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The Law-Making Power

Henry Wade Rogers

Yale Law School

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THE LAW-MAKING POWER.

The law-making power of the state is the governing power of the state. It is the power to make laws, and to alter and repeal them. It is the power to regulate civil conduct; to promote by good laws the welfare of the subject, or by bad laws to provoke calamity and ruin.

When the American people came to establish governments, they acted on the principle that the law-making power should be kept distinct from the law-executing and the law-interpreting powers. They understood perfectly well that any government must of necessity be an arbitrary government where such a separation of the powers is not established. They consequently in the constitutions of the several States, and in that of the Federal Government, lodged the legislative power in one body, the executive power in another body, and the judicial power in still another.

While the legislative, executive and judicial departments of government are coordinate in theory, yet in reality circumstances conspire to give to the legislative department a superiority over the other two. Its constitutional powers are conceded to be more extensive, and, as Madison declared, less susceptible of precise limits. More frequently than the other two, it usurps powers that do not pertain to it. The tendency from the beginning of our history has been toward an aggrandizement of the legislative power at the expense of the other departments of the government. "In republican governments," says Hamilton, "the legislative authority necessarily predominates."

The judicial branch of the government is regarded as the weakest of the three great departments. Montesquieu asserts that the judiciary is, as compared with the other departments, "next to nothing." And Hamilton, in the Federalist, speaks as follows of it:
"Whoever attentively considers the different departments of power must perceive that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution, because it will be least in a capacity to annoy or injure them." (Federalist, p. 575.)

The executive holds the sword, the legislature the power.

In law-making the chief power rests with those who have the right of initiating legislation. In earlier times the right of initiative was with the king, and the assembly assented or withheld its assent in respect to matters which he proposed. In the law-making bodies of our own country the method of making laws is exactly the reverse. The legislature initiates, and the executive approves or vetoes the laws proposed to him.

Legislatures, as law-making bodies, are comparatively of very recent appearance. The earliest attempt to distinguish between legislative and executive power is attributed to an Italian writer of the fourteenth century. The assemblies from which many of the legislative bodies have been derived were assemblies of the great men of the state, whose office it was simply to advise and control the king. They did not originate, or make laws in the manner in which that power is now exercised by the law-making bodies.

The American people in framing the several State constitutions did not exhibit any special distrust of the legislative department. In the first State constitutions the law-making power was conferred in very general terms, and such restraints as were imposed resulted rather as a consequence of a written instrument and of a division of power than as a principle, had in mind in creating the government. The people distrusted both the executive and the judicial departments more than they did the legislative department. In nine of thirteen of the States the constitutions provided that the Governor should be elected by the legislative department, and in eleven States he was given no veto on the action of the legislative body. In five of the States the legislature had the power to review the action of the judiciary, being authorized to sit as a court of last resort. It was not long however before experience demonstrated that it was the legislative power after all which was dangerous and upon which it was desirable to impose additional restrictions.
If we examine the systems of government which exist in Europe and contrast their legislative departments with those we have established, we shall find marked differences distinguishing them. Sir Edward Coke said of the power and jurisdiction of Parliament that "it is so transcendent and absolute that it cannot be confined, either for persons or causes, within any bounds. * * * It hath sovereign and uncontrolled authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms."

In France, too, the legislative department is supreme. The Chamber of Deputies and the Senate seem to be invested with sovereign power, and can alter at their will the constitution itself.

The American people, it is unnecessary to say, have never conferred on the legislative department in any State, or in the Nation, any such unlimited power as is possessed by the law-making power in the countries I have named. On the other hand, the people in this country have conferred on the legislative department in each State, as well as in the Nation, a more absolute power than is conferred upon the same department in the Swiss Confederation.

It is a settled maxim of constitutional law in the United States, that the law-making power conferred upon the legislative department cannot be delegated to any other body or authority. "The prevailing doctrine in the courts appears to be, that except in those cases where by the constitution the people have expressly reserved to themselves a power of decision, the function of legislation cannot be exercised by them, even to the extent of accepting or rejecting a law which has been framed for their consideration." * But in Switzerland the legislative department of the government is obliged to submit the laws which it passes to a vote of the people, provided a sufficient number of citizens petition that they be submitted to that ordeal. In some of the States of Switzerland, no law which has passed the legislature can go into operation until it has been submitted to the people and approved by them.

The history of the English Parliament shows that the functions which it performs at the present time are very different from those

* Constitutional Limitations, p. 143.
which it discharged in former times. The idea which we now have of it is that it is a law-making, a law-creating body. But this was not its function in the earlier ages. It was designed to be not so much a law-creating as a law-preserving body. The existing laws and customs of the people were not to be changed by the king unless the parliament consented thereto. The principal concern of the people was to preserve their old laws and customs, not to enact new ones, or alter the old ones. The Great Charter of King John claimed to be a transcript of ancient laws, and not a creation of new rights and privileges. Its language was:

"No freeman shall be taken or imprisoned, or disseized, or outlawed, or banished, or in any wise destroyed, nor will we pass upon him or commit him to prison unless by the legal judgment of his peers or by the law of the land."

