argument of this chapter.

¹ Table of aggregate revenues and expenditures of the five eastern colonies, 1895-6:—

Revenues.	Expenditures.
TAXATION—	<i>Customs and Excise ... £220,000</i>
<i>Customs ... £5,707,000</i>	<i>Post and Telegraph ... 1,802,000</i>
<i>Excise ... 663,000</i>	<i>Defence (approx.) ... 575,000</i>
Other Taxation ... 1,744,000	<i>Lights, &c., and quarantine (approx.) ... 100,000</i>
SERVICES, &c.—	Interest & charges
<i>Posts and Telegraph 1,720,000</i>	on debts ... 6,907,000
Other Services ... 12,867,000	Other Services ... 14,063,000
Total revenues ... £22,701,000	Total expenditure £23,667,000

The above figures are mostly compiled from Coghlan's *Seven Colonies of Australasia*, 1895-6, and the *Year Book of Australia*, 1896, and are taken to the nearest £1000. The items of revenue and expenditure printed in *italics* are those which, upon the assumption made in the text, would be transferred to the federal government. The item 'Interest and charges on debts' is printed in **black letter**, because upon it (as we shall see) the whole question of adjustment mainly turns.

ever. The immediate financial position would be somewhat thus:—

(1) The five colonial governments would be relieved of an aggregate annual expenditure which may be estimated at £2,700,000. Against this they would give up a revenue of some £8,000,000; say £6,300,000 from customs and excise, and £1,700,000 from posts and telegraphs.

(2.) The federal government would take over the above-mentioned expenditure of £2,700,000 from the state governments, and the new, or additional, cost of the machinery of the federal government itself, on an ordinary peace footing, would amount to perhaps £300,000 more; making a total federal expenditure of £3,000,000. (Allowing for savings due to the unification of postal, defence, and other services, the expenditure would probably be somewhat less.) To meet this, it would have the whole post and telegraph revenue of nearly £2,000,000, together with the enormous resources of customs and excise duties—the amount of which would of course depend upon the federal tariff, but which might easily reach £6,000,000 or £7,000,000.¹

These figures would of course be varied if any colony or colonies stood out of the Federation, and they are liable to alteration from year to year; but the general result is similar, whatever combination of colonies we take, and whatever year's figures we choose for illustration.

Looking at these figures, two things strike us at once. The first is that the shortage in the provincial revenues would be far too heavy to be made up by a reasonable

¹ Intercolonial duties at present collected on the borders would of course disappear with the provincial tariffs. There would be a resulting loss of revenue estimated at £500,000, which would remain in the taxpayer's pocket instead of going into the Treasury. This loss (unless it were covered by savings in the cost of government) would have to be made up by federal or provincial taxation. After federation, and until the Federal Parliament had time to construct a new tariff, there will of course be an interval, during which the provincial tariffs must remain in force. The finances of this interval will have to be specially provided for by the Constitution; but this is a temporary matter which will raise no special difficulty, and which need not detain us here.

degree of direct taxation. The second is that the customs revenue of the Commonwealth, under any conceivable tariff, would be immensely in excess of the amount needed to balance the federal accounts. The Commonwealth would be far too rich, the States far too poor; and it is clear that the two sets of finances could only be adjusted either by distributing the surplus revenue of the Commonwealth among the States, or by charging the Commonwealth with, and relieving the States from, expenditure in one way or another to the extent of several millions.

This excess of customs revenue over federal needs is not a mere temporary phase, that will soon pass away; it is likely to keep continually increasing from year to year. Customs and excise revenue may be expected to grow rapidly with the growth of population and trade, whilst the cost of the machinery of government will not increase in anything like the same proportion. The importance of properly adjusting federal and state finance must therefore be measured, not merely by the large customs revenue of to-day, but by the probable figures of approaching to-morrows.

These are a few of the facts which have to be dealt with in attacking the problem. Before examining the methods of adjustment which have been proposed, it may be well to call attention to **Conditions to be satisfied.** the conditions which a perfect system of federal finance should satisfy. Such a system should (1) be fair to all the States—not only at the date of union, but in view of their probable growth and other contingencies; (2) be so far final as to offer no encouragement to constant tinkering or agitation for ‘better terms’ on behalf of one State or another; (3) be nevertheless so far elastic as to be adaptable to changing conditions; (4) reduce dealings between the federal government and the state governments to the narrowest and the simplest possible basis.

These conditions are, perhaps, a little hard to reconcile with one another—especially the conditions of finality and

elasticity. By laying undue stress on one of them we might sacrifice another, and so obtain theoretical perfection in one quarter at the expense of great imperfection elsewhere. But it must be remembered that federalism is essentially a system of compromises; and where each of two extremes offers some advantages and some disadvantages, the problem is to find the golden mean which promises the maximum of good and the minimum of evil.

