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THE WORK OF A CONSTITUTIONAL CONVENTION.

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O navis, referent in mare te novi
Fluctus? O, quid agis? Fortiter occupa
Portum. Tu, nisi ventis
Debes ludibrium cave.

EVER since the establishment of the Constitution of the United States, written instruments defining and limiting the powers of what are in this country the co-ordinate branches of government have been looked on as essential to the preservation of our liberties. It was necessary, when that famous document was first discussed, to lay down certain general principles, which, up to that time, had had a doubtful application or a construction unfavorable to the views which were henceforth to prevail. These changes in the theory of government required to be so plainly set forth that he that ran might read, and to be guarded by some force at once vigilant and incorruptible. It was thus that it was given to the legislature to enact laws, which the executive was to see carried out, while their constitutionality—that is, their harmony with the principles laid down in the written charter, which we call a constitution—might be inquired into by any one who doubted it, and decided by the judiciary. In England the

legislature is supreme, the king being represented by the premier, who must be a member of one of the houses of parliament. He belongs usually to the popular branch, and the judiciary having no power to inquire into the constitutionality of an act, there is neither a veto by the king, nor the power to arrest the operation of an act by the courts, and even the House of Lords generally exercises its legal prerogative by modifying bills passed by the lower house, rather than by rejecting them altogether. And this distinction between the theory of the government of the United States and that of Great Britain, from which country we have derived the greater part of what is valuable in the Constitution of the United States, must be kept constantly in mind and applied as the touchstone, which shall assure us in our quest for what is beneficial, whether what we may borrow for the future will be homogeneous with that which we have taken in the past.

In this country, following the example of the Federal government, each State has had from time to time a constitution, of which not a few of the later ones might have asked the authors of their being

> "Damnosa quid non imminuit dies?
> Aetas parentum, pejor avis, tulit
> Nos nequiores, mox daturos
> Progeniem vitiosiorem."

They make, when you view their long and ill-ranged line, a very sorry array, brightened up here and there with a pet theory, in vogue at the time, stuck like a bright feather in the cap of a ragged soldier, to draw attention by its fluttering gaudiness from the tatters and holes which are visible in that which is mainly important to comfort and decency.[1]

There is among the ignorant classes in this country a deep-rooted belief in rapid and easy cures. Quack medicines are sold by the million, and if only there be enough mystery in the com-

[1] Thus, in the Constitution of Illinois, while cumulative voting has been introduced, the fallacy of the very theory of which we shall endeavor to demonstrate, the judges of the Supreme Court are *elected for short terms of five years.* Is not this to expose the State body to the easily-contracted disease of pecuniary corruption, and then to apply the panacea of minority representation in order to show how easily the cure may be effected;—to dull the palm which should be so sensitive in rendering justice, in order quickly to substitute another not yet grown callous and subject it to the same operation?

position of the prescription, the most innocent compound and the most baleful drug may be vended with equal ease.

We believe that this misapplied credulity has much to do with the success of hastily-fashioned constitutions; if they be long enough, and if they offer a specious though delusive remedy, and above all if the evil to be removed be severely enough felt, they are swallowed with faith, if not with relish. *Omne ignotum pro magnifico est*, and to many an inexperienced mind the ingredient of novelty is not the least of charms. The hearing and propounding of some new thing have not wholly lost for the modern American the charm they once possessed for the ancient Athenian.

Each quarter or third of a century there seems to be a point of time when nearly the whole of our community is attacked with an epidemic of reform. Weary of the sight of political crimes, the only variety in which is their greater or less development; moved at last by the importunities of the press, a feeling arises, which soon becomes universal, and demands a change with all the force which the enthusiasm of a popular movement lends to the voice of the people. It is then that the legislature, forced to give way to the popular current, submits to a plebiscite the question of changing the fundamental law of the State. A constitutional convention is called, deliberates, retires. Its work is placed before the people. Tired of the old love, which in its day had its due share of attention, the heart turns with ardor to the new, and transfers to it all that admiration which in the former case is felt to have been misplaced.

The present time seems to be one in which a high though passing wave of popular sentiment is sweeping across the country, demanding a reform. In the Federal as in the State government, the accustomed sight of pigmies plundering a sleeping giant has at last grown startling, and in his deep repose the latter begins to show signs of uneasiness. Committee is piled upon committee, report upon report; nay, in Pennsylvania the people have decided to change the Constitution under which they have been living since 1838, and a convention is now engaged in drawing up something that will suit the popular taste of 1873 better than the antiquated fashions of thirty years since. New Jersey and Ohio are following the same course, which in its turn will be again imitated, and so on to the end of the chapter.