But it is noticeable that this document, so often referred to as the foundation of constitutional government in England, and as the basis of our liberties, contains no reference to the previous existence of any legislative assembly, and makes no provision for creating any such assembly in the future, although it provides for an election in each county of twelve knights whose duty it shall be to inquire of bad customs to be abolished in the manner specified in the Charter. Beyond providing an assembly for this repeal of bad customs, and for the imposition of taxes or aids, as well as for the conversion of military service due by tenure into the payment of a money rent, the people of that time do not appear to have been concerned about the subject of legislation.*

In Great Britain, we are told by a writer on the English Constitution, that the legislature chosen, in name, to make laws, "in fact finds its principal business in making and in keeping an executive"—meaning thereby the prime minister.† The cabinet system prevailing in that country clearly weakens the legislative power. A cabinet often compels legislation by a threat of dissolution, or by a threat of resignation. The fear that if one votes against the ministry one may soon not have a vote at all, is a potential factor in securing the passage of measures which the ministry desire. The writer last referred to expresses the opinion that in England a strong cabinet can obtain the concurrence of the legislature in all acts which facilitate its administration,‡ and he declares that

† Bagehot on the English Constitution, 3d ed. p. 12.
‡ Ibid. p. 23.
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members of the House of Commons are mostly, perhaps, elected because they will vote for a particular ministry, rather than for purely legislative reasons,* the House of Commons being mainly and above all things an elective assembly. The election, he says, is now the most important function of the House of Commons. It does not rule—it only elects the rulers.†

The law-making power does not reside exclusively in the legislative department of government. It is found to exist in the judicial department, which creates law as well as interprets it. In theory the legislative and judicial departments of the government are separate and distinct. The function of the legislative department is to enact the law, while that of the judicial department is simply to interpret it. But while this separation may be theoretically complete, it is found not so in actual practice. You do not need to be reminded that the judges in our courts of last resort are obliged to legislate in cases which are new in principle, and in respect to which the legislative will is unexpressed. In such cases the courts make new rules, and in doing so exercise the legislative function. And this power the courts possess even under constitutions the most explicit in forbidding either of the three departments of government exercising the powers of the other two. The Massachusetts constitution of 1780, for instance, declared that the legislative department—

"Shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."

But such a provision as this did not prevent, and was not intended to prevent, the judges, in deciding cases, from establishing new principles where the statutory law was inapplicable and no precedent could be found which governed the questions in dispute. The courts exercise the law-making power not alone in cases where the legislative will is unexpressed. They exercise it as well in cases where it is expressed, when they are called on to interpret

† Ibid, pp. 132, 140. "A good horse likes to feel the rider's bit; and a great deliberative assembly likes to feel that it is under worthy guidance. A minister who succumbs to the House—who ostentatiously seeks its pleasure—who does not try to regulate it—who will not boldly point out plain errors to it, seldom thrives."

HeinOnline -- 3 N. W. L. Rev. 43 1895
the meaning of the statute in which the legislative will is supposed to be embodied. To quote the words of an English bishop, spoken almost two hundred years ago, and quoted several times of late:

"Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver, to all intents and purposes, and not the person who first wrote or spoke them."

Before him, and three hundred years ago, Montaigne had written:

"I am not much pleased with his opinion, who thought by the multitude of laws to curb the authority of judges. * * * He was not aware that there is as much liberty and stretch in the interpretation of laws as in their fashion; * * * human wit does not find the field less spacious wherein to controvert the sense of another than to deliver his own."

Not only is it true that the courts make law, but they make more law than do the legislative bodies. Lord Mansfield is quoted as saying to a friend that in his judicial work he created more law than both houses of parliament.

The law of bailments resulted from an exercise of the law-making power of the judiciary in the great case of *Coggs v. Bernard*, when Lord Holt introduced the whole civil law relating to that subject into the common law of England. This branch of the law was not planted on its Roman foundation by any action of parliament, but is pure and simple judge-made law. The law of insurance was practically created by Lord Mansfield. He it likewise was who established our system of maritime law, ingrafting into the common law principles never enacted by the legislative department. He built up the commercial law of England, adopting from the law of the continent such principles as commended themselves to his judgment as most just and useful. So in the exercise of the law-making power of the judiciary. Lord Nottingham and Lord Hardwick reduced the principles of equity into a scientific system. The most useful and important principles of the law of contracts are not to be found in the statutes enacted by parliament, but were incorporated into the common law by judges who borrowed them from the civil law.

As between the legislature and the judiciary, the former is the superior law-making power of the state, as it has the authority to declare that the law as promulgated by the latter power shall not be

*Montaigne's Works, p. 519.*
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law thereafter. And the tendency of our times has been for this superior law-making power to narrow materially the domain within which this inferior power can legislate. It is evident that every time a legislature regulates by statute a subject which before was governed by the common law, it limits pro tanto the legislative power of the judiciary. For while a rule rests on unwritten law, the courts may modify or change it by a re-examination or re-interpretation of the previously decided cases; but they lose that right the moment the legislature passes a statute declaring a written rule. Then the power of the courts is confined simply to an interpretation of the language which the legislature has employed. To the extent that the law is codified, to that extent the judiciary is limited in its legislative powers. Codification means a transfer from the judiciary to the legislature of the development of the law, and an elimination, in very large degree, of the judiciary as a law-making power. When codification is accomplished, judicial legislation ceases except to the extent that it becomes necessary to construe the written language.

The law-making power of the courts is often attacked on the ground that it is "undemocratic," and that it is contrary to the genius of our American States that legislation should emanate from any but the people's representatives, and be other than an expression of the popular will. That the legislature of the States should seek to place limitations on the law-making power of the judiciary is in accord with the democratic idea. In the history of the exercise of the law-making power in the United States we might naturally expect to find the legislatures narrowing the bonds of judicial legislation in obedience to the imperious demand of the people that they should be permitted to formulate the laws through their representatives chosen for the purpose. But as a matter of fact, thus far in our history the demand that the courts should be deprived of their law-making power has been made almost exclusively by the members of our own profession, the people as such apparently taking little interest in the matter. It is also probably true that the profession, as a whole, has until lately been opposed to the change. In this country the movement in favor of a codification of the law began in the State of New York, with the adoption of its code of 1848. It was received in its own State with a tide of professional derision. We are told that in 1850, at a banquet of the New York City Bar, one of its most distinguished members
proposed as a toast, "Jack Cade and Jack Code!"—and that the toast was drunk with much eclat. And Mr. David Dudley Field himself declared, speaking a year or so ago in relation to the codification of the law in New York, that "nothing of this would have come about if the lawyer's of New York as a body had had their way."*

The appointment of the commission in New York with instructions to reduce into a systematic and written code so much of the law of the State as they might deem practicable and expedient was due to action taken by the Constitutional Convention of 1846; and it is fair to say that the resolution authorizing the appointment of the commission was not introduced by a lawyer, but by a merchant from the city of New York, Mr. Campbell P. White. The agitation in favor of the movement originated as early as 1826, with a small coterie of lawyers, and the discussion was mainly confined to members of the profession. The fact that the resolution was formally moved by a layman, of course affords no proof even that it was drawn by a layman, and certainly does not establish the fact that the people as such were deeply interested in the matter.