The chief difficulty arises from the fact that customs and excise revenue must be controlled by the Federal Parliament and paid into the Federal Treasury, coupled with the fact that great part of it will not be needed for federal, but will be needed for provincial, purposes. Some adjustment is obviously necessary; the question is how to effect it. Federal history, though instructive on this point, gives us no direct example to follow. In no case except that of Canada were the framers of a federal constitution brought face to face with the prospect of an excessive federal revenue; and the Canadian system has already been criticized.¹ When the American Constitution was framed, the possibility of an unmanageable federal surplus was overlooked, as we have seen;² no means of adjustment between the Nation and the States were provided, and the United States have suffered in consequence. The two European Federations—Switzerland and Germany—both have heavy military expenditures, and their constitutions seem to contemplate the probability of a federal deficiency rather than a surplus. They make no provision for the distribution of any surplus revenue; but they both provide that any deficiency may be made up by levies upon the several States. In Germany, such levies are to be in proportion to population; whilst in Switzerland they are left to be assessed by federal legislation, with special reference to the wealth and taxable resources of each Canton.³

¹ P. 92, above.

² P. 68, above.

³ Pp. 102, 78, above.

The difficulty of adjustment is, therefore, not a new one, but it is one which history does not satisfactorily solve. All other Federations are either differently circumstanced, or have not dealt thoroughly with the question.

The chief modes that have been suggested for effecting the necessary adjustment—*i.e.*, for apportioning the excess of federal revenue among the several States —are four in number, viz. :—

**Modes of
Adjustment.**

(1) To require the federal government to pay to the several state governments, in some fixed proportion, any surplus revenue it may have from year to year.

(2) To charge the federal government with the duty of raising fixed annual subsidies to be paid to the several state governments.

(3) To hand over to the federal government the administration of certain additional departments, such as railways, education, justice, &c.

(4) To transfer to the federal government, in whole or in part, the burden of the public debts of the several states.

These four modes do not necessarily exclude one another ; any two or more of them may be combined. Each mode, too, involves the question of the basis upon which expenditure should be apportioned among the several States ; whether in proportion to population, or territory, or revenue, or a combination of all these and perhaps other factors. The merits of each mode of adjustment, and each principle of apportionment, may now be briefly discussed.

(1) The first plan—the distribution of the surplus federal revenue among the state governments—is that adopted by the Commonwealth Bill. The basis of apportionment therein provided will be criticized later on ; but apart altogether from that question, and even assuming that the basis of apportionment is perfectly equitable, the whole system of handing over surplus revenue to the States is open to grave objections—at least while the amount of such surplus is

considerable. In the first place the federal government, having control of a revenue far greater than it needed for its own expenditure, would be exposed to the temptation of gaining cheap popularity in two ways: either by embarking on a policy of extravagant expenditure, or by an equally reckless remission of federal taxation. In either case the effect would be felt not by the federal government itself—whose finances could hardly fail to balance in any case—but by the state governments, whose dividends out of the federal surplus would probably dwindle. And further, even supposing the federal government to be above all temptation, the effect on state finance would be apt to be demoralizing. A great part of each State's revenue would come from a source wholly beyond the control of its government, and liable perhaps to fluctuations for which that government was nowise responsible. The blame of a state deficit could thus easily be shifted on to other shoulders; the Treasurer's financial responsibility would be lessened, and the chief guarantee of economical administration be removed. These are criticisms which, since the appearance of the Commonwealth Bill, have been so often reiterated as to have become commonplace. It is now generally admitted by the staunchest friends, and even by the framers, of that Bill that these financial provisions are insufficient, and would not prove satisfactory, from the point of view either of the Commonwealth or of the States.

(2) The second plan is the Canadian one, which requires the federal government to raise, and pay over to the several state governments, certain fixed annual subsidies; not merely, as in the plan just discussed, the casual surplus from year to year. This plan, while it bears some resemblance to the other, is free from some of the above objections. It gives the Provinces a more assured revenue, and the Dominion more definite obligations. But it is open in turn to criticisms which have already been outlined on page 92.

(2) Fixed
Federal
Subsidies.

(3) The third suggestion is that certain expensive departments should be transferred from the state governments to the federal government, with a view to absorbing the federal revenue. This seems to involve an inverted idea of the considerations which should guide the choice of subjects for federal control. It is beginning the adjustment from the wrong side—like the Procrustean plan of fitting the man to the bed. The question whether railways or education or justice or any other department should be under federal control is really independent of the question of financial adjustment, and dependent altogether on a quite different question, namely, whether the administration of that department is properly a matter of national or provincial concern. If the answer to the last question is in doubt, considerations of financial convenience may of course turn the scale; but to throw certain departments on to the federal government with the sole (or chief) object of transferring the burden of expenditure would surely be a risky experiment. The sentiment of state independence would be likely to take alarm at the proposal to transfer any departments to the federal government except those which could not be efficiently administered on a provincial basis. The sounder and safer system would be to mark out first the proper departmental authority of the Commonwealth, and then to build the financial adjustments on those foundations.