At such a period, therefore, it seems not amiss to discuss the question, so often put, so diversely answered, what should be the work of a constitutional convention? And, in order to answer this question properly, it may be of use to us to ask one or two others. What is to be the theory on which the Constitution is to be framed? How far can such a theory be expressed in a practical form?

A constitution, according to the view we take of it, should not be a mere abstract and general declaration of rights and liberties. For if this were enough the work were quickly done, and each convention would come to an end after it had recommended to the future legislator to dispense justice in mercy, to respect the rights of all, to infringe upon the privileges of none. It will be seen, as soon as we examine it critically, how anomalous in its character is the legislative body which we call a constitutional convention. By its very existence it demonstrates the imperfection of our form of government. We dare not, disguise the fact as our self-love may prompt us to do, trust our legislature with the whole and with the true work of legislation. This consideration at once enables us to answer the questions put a moment ago. Governed as we are, it is necessary to elect sentinels to see that the false shepherd does not fleece his flock too closely. In addition, therefore, to the declaration of the great principles of our government, many clear and positive restrictions should form a part of the instrument. "Thou shalt not" should, as in the Mosaic code, form a large proportion of all the commandments given.

But is there no other help for it, it will be asked? Is the theory of American government to continue an ill-devised system of checks, constantly getting out of order, and becoming obsolete, (for no human ingenuity can foresee all the methods of infringing the law to which the future will give birth)? How long, we ask in tribulation, must we suffer from these things? Just so long as we are content to choose our upright and able legislative body each third of a century instead of each year; just so long as we permit the most ignorant and the most corrupt of the men who live about us to plot in taverns political stratagems which bear fruit in high offices; just so long as we regard the nominations as of but little importance, and march like sheep to the polls in order to give our

suffrages to men and measures whom we alike despise, because our neighbor gives his, as unwillingly, to what is no better. Would you have a panacea for the disease which has eaten so deeply into the whole body? Forget party hates where party politics are not involved. Recollect that the adverse factions are but the flint and steel from the collision of which the fire of truth is to be struck, and directly they cease to serve their purpose they should be flung away, and recourse had to fresh materials. Go to the nominating conventions, and do not re-enact the tedious farce of rousing from the deep lethargy which has benumbed, after the mischief has been done, and then endeavoring to restrain its complete operation. Until, however, the happy time shall come when legislatures shall be equal to conventions in honesty and in intelligence, written constitutions will continue to be in vogue, and, in order to be effective they must treat the legislator as he is, not as he ought to be, and must enact, not such restrictions as might or would be good provided he had as high a sense of honor as it is his duty to possess, but such as will be of avail against him, low-toned and ignorant as on an average he now is.

Among the abuses which at present exist in many of the State constitutions, and which are capable of being altogether removed or greatly lessened, seem to be the following:

1. The undue influence of the Federal upon the State government. The remedy is of a simple nature and in many States has been adopted. It is to make all elective officers hold for terms that will expire in years in which there are no Federal elections. Suppose, for instance, that the governor's term was made to last either two or four years, that of the State senator four, and that of the State representative two. In such a case the governor, half the senators, and all of the representatives might be elected one year after the election of the presiden (which time would also be a year distant from any congres sional election); the other half of the senators (the governor if his term were to last but two years), and a new house of repre sentatives being chosen two years afterward, at the end of th third year of the president's term. If the present scheme were now in operation, a president and members of congress would be chosen in 1872; in 1873, State representatives, half of the State

senate and a governor; in 1874, another congressional election, while the other half of the State senate and a new house of State representatives would be chosen in 1875.

2. The second great evil of which we have to speak is the union of municipal or local and political or general elections, which prevails so extensively at present. By this means men are, in a moment of party passion, induced to condemn an excellent man, and to support a bad one, as he is found on the ticket which they are opposed to, or advocate. It would be a great gain to fix all municipal elections in the spring, thus distinctly setting before the community the fact that such elections were not in any way political. This is now the case in Ohio and in several of the New England States, and is found extremely beneficial.