The law-making power of the legislative department of government generally operates prospectively, while that of the judiciary operates retrospectively. Retrospective legislation proceeding from the legislative department is so objectionable in principle that the judicial department will decline so to construe an act of the legislature as to give it retrospective operation, unless the legislature has very clearly indicated its intention that a contrary construction shall be given. The judiciary will not lightly imply an intent that the legislature intended to enact a retrospective law. And indeed in some of the States the people have by a constitutional provision prohibited the legislative department from passing such laws. "The General Assembly shall have no power to pass retroactive laws" is the language used in the constitutions of several of the States. The judiciary in announcing a new principle must of necessity make it applicable to past transactions—to the case or transaction then before the court. Judge-made law, therefore, Bentham took great delight in referring to as dog-law; "You wait till your dog does the thing you want to break him of, and then you beat him for it."

*See his article in American Law Review for August, 1891.
But the law-making power in this country is not alone in the legislative and judicial departments of government. The people of the several States, in the constitutions which they have established, have reserved to themselves some portion of this power by requiring that certain proposed laws shall be submitted to them for their approval. The legislative department may propose constitutional amendments, but cannot make them a part of the fundamental law without submitting them to a vote of the people. Delaware furnishes the only exception to the principle stated, and in that State alone are the people without any direct share in amending their constitution. In a large number of the States the people have reserved the right to pass upon laws which create State debts beyond a certain specified amount. This is the case in California, Idaho, Illinois, Iowa, Kansas, Kentucky, Montana, Missouri, New Jersey, New York, Rhode Island, Washington, and Wyoming. In other States the people have reserved to themselves the right to pass on laws loaning the credit of the State to any person, association, or corporation. There are like reservations of power in the constitutions of the several States in regard to various matters which do not need enumeration here. There seems to be a sentiment, more or less prevalent among the people in favor of extending this right of popular legislation by the introduction of the principle of the Swiss Referendum. The People's party in the platform adopted by their national convention in 1892 commended to the favorable consideration of the people, "the legislative system known as the Initiative and Referendum." The National Socialistic Labor party of the United States declares that "the people have the right to propose laws and to vote upon all measures of importance according to the Referendum principle."

It is usual to provide a check on the law-making power of our legislative assemblies by conferring on the executive department of the government a qualified veto power. Whatever may have been thought in other periods of our history, the general opinion in this country at the present time favors the existence of a qualified veto in the executive, and the bitterness with which the old Whig party once assailed it has passed away. The early presidents used the power only in rare instances. Washington vetoed but two measures, Madison six, and Monroe one. Adams and Jefferson did not exercise the power in a single instance. Since the-
close of the civil war it has been employed much more frequently. Mr. Lincoln only used it on three occasions. But Johnson vetoed twenty-one bills, Grant forty-three, and Mr. Cleveland in his first administration three hundred and one, being more than twice as often as all the other presidents combined. As a result, a senate committee made Mr. Cleveland's course the subject of a special report, stating that it was an unconstitutional exercise of power for a president to refuse to sign a bill simply because he disagreed with congress regarding the expediency of the measure. In this conclusion the senate committee was undoubtedly mistaken. The constitution confers the power on the executive, and does not undertake to define the reasons for its exercise. It rests therefore in the sound discretion of the executive to make use of it, or not, for reasons satisfactory to himself. Washington based his second veto solely on expediency. And it may well be employed to prevent hasty, useless, unconstitutional, or impolitic legislation. In this country it has worked well in practice. It has been said that the power of preventing bad laws includes that of preventing good ones. And it has been well answered by Hamilton, that "The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones." The danger to be dreaded is not one arising from a dearth of legislation, but from over-legislation.

Under the American system of government the law-making power of the judicial department can be checked by the law-making power of the legislative department, not as affecting the particular case adjudicated upon, but in respect to all like cases thereafter arising. The law-making power of the legislative department is held in check by the judicial department, which can nullify any act of the legislative department which violates the fundamental law as it is embodied in the constitution of either the State or the United States. The law-making power of the people is held in check by the fundamental law which they themselves have established. Under the system of government prevailing in Great Britain the law-making power of the legislative department is supreme. It is not held in check either by the executive or the judicial departments of the government, and the people have imposed no restraint on its exercise in any fundamental law. In Germany the constitution of the empire defines and limits the law-making powers possessed by the Bundesrath and the Reichstag,
out the judicial department of the government has no check upon an unconstitutional exercise of the law-making power by the bodies referred to. In Switzerland, too, the judicial power of the federal tribunal cannot check the law-making power lodged in the federal assembly by pronouncing it to be in violation of the constitution of the confederation. But in that country the people have reserved unto themselves the power to directly nullify the action of the law-making power by means of the referendum. In France, under the old monarchy and an unwritten constitution, the judicial department did in several instances declare the acts of the legislative department void as being contrary to binding right. But the constitution of 1791, which was the first written one in Europe, declared that the judicial tribunals could not “interfere with the exercise of the legislative power.” And that restriction has continued in force in France under all forms of government, from that time to this. Mr. Brinton Coxe has called attention to the noteworthy fact that in France the power of the judiciary to nullify the action of the law-making power was recognized under an unwritten constitution and denied under a written one. He adds that “French public law upon the subject is thus in direct contradiction to Marshall’s view of written constitutions.”*