(4) The fourth plan remains, namely, to transfer to the federal government, in whole or in part, the burden of the existing public debts of the several States, with, perhaps, a further provision for taking over—in certain events, in certain proportions, and on certain terms—debts hereafter to be incurred by the States.

Assuming (for the present) that the existing debts of the colonies are such that the Commonwealth could take over from the several colonies an indebtedness, the interest on which would (with the other liabilities taken over) approximately compensate them for the loss of the customs,

the preliminary financial adjustment could be effected in a way which would be free from the objections urged against the other methods. A glance back at the last few pages will help to make this clear. The interest bills which the Commonwealth would have to pay would dispose of most of the unmanageable surplus and its attendant temptations; Commonwealth and States alike would know the precise extent of their liabilities, and would themselves be responsible for meeting them; and no invasion of state rights would be involved, because taking over a debt—unlike taking over a public department—means assuming liabilities only, and not privileges. A State might well object to giving up control of a department, but could hardly quarrel with a proposal to give up an indebtedness.

This consolidation of debts, too, is desirable for its own sake, on the score of economy. The Commonwealth could undoubtedly borrow on better terms than any of the States, and could before long effect a national saving which has been estimated at from half a million to a million sterling. Accordingly, debt-consolidation has always been spoken of as one of the great ends to be attained by federation, and when it proves also to be a means of making federation effectual—a valuable part of the federal machinery itself—it occupies a position of double strength. Debt-consolidation must be, financial adjustment must be; and if the one end could be made a means to the other, the difficulty of disposing of the federal surplus would be solved.

It has sometimes been assumed that taking over the debts necessarily involves taking over the great public works which chiefly represent the sums borrowed; the idea being, apparently, that liabilities and assets must go hand in hand. The idea is right, but it hardly warrants the deduction. The assets on which our public debts are charged are not any particular works, but the consolidated revenues of the respective colonies. In giving to the Commonwealth the power of

Debts and
Assets.

raising customs and other revenue, we give it a large share in those assets; and we may well give it also a large share in the liabilities. Indeed, it may even be argued that in common honesty to our creditors, who have lent to us on the security of certain revenues, we ought not to make over a great part of those revenues to a federal government without imposing upon that government a corresponding burden of liability. The federal consolidation of debts, therefore, will not necessitate any additional transfer of public works. The lands and works specially appertaining to the departments controlled by the federal government will of course be taken over by the Commonwealth, and will presumably be paid for at their full value, so that the States will be at no loss in this respect. But no assets need be taken over for merely financial reasons—the federal powers of taxation being an asset amply sufficient for all purposes.

It is said, however, that if the debts are consolidated without the railways the fact that the liabilities are separated from the assets will spoil the federal credit. This would undoubtedly be true if the other assets of the Commonwealth were not ample; but if the Commonwealth is given an adequate power of raising revenue, what better security could the most captious creditor ask for?

It has been assumed, in the course of this argument, that it would be possible, at the present time, by relieving the States of all or part of their indebtedness, to compensate them for the loss of customs and excise revenues. The truth of this assumption can easily be shown. The aggregate interest bills of the six Australian colonies (about £7,000,000) are almost exactly equal to the aggregate customs and excise revenues; and it has been recently pointed out by Sir Samuel Griffith that the amounts for each single colony (except perhaps Western Australia) show, and are likely to show for some time, an equally remarkable correspondence. Though this correspondence is perhaps accidental, and not based on any scientific relation, it is

none the less a fact; and it affords a practical illustration of the feasibility of this system of adjustment.

It would thus be possible at the outset, by throwing upon the federal government the whole or part of the debt-burden of each colony, to find employment for the bulk of the federal surplus, and to compensate the States for the loss of their customs and excise revenue. It is probable, however, that the first adjustment would not suffice for ever; that the federal revenue would increase faster than federal requirements, and that a large federal surplus would soon reappear, bringing with it all the old difficulties as to distribution. It would probably be advantageous, therefore, if the Constitution could provide that the federal government might from time to time take over further liabilities from the States in certain definite proportions. This would help to obviate the need for undue direct taxation for state purposes, and would also minimize the danger of the unappropriated federal surplus ever reaching formidable dimensions.

So far, we have only considered the state finances in the aggregate, for the purpose of ascertaining what resources and obligations should be transferred to the Commonwealth, and what retained by the States. We have now to take the States separately, and look for an equitable basis for apportioning among them the financial benefits and burdens of federation. It is only by finding a basis of apportionment which will be fair to each State in the proposed Federation that an acceptable scheme of union can be reached.

The Commonwealth Bill provides in effect¹ that the whole expenditure of the federal government shall be charged against the several States *in proportion to population*; and that the share of each State in the annual surplus shall be ascertained by deducting the amount of expenditure so charged

¹ Ch. IV., s. 9.

against that State from the amount of revenue raised in that State.¹ In other words, the revenue raised in each State is to be returned to that State, less a deduction, on a population basis, of a proportional part of the whole federal expenditure. Power is, however, reserved to the Federal Parliament to alter that basis if it should see fit.