3. There is another evil which has attained its vast proportions so rapidly as to dishearten all but the most courageous and sanguine. It is too well known to need comment that but a small proportion of the men who are most fit through education, wealth and leisure to fill the position of legislators, are willing to enter the lists with competitors to defeat whom is no glory, to be vanquished by whom

> "Were low indeed,
> "That were an ignominy and shame beneath
> "This downfall."

The rich are frequently accused by those who search for truth on the surface, because they are unwilling to enter a contest, the very waging of which is degrading even though the right side be successful.

There seem to be two difficulties which bar every path to reform. Whether they are capable of being readily removed or not will be judged of when they are mentioned.

When we speak of the legislator whose equal we would fain have in this country, we look neither to France, to Rome, nor to Athens, but to that country from which we have derived nearly all of our liberties that are truly valuable, and we see with sadness that in the parent country the legislative and judiciary serve the people much more honestly and wisely than here. Why is it that there is no instance on record of a corrupt English judge in the last one hundred and fifty years? Why is the average member of the House of Commons, socially, morally and intellectually so superior to the average legislator in this country? Why is it that

public opinion is outraged almost daily by witnessing conduct in our public officers which is not known in any civilized country in Christendom? Would that there were some one in the highest of our legislative halls who would, with the dignity of an ancient Roman, shake from his senatorial robe the smutches which his comrades have cast upon it, and exclaim, as did Brutus when the itching palm of Cassius stung him beyond all endurance:

> "What! shall we now
> "Contaminate our fingers with base bribes,
> "And sell the mighty space of our large honors
> "For as much trash as may be grasped thus?
> "I'd rather be a dog, and bay the moon,
> "Than such a Roman."

We shall not attempt to suggest all the causes, the long-continued working of which has produced the low public tone which exists at present. But there is one most potent reason we frequently overlook; we forget too often that the laborer is worthy of his hire. Our plan in this country seems to be to secure men for services which require the bravest hearts, the wisest heads, and the greatest experience, at rates for which we can tempt the vilest and most ignorant to work for us, only because, after the legitimate meal is concluded, they are allowed to plunder to their hearts' content, and carry away from it fragments which far exceed the original repast. One cannot too strongly deprecate a system the very contemplation of which must fill him with shame. When it was proposed several years ago to raise by a quarter the salaries of the Judges of the Supreme Court, at Washington, which amounted to less than one-third of the professional income of several hundred lawyers in Pennsylvania, New York and Massachusetts, it was reserved for the illustrious Butler, distinguished alike in the arts of peace and war, to insist that the judiciary was well enough paid, "and besides," said he, "there are hundreds of lawyers who would be glad to change places with them now." But if the salaries of those same judges were reduced to a quarter of the pittance which is now grudged them, there would be hundreds and hundreds of thousands of men who would be glad to exchange with the present incumbents; nay, if the occupants of our almshouses were admitted as competitors, we should have an innumerable throng ready to barter, on easy terms, their poverty, deg-

radation and vice, against the extremely small salary attached to the position of judge, and if their deeds were to equal their will, our law would soon at least merit the praise of originality.

But surely such fallacies as these are not worthy of repetition in our day, and those who reflect are convinced that the salary and honor combined will, in the long run, exactly gauge the man who takes it, and that the State will get just such men to serve her as are well paid by the wages she offers.

It may not be amiss to state a fact which will at least give high sanction for largely-increased judicial salaries. The early Congress which first fixed the salaries of the Judges of the Supreme Court of the United States, discussed the subject with attention, and fixed a sum which was then avowedly greater than that made annually by the leaders of the bar in any part of the country, in order that not only honor but precuniary motives might tempt from their private practice into the service of the United States the men most worthy to fill the lofty position. "Your legislature may be corrupt," said Gerry, "and your executive aspiring, but a firm, independent judiciary will stop the course of devastation—at least it will shield individuals from rapine and injustice." Fisher Ames said that in the four New England States $1,500 a year for the Chief Justice of the United States "would "be an object sufficient to excite the attention of men of the first "abilities in those States," Mr. Vining said: "There are many "gentlemen in the practice of the law whose abilities command "a greater income than $3,000 per annum; can it be expected "that such persons will relinquish their lucrative professions "merely in order to serve the United States?" The salary of the Chief Justice was then fixed at $6,000, and that of the Associate Judges at $3,500, these sums being more considerable than that mentioned as the probable amount of the highest professional income of that time. Now what attraction is held forth to the man who, successful in business and ripe in years, promises to the community, not by lightly-taken oaths, but by his experience and probity, a worthy representative? It is not social position; it is not money. There was a proposition suggested a few days ago by one of the committees of the Constitutional Convention of Pennsylvania to pay the legislators of that State $1,200 *per annum;* but this was thought too large by many members and, an