The question suggests itself whether the law-making power should be lodged in a legislative assembly composed of a large or a small number of representatives. At the present time the British House of Commons consists of 670 members. The French Chamber of Deputies contains 584 members. The German Reichstag is constituted of 397 members; and the House of Representatives at Washington of 332 members. The ratio of representation is therefore smaller in the United States than in any of the countries named. We are sometimes told that in a multitude of counselors there is safety. It is also claimed that it is easier to corrupt a small body than a large one, and therefore there is less likelihood of corrupt and scandalous legislation where the law-making assembly is composed of many members. But it may be doubted whether our experience in the United States justifies the claim thus made. In some of our State legislatures where the membership has been the largest, the most venal and iniquitous legislation has been enacted. The “big membership” theory has not everywhere worked well as a safeguard against corruption.† Alexander Hamilton expressed

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† See The Nation, June 23, 1892, p. 460.
the opinion in the *Federalist*, that in all legislative assemblies, the greater the number composing them may be, the fewer will be the men who will in fact direct their proceedings. The reasons which he gives for the opinion seem eminently sound. He says:

"In the first place, the more numerous any assembly may be, of whatever characters composed, the greater is known to be the ascendency of passion over reason. In the next place, the larger the number the greater will be the proportion of members of limited information and of weak capacities. * * * It is precisely on characters of this description, that the eloquence and address of the few are known to act with all their force."

He spoke with much wisdom when he declared in the same connection:

"The people can never err more than in supposing that by multiplying their representatives beyond a certain limit, they strengthen the barrier against the government of a few. Experience will forever admonish them, that, on the contrary, after securing a sufficient number for the purposes of safety, of local information, and of diffusive sympathy with the whole society, they will counteract their own views, by every addition to their representatives."

In framing the fundamental law for our states this statement of Hamilton's should be accepted as a sound principle of political science, and one that cannot be disregarded but to our prejudice.

The method which the law-making power pursues in ascertaining the collective will of its members, sometimes becomes a matter of great importance. Until recently no limit was placed on the time within which debate might continue, in the British parliament. Filibustering, or systematic obstruction, was rarely resorted to until within the last twenty years. In the debates on the Irish question, in 1877, and again in 1881, the filibustering was so great that a closure rule was enacted in 1882, which gave the speaker of the House of Commons the right of informing the House that he thought the time for closing the debate had arrived so that a motion to that effect might then be made. In 1887 a rule was adopted and is still in force in the House of Commons, which provides that any member may move "that the question be now put," and "unless it shall appear to the chair that such motion is an abuse of the rules of the House or an infringement of the rights of the majority," the question shall be put and decided
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without debate. In both houses of parliament each member present is held bound to vote, and can be compelled to vote. This has always been the rule in that country. The minority cannot defeat legislation, either by filibustering tactics or by breaking the quorum in declining to vote.

In the Senate of the United States neither of the rules mentioned is in force, and out of respect to the so-called "courtesy" of that body a minority can obstruct important legislation, for weeks at a time, to the serious injury of the business of the country. The recent experiences in the Senate were a humiliation and a shame, and seriously impaired, both at home and abroad, the respect entertained for the upper house of Congress. Any system of rules, or miscalled "courtesy," which enables a small fraction of a body to paralyze legislation by refusing to vote deserves the most severe condemnation. The House of Representatives in 1890 adopted a rule, not now in force, providing that to make a quorum "the names of members present who do not vote shall be noted by the clerk and recorded in the journal." Under the rules at present in force in the House it is possible to terminate debate, but there is no method by which the majority can legislate if the minority break the quorum by declining to vote. The constitution gives even to the minority of each house a power to compel the attendance of absent members. But what does their presence avail if they can sit in their seats and paralyze all legislation by declining to vote? The rules of all law-making bodies should give to the presiding officer, under such circumstances, the power either to count a quorum, or to punish the obstructionists for disorderly behavior. Each house of Congress is given by the Constitution the power to punish its members for disorderly behavior. It is difficult to imagine any conduct more disorderly than that which is designed deliberately to make all legislation impossible.

In France the theory is that the President of the Chamber of Deputies has a right, in order to obtain a quorum, to count all members who are present at the time, whether they vote or not. This it is asserted he can do whether the authority is incorporated in the rules or not. But their rules contain a peculiar provision to the effect "that, in case no quorum is present, a vote on the question under discussion will be called for at the next sitting, when the result will be valid whatever may be the number of deputies who take part in the ballot. So the President orders a
vote, declares there is not a quorum, adjourns the sitting, calls the house to order again at the end of ten minutes, and then orders a new vote, which this time becomes valid."*

In Germany a member present and not voting is counted in order to make a quorum.

In Switzerland it is necessary that the quorum should be present, but not that they should vote. If a quorum is present the ballot is binding when it is a majority of those voting.

Your attention has been directed to the fact that when the people in this country came to establish State constitutions it was not the legislative department that they distrusted. Experience soon led them to see the mistake they had committed. The legislative department has been deprived of the power it formerly possessed, of electing the executive; his term of office has been extended until in almost half the States he now holds for four years instead of one as formerly; and he has in almost every State been given the veto power as a check upon legislation, whereas formerly he possessed it not. The legislative department, which in some of the States formerly constituted the court of final resort, has been deprived of such power. This distrust of the legislative department has caused a large number of constitutional restrictions to be imposed upon its law-making power. In respect to a number of subjects they are absolutely prohibited from legislating at all, while as to many others they are only permitted to legislate by a general law. And upon whatever subject they legislate they are required to observe certain set forms thought essential to due care and deliberation, and as a preventive of fraud. The extent of the change which has been made in the powers of the legislative department may perhaps be better understood by a comparison which Mr. Henry Hitchcock of St. Louis has made between the Missouri constitution of 1820 with the constitution adopted in the same State in 1875. Mr. Hitchcock tells us that the constitution of 1820 with all its amendments up to 1855 contained only three express restrictions on the legislative power, while the constitution of 1875 in its fourth article contains fifty-six sections, more than half of which, he says, either prohibit the enactment of laws upon specified subjects, or prescribe the manner of enacting, amending, and repealing laws already in force.