The defects of this scheme have been put very plainly by Sir Samuel Griffith (among others). He points out² that the sums actually expended for the benefit of each State have no necessary connection with population, and that 'many of the expenses of federal administration may be heaviest where the people are few.' He further shows that this mode of charging the expenditure would (on the basis of the existing provincial tariffs) throw the whole cost of federation, and something more, upon Victoria alone; whilst Queensland and Western Australia, instead of contributing, would be in pocket by the transaction. Of course, Sir Samuel's figures would be altered if a federal tariff were taken as the basis; but similar inequalities would appear, no matter what the tariff might be, as long as the whole federal expenditure was charged against the States on a population basis.

A much better basis, and one which seems to be at once sound, logical, and fair, has been suggested in a paper read by Mr. J. T. Walker at the Bathurst Con-
 The 'Com-
 vention of 1896, and embodied, with slight commercial Basis.'
 modifications, in the report of a special committee of the Convention.³ This basis, styled by its sponsors the 'com-

¹ The bill defines the principles upon which the revenue raised in each State should be computed. Particularly, it provides that, when goods have paid duty in one State and afterwards been exported to another, such duty is to be credited to the latter State. It would probably be necessary, for statistical purposes, to station a few inspectors along the borders on the main inter-state highways.

² University Extension Address, 1896.

³ The paper and report embody other principles—for instance, that of federating the railways. Here, however, it will be enough to deal with the suggestions for apportioning revenue and expenditure among the States.

mercial basis,' follows the Commonwealth Bill as regards the mode of ascertaining the amount of federal revenue raised in each State. As regards the mode of charging the expenditure, however, it introduces a new principle. It recognizes two classes of federal expenditure, and provides a distinct mode of apportionment for each. The *new* or *additional* expenditure of the federal government (*e.g.*, the cost of the Federal Parliament, federal courts, &c.) is to be debited against each State on a population basis. So, also, is the cost of certain services (*viz.*, defence, ocean lights, &c., and quarantine) which are of such a kind that expenditure incurred in any one State benefits them all. So far the provisions of the Commonwealth Bill are not departed from; but the important departure is now to come. The great bulk of the federal expenditure—representing expenses of which the several States have been relieved, and which are of such a kind that the items spent for the benefit of each State can readily be ascertained—is to be charged *to the States which have received the benefit*. In other words, expenditure which is for the benefit of one State is to be charged against that State; expenditure which is for the benefit of all is to be charged against all on a population basis. Or, to put it in yet another way, there would be a pooling of the *net* revenues only from each State, not of the *gross* revenues. On this system the federal government would be the 'quasi-banker' of the state governments, and its duty would be—

(1) To credit each State with the revenue raised in that State.

(2) To debit each State with the expenditure incurred for its benefit, (including, of course, the interest paid on its share of the consolidated debt) and also with its proportion of those special services which are charged on a population basis.

(3) To strike periodical balances, and pay to each State any surplus owing to it.¹

¹ Mr. Walker suggests further that in the event of a deficiency the

The effect of this system would be that each State would get back (in services or cash) its own, less a *per capita* contribution (estimated at five shillings a head) for the additional cost of federal government and for certain special services. Against this each State would certainly be able to effect some savings in the cost of its provincial government, and would also share in the savings due to consolidation of debts and departments. * The net result would probably be that the whole cost of Australian government would be actually less than at present.

Many details need to be elaborated in connection with this scheme, as, for instance, whether the railways should be federated, whether the whole or only part of the state debts should be consolidated, and so forth. But, perhaps, it is not too much to say that the 'commercial basis' shadows forth the true principle of adjusting the benefits and burdens of federation among the several States.

Enough has perhaps been said to point to the conclusion that the financial problem is no more incapable of

solution than any other of the many problems involved in federation, and that it will be possible to reach an adjustment on lines equitable to all the colonies. Perhaps the chief conclusions of this section may be summed up as follows :—

(1) The federal government should be given definite obligations commensurate with its probable revenue, so that the dangers arising from a large unappropriated surplus may be avoided.

(2) Debt unification, desirable for its own sake, is also the best means to effect this object.

States should be called upon to pay ; but this would be obviously unsatisfactory. Little reliance can be placed on a system which involves levies upon the state governments—an expedient smacking of 'confederal' ideas. Besides, the colonies are not likely to give the Commonwealth *carte blanche* to incur debts on their behalf. It will be the duty of the federal government to see that there is no deficiency ; or, if there should be a deficiency, to meet it by federal taxation.

(3) Federal expenditure should be charged against the States benefited, where that can be ascertained: in other cases it should be charged against all the States on a population basis.