amendment was pressed to limit the salary to $700. The reasoning urged in support of it was that three months was a sufficient time in which to pass the requisite laws (as if debate were of no importance); and that three months' service at $1,200 was at the rate of $4,800 a year. But there can be no greater mistake than such a mode of computation; for in our large cities intellectual labor of the first order is so well paid that even $4,800 would be but a trifling attraction to the man of the requisite ability, while he might almost as well serve for a year as for three months; for no business which requires constant care and attention will permit an absence from it for that length of time.

This seems to us a subject of such vast importance, that we may be pardoned for dwelling a moment longer upon it. The average income of the first lawyers, physicians and merchants ranges in the principal Atlantic States from $25,000 a year up to a much higher figure. It is such men whom it is desirable to have in the legislature. Now there is but one way to accomplish this end, for the people will never be willing to give large salaries. Membership in the legislature may be made an attractive position. The time may come when a man who has been successful in business will think that his position in the community is raised by his nomination as a representative. Such, however, is not now the case, for it is well-known that almost no thoroughly capable, middle-aged man will consent to be a candidate for the legislature in any large city. If he is in business he cannot afford to leave it; if he has been successful in life and looks to the enjoyments of this world's good things, he is unwilling to spend three dreary winter months in some provincial town in the interior of the State where he can have no intellectual amusement whatever, and where, oftentimes, the physical atmosphere is, as in Harrisburg, as unhealthy as the moral.

The only cure for this evil is to remove the capital of the State to its great commercial and intellectual center. Such a change would operate at once beneficially. Instead of such members as usually represent New York and Philadelphia in Albany and Harrisburg, cities might be as respectably represented in the State Legislature as they have been in their constitutional conventions. It could work no inconvenience to the country members—the additional distance from any part

of the State, being in point of time but a few hours, while the legitimate facilities for honest and wise legislation would be multiplied a thousand-fold. Men and measures would be subjected to a severer criticism and many a man who would serve his State with alacrity, even at a large pecuniary sacrifice, were it possible to do so without giving up his means of subsistence, would gladly be a candidate for office. It may be objected that though all this be true the Constitution is not the proper place in which to decide as to the site of the capital, that such a question should come before the legislature alone. But if the legislature willfully closes its ears to the voice of reason, charm she never so wisely, what more proper appeal can there be than from the unjust steward to the badly served master; from the legislator to the people? If the question be a vital one, and in the opinion of many it is more important than the prohibition of special legislation, what more appropriate way to decide it than by submitting the question, in a separate article, if necessary, to the people who are injured, and feel that they are injured, and yet lack redress? Is the question of the influence of the community in which the laws of a commonwealth are fashioned of so little importance to those who are to gain or lose by the effect of these laws? Evil communications corrupt good manners, and if you would have your legislators pure and able you must give them the means as well as the inducements to remain so.

And here we may be permitted to advert to another topic of almost equal importance; we mean those regulations which render the Supreme Court of the State far less efficient than it would otherwise be by compelling it to take complexion from several different communities, instead of permitting its character to be moulded by one homogeneous bar. The dependence of the bench upon the bar, of the judge upon the advocate, needs but to be stated to be understood. The influence of the leading lawyers in any city sends its electric spark through the whole body, and gives shape to what would otherwise be a veritable chaos. What would be the effect upon any bar if each tyro were to propound legal views, original with himself, and had not the ripe experience of his leader to lop off his redundancies and complement his inexperience? The chaotic condition of the speaker's mind would extend to the well ordered judicial brain, if from the

beginning of the term to the end of it the judge were to hear, and the counsel but to suggest some new thing, without regard to the highly valued precedent whose worth, like good wine, is enhanced by its age. Now, to a certain extent, the same confused result is produced by the necessity of sitting in several places, under which the judges of the supreme courts of most of our States now labor. It is owing, among other reasons, to this constant change and subjection to fresh influences that there is so much disagreement in that court whose decisions should never, if possible, be pronounced with a dissenting voice.