Notwithstanding all the precautions which have been taken to

restrain and check the law-making power of our legislative bodies, we are compelled to admit that the efforts have been in large part unsuccessful. A comparison of the legislation enacted during the first half of this century with that which has been enacted since is not reassuring. Judge Cooley, than whom I know of no one better qualified to speak, has expressed the opinion that the early legislation was in general more careful, more circumspect, and less open to criticism as encroaching on private rights or sound principles, than much of that more recent. And he declares that by far the larger part of all the doubtful legislation which the history of the country presents has taken place since the year 1846, "when radical ideas began to be characteristic of State constitutions, and the theory that officers of every department should be made as directly as possible responsible to the people after short terms of service was accepted as a political maxim."*

It cannot be denied that in the United States there exists at the present time a general distrust of our legislative bodies. The people lack confidence in the intelligence, capacity, wisdom and integrity of the state legislatures. It is becoming a difficult matter in this country to induce men who are occupied in successful business enterprises, or who are engaged in lucrative professional practice, to sacrifice their personal interests by becoming members of the legislative assemblies of the states. They do not appreciate membership in such assemblies as an honor, and do not feel called upon to make the financial sacrifice which such service involves. It is too frequently the case, therefore, that men are chosen to these positions whose education, experience and standing in the community do not at all entitle them to such distinction, and who are not qualified to wisely discharge the very responsible trust committed to their keeping as law-makers for the commonwealth. It is also unfortunately too often the case that corrupt men secure their election to these legislative bodies for the money that can be made by selling legislation—by "sand-bagging" corporations.

In our earlier history it was considered a high personal honor to be a member of the law-making body of the state. The representative regarded himself as charged with grave personal responsibility respecting the enactment of law. He looked upon a public office as a public trust, and considered his election to the legislature as a kind of civic decoration bestowed upon him for his worth

*Princeton Review, March, 1878, p. 236.
by the people of his district. The pay was small the illicit profits nothing. The best men in the commonwealth were willing to serve it in the law-making body. We may well deplore that in these later times this has been so greatly changed, and that good men should feel so much reluctance about assuming the office of a legislator, thus giving opportunity to bad men to crowd themselves into public place “for what there is in it,” without any sense of duty or responsibility. Why has the “honorary” impulse to public service so largely lost its force in the states of the American Union? And why is it that public office has so largely ceased to be regarded by our law-makers as a public trust? Many reasons are given in explanation, and I shall venture to call attention to a few.

1. The rise of great cities has undoubtedly had much to do in effecting the change referred to. Nearly half a century ago De Tocqueville saw in the size of certain American cities and in the nature of their population a danger threatening the future security of the Republic. Since that time our cities have grown until our urban population has become more than six times as great as when De Tocqueville wrote, and far more heterogeneous. The immigrants from foreign lands generally seek our cities, and there the several nationalities segregate themselves, living the old country life over, speaking their own language, clinging to their old ideas, practicing their old customs. Under such circumstances they do not easily become assimilated with us. The result is that in the cities especially, the morale of the voting constituency is much lower than it formerly was. The foreign vote is either in the majority, or when it is not it holds the balance of power and controls elections. The massing of large bodies of foreigners together affords an excellent opportunity to the machine politician, and votes are bought and sold without scruple. A man who buys votes to secure his election may as a general rule be depended on to sell his own when the opportunity presents itself. His moral sense is so blunted that even in cases where his vote is not purchased he can be pretty certainly depended upon to vote on the wrong side of every question. A man prominent in political life has declared it to be his observation that nine-tenths of the city members of the legislature of his own state would, as a rule, be found hostile to any reform, and that the only hope of reform was in the action of the country members.
2. The growth of private corporations and of corporative power has been another influence whose blighting effect on the morality of legislative bodies has been marked. Not that the conception of a private corporation is an idea originated in our times, or even in modern times. We all know that such corporations existed among the Romans, and some have asserted that their origin is to be found in the laws of Solon. But however old the idea may be, it is within our time that these corporations have grown in number, in wealth, and in power, to such an extent as to make them formidable for evil throughout the country, and to constitute them a noticeable political and social phenomenon. Fifty years ago there was hardly a railway corporation in the United States, while now there are about two thousand such corporations, employing nearly a million of persons, and holding property worth more than $7,000,000,000. We have great express and telegraph companies, great manufacturing and mining companies, great insurance and banking corporations. All these the state has had to legislate concerning, and the corporations have found it desirable to use illegitimate as well as legitimate influence to prevent legislation hostile to their interests. To this end they have spent money to elect legislators friendly to their interests, and to defeat those deemed unfriendly. They have practiced bribery in the legislative halls. And so notorious has all this become that certain great railroads are commonly reported as "owning" the legislatures of certain states. Thus has it been demonstrated not only that corporations have no souls, but that the legislatures of too many of our states have none either. In 1613, Chief Baron Manwood declared that corporations had no souls; and proved it after this fashion: "A corporation is a body aggregate; none can create souls but God, but the king creates them, and therefore they have no souls."

3. The principle of rotation in office which prevails so largely in this country at the present time has not had a wholesome effect on the character of our legislative bodies. In this respect the practice of European states is quite different from our own; and in our own country quite a difference has existed between the practice of the north and the south. One reason why the south has had so much influence in the Congress has been due to the fact that it has kept its able men there, electing them and reelecting them, thus giving them the experience necessary to make them useful and influential.
In the north, on the other hand, it has been in recent times a sort of unwritten law that after one had served two terms either in congress or in the legislature it was his duty to step aside and allow the office to be "passed around" as a kind of perquisite to the workers. The extent of the change which has come over the country in this respect may be inferred from a table which appeared in the New York Nation, June 23, 1892, giving the statistics for the legislature of Connecticut. It shows how this principle of rotation in the legislative office has gained ground steadily during each decade of the century. In the decade beginning in 1790 the number of representatives re-elected in Connecticut was 63.7 per cent; in 1800 it was 54 per cent; in 1810, 41.7 per cent; in 1820, 26 per cent; in 1830, 22.6 per cent; in 1840, 12.7 per cent; in 1850, 12.2 per cent; in 1860, 12.7 per cent; in 1870, 10 per cent; in 1880, 9.3 per cent; in 1892, 9.01 per cent.