§ 8. *The States.*

The constitutions of the States composing a federated Australia are ready made, in the shape of the existing State Constitutions. These will, presumably, be interfered with as little as possible by the Federal Constitution. Certain departments will disappear from the state governments; Postmasters-General will be missing from the state Cabinets; budgets will be a good deal altered; the eternal 'fiscal question' and several other fields of state legislation will be gone for ever; but otherwise the change from Colony to State will cause no break in the several administrations. The state governments, in fact, will retain all the powers they now have, except such as are expressly taken from them by the Federal Constitution.

Powers may be taken from the States in two ways: either they may be vested (exclusively or concurrently) in the Commonwealth¹ — translated, as it were, to a higher plane; or, without such translation, they may merely be prohibited to the States, and thus extinguished altogether. The powers to be vested in the Commonwealth have already been dealt with, and the prohibitions which they necessarily imply are obvious enough; it remains to be seen whether any further prohibitions need be directed against the States by the Federal Constitution.

It would be hard to argue that the Federal Constitution, regarded as a federal constitution pure and simple, has any

¹ Powers vested exclusively in the Commonwealth will, of course, cease immediately to be exercisable by the States; powers vested in the Commonwealth concurrently with the States will continue to be exercisable by the States until such time as the Commonwealth chooses to exercise them. See p. 178 below.

need to concern itself with this second class of prohibitions. But the United States has set the example of incorporating in the Federal Constitution a kind of 'declaration of rights' to protect the citizens against abuses on the part of the state governments. The idea, of course, is that by embodying these rights in the fundamental law they are better secured than if they were left to the mercy of state legislation. It is an interference with state rights, on behalf of popular rights: an interference undoubtedly justifiable, if necessary, but if not necessary, better dispensed with. If we look through the list of such prohibitions in the American Constitution, we shall find that few of them need trouble us. Some—such as the prohibition against titles of nobility—seem trivial; others are already amply secured to us. The solitary example to be found in the Commonwealth Bill is the provision that 'a State shall not make any law prohibiting the free exercise of any religion.' It may well be doubted whether even this was necessary.

Some structural changes in the state constitutions there will of course be; and chief among them, perhaps, will be the change in the nature of state State
Vice-royalty. The position of the Queen's Governors.
representatives in the Provinces of a 'Federation under the Crown' has been touched upon in connection with the Canadian Lieutenant-Governors; but it needs to be further dealt with here.

We know of course that the Queen is the nominal source and fountain-head of executive power throughout the Empire. In every State of the Commonwealth of Australia (whilst it remains under the Crown) administrative acts must, unless we break with all our constitutional forms, be done in the name of the Queen; and there must, therefore, be in each State a Viceroy¹—a representative of the Queen—from whom such acts must emanate. But it does not

¹ The word 'Viceroy' is used throughout in an impersonal sense, to mean the repository of vice-regal powers, without implying that those powers are necessarily reposed in an individual person.

follow that this Viceroy—the nominal executive head of the colony—need be appointed by the Home Government; nor even that the Vice-royalty need be vested in a single individual. There is no reason why each State in the Federation should not have as complete a control over this part of its constitution as over any other; why each State legislature should not have power to decide how the Viceroy of the State should be chosen, and whether such Viceroy should be an individual ‘Governor’ or a corporate body—either distinct from or identical with the Executive Council.

Before discussing how the office of State Governor should be dealt with, it is necessary to be quite clear as to the duties which the Viceroy in a State will have to fulfil. We know that the Governor of a British self-governing colony has a double capacity. In relation to the colony itself, he is somewhat in the position of a constitutional monarch. In relation to the Imperial government, he is a servant of the Crown, holding an appointment from the Colonial Office, accountable to it, and acting under its instructions. As an Imperial officer, his duties are to obey orders and to safeguard Imperial interests. As local ruler, his duties are chiefly to ‘reign without governing;’ to choose advisers having the confidence of Parliament, and to be guided by their advice while they retain that confidence; subject always, of course, to Imperial instructions.

But when a federal government is interposed between the Empire and the colony—so that the colony, instead of being a direct dependency of the Empire, becomes a component State in a federal dependency—the position is somewhat changed. There will be no further need for even a nominal control by the Imperial government over the individual States, seeing that Imperial interests will be fully protected by the control exercised, through the Governor-General, over the Commonwealth. State administration, when confined to local

subjects, will no longer be a matter of Imperial concern; and there will no longer be any satisfactory reason why the state Viceroy should be appointed by, or responsible to, the Imperial government. This has been recognized in the case of Canada, where the Lieutenant-Governors of the Provinces are appointed by, and act under instructions from, the Dominion Government.¹ But the Canadian plan, as we have seen, is inconsistent with true federalism; it is based on the assumption that the Provinces are *dependencies* of the Dominion. Surely the proper plan is to allow the Parliament of each State to provide for the appointment of the Queen's representative in that State. This is the method chosen by the Commonwealth Bill. The Bill, however, goes farther, and rather unnecessarily lays it down that 'in each State of the Commonwealth there shall be a Governor.' A Viceroy in each State there must be, as the nominal source of executive authority; but the Federal Constitution need not concern itself whether the State shall entrust vice-regal powers to an individual, or to an executive council, or to any other body. That is a matter in which each State may well be left to its own devices.