There cannot be too great simplicity in the theory upon which the judiciary of a State is formed. Every unnecessary multiplication of judges and intermediate courts is a direct injury to every one within their jurisdiction. The judicial system of New York has become a bye-word among lawyers, as much for the unjust delays to which innocent parties are subjected, as for the venality of the sworn ministers of justice. He who, in that State, demands his rights at the hands of justice, must first serve a period of probation upon the bed of Procrustes, whose malicious devices have lost none of their efficacy by being entrusted to the hands of legal assassins.

The system of Pennsylvania has always been simple, and until lately it has been reasonably rapid. Five judges of the Supreme Court, including the chief justice, have until within a year been able to dispose annually of the work before them. Owing to the large increase of litigation, a natural result of the increase in wealth and population, that court now finds itself overburdened; to relieve it of this severe load, without impairing its general efficiency, will, during the present month, occupy the close attention of the Constitutional Convention of that State.

We do not believe that any advantage will result from two of the proposed changes. Five judges in a court of appeals can do the same work as fifty, as regards *hearing arguments*, the most important part of a judge's duty. It is true that the greater the number of the members of the court, the fewer opinions will each be obliged to write. This is purchasing a small profit at a large price. The increase of homogeneousness and agreement in opinion will be in an inverse ratio to that of the number of the judges; and there are many subjects, as every lawyer knows, on which it is

most important to have the law firmly and forever settled, in the place of a fluctuating series of decisions, from which it is impossible to tell how long the last may be the ruling authority. If the present salaries of the judges of the Supreme Court were brought more into relation with the professional incomes of the gentlemen practicing before them, five judges could do the work of a dozen, and do it far better. A salary of fifteen thousand dollars a year, appointment during good behavior, and a retiring pension during life, on a sliding scale which should be greater or less according to the term of actual service, would command the very best legal ability in this State; but that sum should be the minimum. While aware of the danger which arises when the duties of a Legislature are sought to be performed by a Constitutional Convention, we believe that experience will show that there are some legislatives duties which will not be performed at all, if entrusted to those who have hitherto so grossly neglected them. A sailor who is drowning will not reject a floating log, because a life-preserver or a rope would be a more nautical and appropriate support in his unpleasant situation.

We believe that a clause should be introduced into the constitutions of all our States prescribing a minimum limit to the salary of the members of the Judiciary. If some such salary were paid judges could hire assistants to do the mechanical part of their business and post them on minutiæ, as is now universally the case among leading lawyers everywhere, and in England among the judges. Written opinions, the bane of a judge's life, would be no longer necessary, and no one but the yearly reporter would regret the decreasing size of the yearly reports.

The establishment of intermediate courts is not only undesirable but injudicious. As Lord Selborne lately said when advocating his Judiciary bill in the House of Lords, experience has shown that an unsuccessful suitor will almost invariably try all the remedies which are offered to him. If the theory of our present system be examined, the anomaly of more than two courts, will at once be seen. The supreme courts of our different States hear appeals from all the county courts of the State in which they exercise jurisdiction. Theoretically the object of the higher tribunal is to establish one consistent common law, which may prevail through the whole State, otherwise there would be constant collisions

between courts of co-ordinate jurisdiction. This is the true sphere of the Court of Appeals; and the power of correcting errors is merely an incident appendant thereto. If it were not so, a court should be established to re-hear all cases about which the Supreme Court differed, and so on *ad infinitum*. This being admitted, intermediate tribunals render the object to be obtained more remote, and it is no justification that they are to deal with small sums. It is the principle, not the amount, which should send a case to the Supreme Court. If, therefore, a system could be devised to prevent sham cases from interrupting and delaying the court of final jurisdiction, and of punishing those who thus sinned, the object sought for would be gained without sacrificing anything. Now this is just what a judicious system of costs accomplishes. If A sues B, and A's claim is manifestly unreasonable, he should reimburse his adversary for the trouble and inconvenience to which he has improperly put him, provided they can be estimated in dollars and cents. This is just what a system of costs properly wielded would accomplish, and if a full discretionary power to remit or apportion were lodged in the hands of the judge, we do not hesitate to say that we believe that more than one-half of the cases now brought would sink into that oblivion from which they should never have emerged.