The Nation is justified in asserting that this principle of rotation is in practice fatal to any theory of legislative responsibility, as it simply tempts a man of easy-going principles "to make the most of his 'good time' as a legislator." It opens no career of statesmanship, and therefore no inducements for one to specially fit himself for political life.

But, we may inquire, what principles should control in the enactment of laws. Locke in his work on civil government declares:

"These are the bounds which the trust that is put in them by the society, and the law of God and nature, have set to the legislative power of every commonwealth, in all forms of government:

"First. They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.

"Secondly. These laws also ought to be designed for no other end ultimately but the good of the people.

"Thirdly. They must not raise taxes on the property of the people, without the consent of the people, given by themselves or their deputies. And this properly concerns only such governments where the legislature is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves.

"Fourthly. The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." *

*Locke on Civil Government, § 142.
I venture to add the following:

1. A statute must not violate the fundamental law of the State or Nation. Every legislator before entering upon the discharge of his duties is sworn to support the constitution of the United States, and, if he is to make State laws, the constitution of his State. If he votes in favor of the enactment of a law which he believes unconstitutional, he violates his official oath, wrongs the commonwealth, and betrays the trust reposed in him. In determining whether a certain measure shall be enacted into law it is his duty to consider whether the law proposed is in conformity to the constitution, and he is not relieved from that responsibility by the fact that the question may afterwards be submitted to the courts for final decision. And in the determination of this question of constitutionality the legislator and the judge are governed by somewhat different principles. If the legislator doubts the constitutionality of the proposed law, it is his duty to withhold his vote from it. But when the question of constitutionality comes before a court, the mere doubt of the judge is not sufficient ground for declaring it unconstitutional. Prof. James Bradley Thayer, of the Harvard Law School, in an admirable paper read at Chicago in August last before the Congress on Jurisprudence and Law Reform, maintains the proposition that in cases where the courts are called on to pass on the constitutionality of a legislative act, "the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not." The courts sustain acts which in the opinion of the judges themselves a true construction of the constitution would not justify in cases where it is not clear beyond a reasonable doubt that the legislature has exceeded its powers. If it is not clear beyond a reasonable doubt that the act in question is unconstitutional, it will be sustained by the courts. "A legislative act is not to be declared void upon a mere conflict of interpretation between the legislative and judicial power. Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumption."

Again: "It is but a decent respect due to the legislative body by which any law is passed, to presume in favor of its

* The People v. The Supervisors, 17 N. Y. 235.
validity, until its violation of the constitution is proved beyond all reasonable doubt.” *

An accomplished lawyer, and former president of the American Bar Association, John Randolph Tucker, of Virginia, has expressed the opinion that the conscience of the legislator and of the executive should be quickened to a more strict observance of constitution limitations even than the judge. He says:

“The legislator cannot justify a vote to make an act a law, on the ground that as judge he would not be justified in annulling its effect. For the legislator does not cross any forbidden line when he refuses to enact what he believes is repugnant to the constitution; and he knows every fraudulent motive which would make void his act, though screened from the judicial eye; he knows it, and God knows it; and he cannot enact what that motive makes void, without perjury of his soul, treachery to his trust, and treason to his God. The legislator and the executive can do no dutiful act, therefore, which they do not believe to be warranted in terms and in motive by the constitution they are sworn to support. Support is affirmative duty. The oath is not negative, that they will not pull down the pillars of the edifice; but that, as pillars, they will support and uphold it.”

2. A statute must be just in principle. Legislation is a branch of ethics, and the legislator must have regard to ethical considerations. Filangieri, a learned Neapolitan who, a hundred years ago, wrote on the science of legislation, declared that the positive goodness of a law consisted in its conformity with the principles of morality and with the precepts of revelation. God and nature, he asserted, protected the rights of mankind, and no transitory expediency could justify their infringement.† The Aquiline law which rendered it no more penal to kill a slave than a horse, resisted an authority paramount to that by which it was prescribed.

Judge Dillon, in delivering his address as president of the American Bar Association, said at Saratoga, in 1892:

“Theoretically, and for many purposes, practically we must discriminate law and morality, and define their respective prov-

* Ogden v. Saunders, 12 Wheat. 213.
† Getano Filangieri was born in Naples, in 1752, and his work, “La Scienza delle Legislazione,” was written when he was thirty years of age. He died in 1788, in his thirty-sixth year. The work was translated into German, French, and Spanish. The first volume only was translated into English, in 1792.
inches. But those provinces always adjoin each other, and ethical considerations can no more be excluded from the domain of law in its every part than one can exclude the vital air from his room and live."

Milton argues that to allow sin by law is against the nature of law, the end of the law-giver and the good of the people.*

Bolingbroke declares that the laws of nature are truly "the laws of laws," adding that if the civil laws are imperfect it is because they have been made without a sufficient and consistent regard to natural law.†

Neither can I forbear asking your attention, somewhat at length; to what Mr. Carlyle has to say on this subject:

"A continued series of votings transacted incessantly for sessions long, with three-times-three readings, and royal assents as many as you like, cannot make a law the thing which is no law. No, that lies beyond them. They can make it a sheepskin act of Parliament; and even hang men (though now with difficulty) for not obeying it—and this they reckon enough; the idle fools! I tell you and them, it is a miserable blunder, this self-styled 'law' of theirs; and I for one will study either to have no concern with it, or else by all judicious methods to disobey said blundering, impious, pretended 'law.' In which sad course of conduct, very unpleasant to my feelings, but needful at such times, the gods and all good men, and virtually these idle fools themselves, will be on my side; and so I shall succeed at length, in spite of obstacles; and the pretended 'law' will take down its gibbet-ropes, and abrogate itself, and march, with the town-drum beating in the rear of it, and beadles scourging the back of it, and ignominious, idle clamor escorting it, to Chaos, one day; and the Prince of Darkness, Father of Delusions, Devil, or whatever his name be, who is and was always its true proprietor, will again hold possession of it—much good may it do him!