The position may be illustrated by reference to the 'veto power'—the Crown's right of refusing assent to legislation—the occasional exercise of which is perhaps the most conspicuous instance of the control now exercised over the colonies by the Imperial government. When Federation takes place, the Imperial government will retain a veto power over *federal* legislation, though of course the power will rarely, if ever, be exercised. But there will be no need for an Imperial veto on state legislation, because a State—under the Federal Constitution—can only deal with matters of internal administration. There is no Imperial veto over the laws of a Canadian Province; and there need be none over those of an Australian State. Clearly, however, we must not imitate the Canadian plan which gives to the federal government

¹ P. 89, above.

itself a veto over provincial laws. We ought to recognize the principle that the States have a right to pass any laws which the Constitution allows them to pass. Let each State, if it pleases, entrust its own Viceroy with a veto power; but let that Viceroy be responsible to the State alone, and bound by no outside instructions. For the rest, the only veto needed is that of the Federal Supreme Court: a judicial veto upon unconstitutional laws. Neither Empire nor Commonwealth need concern themselves with the laws passed by a State, because state laws are powerless to transgress the Federal Constitution.

The upshot of this argument is that each State ought to have full power of administering its own affairs, passing its own laws, and amending its own constitution. **Conclusion.** tion, subject to no control except the control exercised by the Federal Supreme Court in its work of interpreting and enforcing the Federal Constitution. This is a principle which is of the utmost importance to the smooth working of the federal system. It forms the groundwork of the American union, and it is just as applicable to a Federation 'under the Crown' as to any other. The 'representation of the Crown' in the States ought to be no more than a legal fiction, and ought not to carry the least implication of any power of control exercised by the government of the Commonwealth or of the Empire over state legislation or state administration.

The whole contention may be summed up thus: We have three grades of governments—the sovereign Empire, the dependent federal Commonwealth, and the component States of the Commonwealth. **Empire, Commonwealth, and States.** The relation between Commonwealth and States is defined by the Federal Constitution; the two sets of governments are co-ordinate, and the States are not 'dependent' on the Commonwealth, as the Commonwealth is on the Empire. But neither ought the States to be 'dependent' on the Empire, except through the medium of the Federal Constitution. The 'dependency' relation is an

external relation, and therefore concerns only the Commonwealth as a whole, not the individual States. The six or seven 'painters' are not cut, but are woven into a single federal cable—a cable which is made fast not to the States, but to the Commonwealth.

The Federal Constitution need not concern itself with the direction in which the state constitutions will need to be modified. That is a question which each State will be able to solve for itself. All that need be done is to leave the States free to amend their own constitutions. All the colonies already possess wide powers in this respect; but probably under a Federation these powers might be extended, and the States given full control over their own local institutions, without the reservation of any veto power on behalf of the government of the Commonwealth or of the Empire. Seeing that the States will be powerless to overstep the limits of the Federal Constitution, there is every reason why within those limits they should be wholly unfettered.

We need not suppose that sweeping changes in the state constitutions will immediately follow. There is indeed likely to be some modification in the office of Governor as regards appointment and possibly also as regards functions. These may or may not lead to other important changes. All that we have to do is to leave the door open, so that when a change is needed it may be made. Amongst other changes, we may perhaps anticipate a reduction in the numbers of our state legislators; though not, probably, to a marked extent. A State Parliament—with control of lands, works, industry, justice, and indeed the whole range of provincial government—will lose little of its importance and none of its dignity; and it will probably gain in usefulness by being relieved of the hopeless task of trying to do national work with provincial machinery.

The existing laws of each State will of course remain in force, after federation, except so far as they are over-ridden by the Federal Consti-

Power of
Amendment.

State Laws.

tution itself or by laws of the Federal Parliament. So, too, the laws which may thereafter be passed by the Parliament of a State will be good unless they conflict with the Federal Constitution or federal laws. As between the Commonwealth and the States, all possible subjects of legislation will fall into three classes: (1) subjects on which the Commonwealth has *no* power to legislate; (2) subjects on which the Commonwealth has *concurrent* power with the States; (3) subjects on which the Commonwealth has *exclusive* power. Where the Commonwealth has *no* power, the state laws and legislative powers will (except to the extent of any special prohibitions) remain unabated. Where the Commonwealth has *concurrent* power, state legislation will still be good except so far as it may be inconsistent with federal legislation; that is to say, the existing laws of a State, or the new laws which it may pass, will be good unless and until the Federal Parliament legislates on the subject, and will even then remain good except in so far as they conflict with the federal laws. To the extent of such conflict, of course, the federal law will prevail over the state law. Lastly, where the Commonwealth has *exclusive* jurisdiction, the legislative power of the States will cease altogether. In all cases the real test of a state law is the same: Does it conflict with the Federal Constitution or with a federal law duly passed in pursuance of the Constitution? If so, it is utterly void; if not, then (assuming of course that it does not conflict with the constitution of the State) it is good and valid. Observe, that if a state law is found to conflict with the Federal Constitution itself, there is an end of the matter; because no question can arise as to the validity of the Federal Constitution, which is the supreme law of the Commonwealth. But if the conflict is only between a state law and a federal law, there may still be a question whether the federal law is one which the Federal Parliament had power to pass. If the federal law is not such a law, it will itself be void, and of course the state law will stand.