The well-considered decisions of the bench would then establish the law on foundations deeply enough laid to support the ingenious additions of their own successors, so that the after-coming architect might continue to fulfill the comprehensive plan of his predecessor, without impairing the stability of the foundation, or being obliged to adopt a system in discordance with the old one on account of the exigencies of changing times.

It may not be, perhaps, out of place, while speaking of the judiciary, whose fame is so dear to every lawyer, that he watches with the jealous eye of the lover their slightest foibles—to grapple with the great question as to the relative merits of an elective and appointed judiciary. Nor can we better give strength to what we advocate than by quoting the words of one whom, contrary to their habit, his fellow-townsmen have made a prophet in his own country. In one of those charming biographical sketches, in which Mr. Binney's pen shows a grace and elegance commensurate with the vigor of his understanding, and the unerring cor-

rectness of his judgment, he concludes with some remarks, the truth of which deserves to be emphasized by being written in letters of gold: "Mr. Ingersoll's day at the bar," said Mr. Binney, "was the day of judicial tenure during good behavior. It ought "not to be forgotten what sort of men were made at the bar by "that tenure of judicial office, any more than we should forgot who "were the judges that adorned and shed their influence upon all "around them. We are now under the direction of a fearful "mandate which compels our judges to enter the arena of a popu- "lar election for their offices, and for a term of years so short "as to keep the source of their elevation to the bench continually "before their eyes. At least once in the life of every judge, we "may suppose he will be compelled by necessity, much stronger "than at first, to enter the same field; and the greater the neces- "sity, the less will his eyes ever close upon the fact. It is this "fact, reëligibility to office, with the hope of reëlection, that puts "a cord around the neck of every one of them during the whole "term of his office. It is transcendently worse than the princi- "ple of original election at the polls. Doubtless there is more "than one of the judges who had rather be strangled by the cord "than do a thing unworthy of his place; but the personal charac- "teristics of a few are no grounds of inference as to the many; "nor are even the mischiefs already apparent a rule to measure "the mischiefs that are in reserve. We must confess that a sys- "tem is perilous which holds out to its best judge, if he displeases "a powerful party, nothing better than the poor-house, which a "late eminent chief justice saw before him, and committed the "great fault of his life by confessing and avoiding it. The mind "of the public of all parties is becoming apprehensive upon the "subject; and well may it be so even among party men, for par- "ties change suddenly, and once in every five or ten years we "may be sure that the chalice will come round to the lips of those "who have drugged it. No man can be too apprehensive of the "evil who thinks the law worth preserving as a security for what "he possesses, and no lawyer who regards it as a security for his "honor and reputation. For what can it give if either of the "wheels of the instrument receive a twist or bias through party "fear or favor, or it be so ignorantly and presumptuously gov- "erned, as to let them cut and eat into each other, until they

"work falsely or uncertainly. . . . . A leasehold elective "tenure by the judiciary is a frightful solecism in such a govern- "ment. It enfeebles the guarantee of other guarantees—the trial "by jury—the writ of *habeas corpus*—the freedom and purity of "elections by the people—and the true liberty and responsibility "of the Press. . . . . The certainty and permanence of the law "depend in great degree upon the judges; and all experience "misleads us, and the very demonstrations of reason are fallacies, "if the certainty and permanence of the judicial office by the "tenure of good behavior are not inseparably connected with a "righteous, as well as with a scientific administration of the law. "What can experience or foresight predict for the result of a sys- "tem by which a body of men, set apart to enforce the whole "law at all times, whatever may be the opposition to it, and "whose duty is never so important and essential as when it does "so against the passions of a present majority at the polls, is made "to depend for office upon the fluctuating temper of a majority, "and not upon the virtue of their own conduct? . . . . . "In our cities and principal towns, the bar is a large and diver- "sified body. . . . . Venal politicians—leaders in the popu- "lar current—minglers in it for the purpose of leading it, or at "least of turning the force of its waters to their own wheels— "adepts in polishing up, or in blowing upon or dulling the names "of candidates for judicial office—students in the art of ferreting "out the infirmities of judges and tracking the path of their fears "—such men are always to be found in such a body, and to be "found in most abundance at the bar of a court that has a weak "constitution. It is there that thrift waits upon them. There is "no need that the pregnant hinges of their knees should be "crooked to the judges, if they only be to those who make them. ". . . . . It is no comfort to think that the people, or at least "a large number of them, must be present sufferers from such "state of things, and that finally all of them must take their turn, "for the whole people must suffer from a disordered bar. . . . . "Where is the independent bench that can habitually exercise "the restraining power, or the detersive power, to prevent such "faults of the bar from whipping the virtues out of court, or break- "ing down their influence upon the mass? And if the bench— "not individual judges of the bench, as the constitution makes