"My friend, do you think, had the united Posterity of Adam voted, and since the creation done nothing but vote, that three and three were seven, would this have altered the laws of arithmetic; or put to the blush the solitary cocker who continued to assert privately that three and three were six? I consider, not. And is arithmetic, think you, a thing more fixed by the Eternal, than the

laws of justice are, and what the right is of man, towards man? The builder of this world was Wisdom and Divine Foresight, not Folly and Chaotic Accident. Eternal law is silently present, everywhere and everywhere. * * * No pin's point can you mark within the wide circle of the all where God's laws are not. Unknown to you; or known (you had better try to know them a little!)—inflexible, righteous, eternal, not to be questioned by the sons of men." * * *

The design of all laws is to secure the happiness of the people, and we may rest assured that cannot be promoted by any law which violates the laws of morality or contravenes the principles of ethics.

When Mr. Bentham published to the world his Theory of Legislation it was confidently asserted by his admirers that its publication made an epoch and a revolution in the science of which it treated. But the civilized world has not yet accepted Mr. Bentham's principle that utility, and utility alone, is the criterion of right and wrong, and ought to be the sole object of the legislator. It is a mistake to base the approbation or disapproval of a public or private act simply on its tendency to produce pleasure or pain. "He who adopts," says Bentham, "the principle of utility, esteems virtue to be a good only on account of the pleasures which result from it; he regards vice as an evil only because of the pains which it produces. Moral good is good only by its tendency to produce physical good. Moral evil is evil only by its tendency to produce physical evil." † It is only fair to add that by the word physical in this connection, Mr. Bentham includes the pains and pleasures of the soul as well as the pains and pleasures of sense. We cannot, however, accept his theory that it is wiser in general to follow the dictates of utility than the impressions of moral duty. On the general question whether a thing is right or wrong, it is safer to trust to the common feelings of mankind than to individual deliberation on whether more good than evil may be expected from a given action, more pleasure than pain, and that without any rule or standard by which the intensity of any pain or pleasure can be determined. We are furnished with no instrument by which we may take "the altitude of enjoyment, or fathom the depths of sorrow." It is safer for us to follow the beaten high-

† Bentham's Principles of Legislation, p. 3.
way of morality which the common experience of mankind has approved, rather than some new way which that experience condemns but which we fondly imagine will in our case afford more pleasure than pain. "Socrates was in the right," says Bolingbroke, "to curse the men who first divided in opinion things that cohered in nature — morality and utility."

3. A statute must be suitable to the circumstances of the state to which it is to be applied. A law is not to be enacted simply for its supposed philosophical principle. Lieber has said that "no law is philosophical which does not grow out of the given circumstance — out of that society for which it is calculated." An ideal commonwealth cannot be created by the enactment of a code of laws ideally perfect. As Judge Cooley has expressed it:

"Law is only the public will authoritatively and effectively expressed; and it is a mere truism that the moral standard of the people must determine that of the laws instead of being determined by them. The laws must necessarily express the prevailing opinions and purposes of the people who make them, and not of any more enlightened and virtuous people who at some future time may be their successors. In this postulate may be seen the reason why the law cannot be an educator of the people; it would be the people teaching themselves through the law; the teacher giving himself instruction."

Not only is it idle to talk of legislating people into an ideal state by an ideal system of laws, but it is idle to suppose that given such a system of laws, the people would consent long to be governed by them. Carlyle understood this when he wrote:

"The Constitution, the set of Laws, or prescribed Habits of Acting, that men will live under, is the one which images their Convictions—their faith as to this wondrous Universe, and what rights, duties, capabilities they have there; which stands sanctioned, therefore, by Necessity itself; if not by a seen Deity, then by an unseen one. Other Laws; whereof there are always enough ready-made, are usurpations, which men do not obey, but rebel against, and abolish at their earliest convenience."

A writer on the English Constitution, Walter Bagehot, has said that the United States could not have become monarchical, even if the constitutional convention had decreed it, and the component

An address given at the commencement of the Law and Dental Schools of the University of Michigan, March 26, 1884.
states had ratified. "The mystic reverence," he says, "the religious allegiance, which are essential to a true monarchy, are imaginative sentiments, that no legislature can manufacture in any people."

The law-makers of a state are ordinarily men born within the country for which they legislate, moulded according to its customs and traditions, and influenced by the prejudices of their environment. They are the creatures, not the creators of their age. Legislative reforms do not, as a rule, originate with them. They do not lead public opinion, nor even keep abreast of it, being generally quite in the rear of it. It is not often necessary to caution them against ideal legislation, or to remind them that Solon in his wisdom did not undertake to give the Athenians the best laws, but only the best they were able to bear. Law-making is therefore "the science of adaptations." The laws of Lycurgus were not made for and would have been unsuitable for Athens, just as the laws of Athens would have ruined Lacedæmon, being wholly unsuited to its needs and conditions. The laws which were administered at Rome are not the laws which could be administered in London. The laws which may answer the needs of the peoples of Asia, or the peoples of Japan, are not those which are needed in or would be tolerated by the people of the United States. The constitution of the government, the character, customs and religion of the people, the climate and position of the country, are all circumstances which the wise law-maker must consider in the enactment of law.