It is probable that at the outset the Australian Commonwealth may not include all the Australasian or even all the Australian colonies. The Constitution should therefore certainly provide that the five mainland colonies, and also Tasmania and perhaps New Zealand, should, upon adopting the Constitution, be admitted without parley as States of the Commonwealth.

Wider powers of admitting new States will, however, be needed. Any outstanding colony may be subdivided, and the bits seek to be admitted as separate States. Or a State in the Commonwealth may ask to be split up into two or more States. Or again, two or more States may ask to be amalgamated. Or lastly, territories not at present contemplated—such as Fiji or New Guinea—might seek admission, either as full-blown States or as dependent territories. The Commonwealth should have power to accept or reject overtures of this kind; and therefore the Federal Parliament may well be authorized in general terms to admit new States upon such conditions as it may think fit to impose, and to make laws for the provisional government of any territories which may be acquired by the Commonwealth.

It is not unlikely that the boundaries of the States—which are now for the most part where they were drawn with a ruler two or three generations ago—may need re-adjustment. Of course no transfer of territory from one State to another, and no subdivision or amalgamation of States, ought to take place without the consent of the Parliaments of the State or States directly concerned. The most fundamental and essential of state rights is the right of each State to its own territory and its own organic identity. Nor on the other hand ought the States to be allowed, without the consent of the Federal Parliament, to split up or to coalesce, or even to alter their boundaries—a process which might seriously change the character of the Federation. But the Federal Parliament should have power, with the consent of the

Parliaments of the States directly concerned, to effect any alteration of the kind.

§ 9. *The Federal Capital.*

In a federated Australia, there must almost of necessity be a federal capital—a fixed seat of federal government.

A Fixed Capital. Of course some of the old Confederations had perambulatory governments, which sojourned at each provincial capital in turn. This was the case even with the first Continental Congress in America. That Congress, however—mere council of delegates though it was—found its homeless condition both undignified and inconvenient. In the case of a true Federation, where the legislature expands into a powerful two-chambered Parliament, and where there are permanent executive and judicial departments, and all the cumbrous machinery of a great national government, this caravanserai system would be simply impossible.

Granted then that there must be a fixed capital, where is it to be? Fortunately, this question need not be definitely answered until federation is an accomplished fact; it can well be left to the choice of the Federal Parliament. Indeed, it would be difficult—as well as invidious—to choose the best seat for the federal government until it is known what colonies will be comprised in the initial union. But though the question need not be settled until the Federal Parliament has come into existence, the principles on which the choice ought to depend may well be discussed beforehand.

That the site of the capital should be central, accessible, defensible, and healthy are commonplaces which have already brought into the lists a goodly number of claimant cities, towns, and villages. To narrow the choice down, perhaps the first and chief question to be answered is: Ought, or ought not, one of the state capitals (for instance, Sydney or Melbourne) to be chosen as the federal capital?

There are arguments and examples on both sides of this question. To place the political centre at a commercial centre would offer facilities to active men of business—who as a class are capable men—to take a share in the government of the country. To place it in a site apart would tend to encourage a class of professional politicians—a tendency in which evil and good are perhaps mixed. Again, the choice of one provincial capital rather than another as the seat of federal government is a delicate task.

But the chief argument against choosing the capital of a State for the capital of the Commonwealth is that the seat of the federal government ought to be on neutral territory, and not dependent for protection, in the exercise of its duty, on the laws of a single State. For this reason—forcibly stated by Madison in No. XLIII. of the *Federalist*—the United States Constitution gives Congress power to take over (with the consent of the States concerned) a federal district not exceeding ten miles square, to make it the seat of the United States government, and to exercise exclusive authority over it. This was done, and the federal district of Washington, where Congress meets and the headquarters of the government are fixed, is accordingly beyond the jurisdiction of any State and subject only to federal law.

The American example has been followed in most (if not all) of the South American Federations; but not in any of the three great Federations of Switzerland, Canada, or Germany. The Swiss precedent, however, is hardly a safe guide, owing to the wide difference of political conditions. In Canada, it was probably thought that the great powers given to the Dominion government rendered the American precaution unnecessary. In Germany, the basis of the union—which gave the Presidency of the Empire to the King of Prussia—made it a foregone conclusion that the Prussian capital should be the German capital. But in Australia the arguments of Madison deserve great weight; and it will probably be best to set apart a suitable federal

territory for the seat of the Australian government. If so, the existing capitals would clearly be excluded ; since it is impossible to suppose that any State would cede its metropolitan district—containing a third of its population and perhaps more than a third of its wealth.