"it—cannot steadily and uniformly, without special virtue or par-
"ticular effort, repress the professional misconduct of every mem-
"ber of the bar, whatever be his popular influence and connec-
"tions, what honor or esteem will professional distinction obtain
"from the world, and what sanction will professional integrity
"have at the bar?"

And not only should tenure of office continue during good behavior, but some modest stipend should follow the judge into retirement, and spread comfort about him as he descends the path of life, not in the light of a reward, for his services are not to be measured by a pecuniary standard, but enough to keep the wolf from the door after the strength and vigor of the man have been worn out in his master's service. A pension might be so graded as to be an incentive to protracted exertion if there be any doubters who regard the office of Judge as overpaid. Would it not operate as a keen incentive to a judge to work as long as he had strength of body and mind sufficient, if he were sure that if he served faithfully on the bench for twenty years he might retire on an annual pension equal to his salary, if for fifteen years on one equal to three-quarters, and if for ten years on one equal to half of that sum?

There are several duties requiring more judgment than labor which might be admirably performed by retired members of the Supreme Court. None of the prerogatives of the governor has been so much abused as the pardoning power. In Massachusetts, a man convicted by one of the courts can have his sentence remitted only upon a recommendation to that effect signed by a majority of the Governor's Council. A most admirable provision, and the subject we have been discussing suggests the means of forming such a body, of whose conservatism, experience and ability no one could have a doubt. We should suggest the formation of such a council, to be composed of all the retired members of the Supreme Court not actually incapacitated from serving by bodily or mental infirmity; that to this council should be first referred all petitions for pardon, and that the governor should never be allowed even to entertain such a proposition, until three-quarters of that court had declared it as their opinion that the case deserved the governor's interference.

We should also suggest, that no appointment, either of judge or

other officer, should be made by the governor without the consent of two-thirds of his council. This system is, with modifications, pursued in Massachusetts, and is no doubt a principal reason for the continuance to the present day of its justly famous judiciary. Lastly, we would give to the same body the sole power of deciding all the contested elections of members of the legislature. By the creation of such a council, composed in the manner indicated, the members of which would always be a check upon improper executive appointments, all danger of placing that power in the hands of the governor would be removed, and we should have a judiciary of which every member would be worthy of his high office, and would reflect in his person the dignity of the great commonwealth which he served. The addition of this council as a new power in our government, composed as it would be, of the most eminent lawyers of the State, whose experience equaled their sagacity and integrity, would entail no increased expense upon the commonwealth, and would enable her to derive valuable counsel from her retired public servants.

We need not say that there should be a provision forbidding any person who had once held the office of Judge under the new system, from practicing again, after retiring from the Bench.

In speaking of the Supreme Court, we must not forget to notice a silly and illogical provision in almost all of the present constitutions, by which each person who is made a member of that court attains in rotation, if he live long enough, the rank of Chief Justice. It is not difficult to show that the defenders of the present system are involved on the horns of an embarrassing dilemma, for either the office is of small importance and the invidious distinction should be altogether abolished, or it is of moment and must therefore require natural gifts for its exercise, with which one of the judges must be more richly endowed than the rest. If the latter view be the correct one, the Chief Justice should hold office, not for the last few years of his judicial life only, but should be appointed to the position upon the occurrence of a vacancy.

The people of many of our States are at last becoming convinced that the direct election by the citizens of every State officer, from the Judge of the Supreme Court to the constable of the precinct, is not only mischievous, but that it is an abuse which

puts logic to flight, and which cries against the very theory of representative government.