4. Great care should be observed in the clearness and precision of the language used in the law to be enacted. According to Bacon, "A conceivable perfection of a law consists in the clearness and precision of its terms," and in this particular the greatest of legislators have often failed. The careless manner in which many of our state and federal laws are drawn is a reproach to our law-making bodies. They should not be drawn by persons inexperienced in the law, and in the rules of judicial construction. What right has one, for example, to draft a penal statute unless he is aware that penal statutes are by the courts strictly construed? Or what right has one to draft a statute in derogation of the common law unless he is familiar with the same principle? How can one intelligently use the word "may" in a statute unless he knows under what circumstances the courts construe it to be
peremptory in its meaning and not merely optional? And how can he use the word "shall" intelligently unless he knows the rule by which the courts are governed in determining whether the word is to have a mandatory or merely a directory meaning? It would seem to be desirable to make it the duty of the law officer of the government in each state to examine every bill before it is finally enacted into law, to the end that the language used may be clear, definite, precise, and appropriate to the purpose of the legislative body. The complaints which judges have made on this subject have been many and bitter. They are constantly called upon to construe statutes drawn by amateur and incompetent legislators, and as one of them has expressed it, the task "sometimes involves the necessity of harmonizing apparently inconsistent clauses," and making sense of "provisions cast together haphazard by different minds, differently constituted, and looking to the different and special objects without due regard to the harmony of the whole." Lord O'Hagan, whose criticism it is that I have quoted, expressed in his capacity as judge the wish for some department "by which bills, after they pass committee, might be supervised and put into intelligible and working order." The governor of the state of New York some years ago recommended the legislature of that state to create such a department. In France, under the Empire, it was the practice to have the phraseology of all bills passed by the chambers closely examined by the Council of State, and every precaution taken to make them clear and precise in their terminology, as well as to have them consistent with the existing statutes. But we are told that under the existing order of things that country now suffers from carelessly framed laws. Any member of the chamber is at liberty to amend a bill in any sort of language, provided only he can secure the requisite number of votes. In Switzerland bills are carefully prepared by the Federal Council. The right of initiating legislation belongs to any member of the law-making body. He can bring the matter to the attention of the chamber to which he belongs, and if it is approved that body recommends to the Federal Council that it shall draw up and present a bill to the Assembly on the subject thus referred.* In England Sir Frederick Pollock tells us that—

*Many an act of Parliament, originally prepared with the greatest care and skill, and introduced under the most favorable

*Adams and Cunningham on The Swiss Confederation, p. 47.
circumstances, does not become law till it has been made a thing of shreds and patches hardly recognizable by its author, or to any one with an eye for the clothing of ideas in comely words, no less ludicrous an object than the ragged pilgrims described by Bunyan: 'They go not uprightly, but all awry with their feet; one shoe goes inward, another outward, and their hosen out behind; there a rag and there a rent, to the disparagement of their Lord.'"

I take it that this description is not less applicable to the condition of bills which have passed the legislative bodies of this country, including the congress of the United States.

It must be conceded that there is a disposition in the law-making bodies to over-legislation. This country, like other countries, has suffered much in this respect. The law-making power should be humbled by the thought that the great reforms which have been effected in the laws have generally been accomplished, not in doing some new thing, but in undoing something old. For instance, the reforms which Sir Samuel Romilly accomplished in the criminal laws consisted in securing the repeal of laws previously enacted, and which imposed the penalty of death for upwards of two hundred offenses. The reforms in matters pertaining to religion have consisted in the repeal of the laws enacted to compel uniformity in religious belief, and designed to make people religious by law by requiring them to attend religious services, and to contribute to the support of religious bodies. So in reforms pertaining to trade it will be found that they generally have consisted in undoing what some preceding legislative body had enacted, as witness the repeal in England of the laws regulating the wages of labor, the laws regulating the prices of commodities, and laws regulating the interest on money. It was the repeal of the Corn Laws which created anew the industrial life of England.

To such an extent has that country been helped by the undoing of what the law-making bodies had previously enacted, that the author of the History of Civilization in England has been led to say that "The most valuable additions made to legislation have been enactments destructive of preceding legislation; and the best laws which have been passed, have been those by which some former laws were repealed."*

We are told by Demosthenes that among the Locrians the pro-

poser of a new law wore a rope about his neck, signifying that if his measure should fail to work well in practice, he was willing that his life should be sacrificed. This has led Mr. Depew wittily to declare that if such a rule prevailed with us, "the multitude of executions would enforce, as no other experience could, that wise maxim: 'That government is best which governs least.'"*

The number of bills and joint resolutions introduced into the House of Representatives during the First Session of the Fifty-first Congress was 12,402, while the number introduced into the Senate was 4,570—making a total of 16,972. Fortunately for the country, only 1,335 passed both houses. It is safe to say that if the principle prevailed with us that prevailed with the Locrians, the number would have been very materially less. But it would be quite unsafe to allege that there was a single member in either house who read through not every bill that was introduced, but every bill that was passed. And it is perfectly safe to say that there were many members in both houses who would not have understood every bill if they had read them. This is not said in any offensive sense. To legislate intelligently the law-maker, must know accurately what the existing law on the subject is, and he must understand exactly what changes in it the law proposed will accomplish. Legislators may be men of learning and ability, and yet not possessed of the qualifications necessary to make them in all cases intelligent law-makers.

Law-givers have been called *principes perpetui*, because they continue to rule after their death in the laws which they have established. Bacon, expressing his opinion on gradations of honor, names:

1st. The founders of states.
2d. Law-givers.
3d. The deliverers and saviors of a country after long calamities.
4th. The fathers of their countries, which are just and prudent princes.
5th. Lastly conquerors, "which is not to be received amongst the rest, except it be where there is an addition of more country and territory to a better government than that was of the conquered."

To make the laws of a nation or of a state involves a tremendous responsibility, and to be intrusted with such power should be recog-

* Depew's Orations, p. 435.
nized as one of the greatest honors that can be attained. That men should have been ambitious in previous ages to be enrolled in the number of legislators with Solon, Lycurgus, Numa, and Justinian, is not surprising. The splendid words of Gibbon afford a sufficient explanation of such aspirations. "The vain titles of the victories of Justinian," he says, "are crumbled into dust, but the name of the legislator is inscribed on a fair and everlasting monument."

Henry Wade Rogers.