§ 10. *Amendment of the Federal Constitution.*

The importance of the amending power in a Federation is obvious when we remember that amendment of the Federal Constitution is the highest expression of the will of the sovereign people of the Nation and the sovereign peoples of the States. All other authorities—state governments and federal government alike—are beneath the fundamental law of the Constitution ; the amending power alone is above that fundamental law—is in fact, in the last resort, the real legislative sovereign of the Federation. On the proper adjustment of this power—on the avoidance of the opposite faults of over-rigidity and over-elasticity—may depend the acceptance of the Constitution by the colonies, and its stability if accepted. If amendment of the fundamental law is too easy, the colonies will be shy of entering into a compact which may afterwards be altered to their disadvantage ; if too hard, the pressure of national development may break what it cannot bend. The problem is to find the golden mean which will adequately secure state rights whilst allowing fair scope for constitutional development. The reproach of the United States is that amendment of their Constitution is next to impossible : they are hide-bound by the letter of a law which is all but proof against expansion. Canada, again, has hardly any means of constitutional amendment except by asking help of the Imperial Parliament. Switzerland and Germany, on the other hand, incline rather to an excessive elasticity. Let us now turn to Australia.

Of course the Constitution of the Commonwealth, being an Imperial statute, will technically speaking be (like the Canadian Constitution) amendable by the British.

Parliament. We may, however, rest assured that, once passed, it will never again be meddled with by the British Parliament except at the urgent request of the Commonwealth and the States. But we shall not be content (as Canada was) with a Constitution which we cannot amend for ourselves; we wish to provide for its amendment, in some way or other, at the hands of the Australian people. We want our Constitution to be our own to do what we like with; and though of course the British Parliament cannot formally abdicate its power of amendment, that power can then be virtually neglected, as one which hardly any conceivable circumstances would be likely to bring into use.

What then should be the Australian process of constitutional amendment, consistent alike with federalism, with state rights, and with progress?

In the first place it is clear that every part of the Constitution need not be equally open to amendment. It is very usual in a Federal Constitution to impose special restrictions on the amendment of particular clauses. For instance, the American Constitution absolutely forbade the amendment of certain clauses before the year 1808; and it still provides that no State, without its consent, shall be deprived of its equal suffrage in the Senate, or have its limits altered. The German Constitution, too, forbids the amendment, without the consent of the States affected, of those provisions which secure rights to particular States. There is, therefore, precedent, as well as reason, in favour of safe-guarding certain fundamental state rights by forbidding amendments directed against them unless with the consent of the States concerned.

If, however, the territory of each State, its basis of representation in each House of the Federal Parliament, and perhaps a few other important state rights are protected in this way against the possibility of infringement, there will be no need of an excessively stringent process in respect of other constitu-

tional amendments. It will probably be enough to ensure that all such amendments shall receive the assent in some form of a majority of the Nation and a majority of the States. The Commonwealth Bill accordingly provides that all amendments must first be passed by an *absolute* majority of both Houses of the Federal Parliament, then submitted to Conventions elected in each State, and not finally assented to unless approved by a majority of such Conventions, and unless the people of the States so approving are also a majority of the people of the Commonwealth.

This arrangement of Conventions, however, smacks of the system of indirect voting by which the American President is elected, and seems likely to serve no other end than to enable a minority sometimes to outvote a majority. A simpler and better plan would be to adopt the Swiss mode of ratification, namely, to take a Referendum in each State, and to require for acceptance an aggregate majority of votes, as well as separate majorities in a majority of the States. We are already committed to the Referendum to decide upon the acceptance of the Constitution in the first instance; and it seems equally applicable to subsequent amendments of the Constitution.

§ 11. Conclusion.

The scope of this chapter has been confined to the constitutional aspect of federation, because that is the aspect which most needs discussion just now. It is impossible to over-rate the importance of beginning our national life with a Constitution as nearly perfect as possible, in order that the federal machinery may run smoothly from the very start. It is easy to exclaim airily—

For forms of government let fools contest—
That which is best administer'd is best;

but it is not so easy to 'best administer' a bad system. Even good workmen sometimes complain of their tools;

and it is an exploded heresy to think that the rule is otherwise in politics. The better the Australian Constitution is, the better chance will the Australian people have of reaping the full benefit of nationhood.

But though the Constitution is much, it must not be supposed that it is everything. It is, in itself, merely the means to an end; merely the dead mechanical framework of national unity. The life and soul of the union must be breathed into it by the people themselves. When a Constitution has been framed and adopted, the work of Australian union will have been begun, not finished. The nation will be a nation, not of clauses and sub-clauses, but of men and women; and the destiny of Australia will rest with the Australian people rather than with the Australian Constitution. The work now in hand—the making of a Constitution—is great and important; but it is the beginning, not the end.

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