In this country there are three coördinate branches in the government, and the good results expected from their harmonious adjustment can only be obtained by making their orbits parallel and not conflicting. In the executive should be lodged with proper limitations the appointing power, and it is with alarm that we view the shortsighted reforms which are attained, or seem to be attained, by throwing the executive and legislative robes over the judicial ermine. Have we advanced so little in the art of government as to believe that the work of a corrupt legislature, stamped with the approval of a weak or dishonest governor, can be amended by depriving the governor and the legislature of their proper executive and legislative prerogatives and delegating them to the people or transferring them to the judiciary? The theory of our government—and in this respect may it never be changed, however far from its original purity it may have been brought by corrupt practices—is that a judge should be selected because his mind is the rich depository of legal wisdom; because he is acute in discrimination, unweary in attention, honest in judgment, firm and unyielding in decision. Capacity to choose a member of a park commission, or to appoint a man upon a board of trusts for city charities, should never form part of the qualification of a judge, as the exercise of that capacity is sometimes one of his duties.* The remedy is to choose good legislators, to elect an honest and able governor, and not to give to the judiciary powers stolen from the other departments of the government. Let him to whom the one talent has been given be held severely responsible for its improvement, but do not overburden him who has already ten, with the care of yet another, because the first confidence has been misplaced, and the second has not. No judiciary can long stand erect under such a burden. In many States where it has not already fallen it is beginning to show signs of weakness. If the system be not radically amended, we shall have to lament, and that at no remote period, that, while the impure governor is not rendered upright, the honest and faithful judiciary will have been

*In Philadelphia, as in other cities, the Court of Common Pleas has been entrusted with many powers wholly incongruous with its judicial duties, among others those just mentioned.

morally broken down and rendered of no avail as a check, owing to the foolish desire to make it carry more than it can properly support.

There are, however, certain offices, the filling of which might and should be left to the judiciary—those, namely, which are connected with the administration of the details of court business, such as prothonotaries, clerks, etc. It is not only to correct the flagrant abuses of the present elective system, grotesque and unreasonable as it appears to be, that the change adverted to is advocated; it is because no one but the court itself can as properly judge of the qualifications of those men with whom the judge is in daily contract, and whose acts, though ministerial, are of no little importance in securing the rapid operation of the law.

There is another class of judicial officers, about whose character there is but little difference of opinion, except perhaps in their own ranks; for, as Theseus said of the players: "If we imagine no worse of them than they of themselves, they may pass for excellent men." The justice of the peace in our large cities is a disgrace to American civilization, and unless the community soon makes a desperate effort, and rids itself of the poisonous matter which is leavening the whole mass, amputation must eventually take the place of the still potent purge.

From the justice of the peace proceeds a very large proportion of all that is corrupt and vicious in the political administration of the large cities. A majority of the men who now hold the position are incapable of exercising its important functions through their character, their associations, and their dense ignorance. So keenly has the evil been felt in a community which is far from courting changes, that, but a few weeks ago, a presentment of the grand jury of Philadelphia recommended that the office should be altogether done away with by legislative enactment.

But the duties attached to the position cannot, unfortunately, be handed over to the already overworked judges of the county courts, and to abolish the name would be but to introduce the wolf under a new disguise, and deprive the community of the only weapon left in its defense—a constant and suspicious vigilance.

But efficient changes may be made which will ensure the progress of reform by the easiest of paths—that of prevention. we would suggest:

1st. That the present pernicious system of fees, the most corrupting of all bad influences, be wholly done away with in high and low places, and that every State and city officer be paid a fixed salary.

2d. That the justices of the peace should be appointed by the unanimous consent of all of the judges of the county in which they exercised jurisdiction, but that they should be subject to summary removal by the governor or by a bare majority (or in case of an even number by half) of the whole number of judges of the same county.

3rd. That every justice of the peace should be a member of the Bar, and that in addition he should, upon receiving his appointment, be obliged to pass a particular examination upon certain branches of law most necessary for the proper discharge of his duties.

4th. That the board of examiners should always be the same as that appointed for the examination of persons desiring admittance to the Bar, but that the examination itself should be a special one, more stringent in its character, to be conducted separately, and that admission should be left entirely to the discretion of the board and that any one vote of the board of examiners (the voting to be by ballot) should be enough to exclude a candidate. The advantages of these changes are so evident that it seems hardly necessary to discuss them.

In regard to the executive department, besides the suggestions already made as to length of tenure, limitation of the pardoning power, and appointment of the judiciary with the aid of the governor's council (for without the latter restriction it would be far better to have recourse, as of old, to the clumsy machinery of a nominating convention), a word or two may be said about some of the officers immediately connected with the administration of the government.

In almost all of the States the attorney-general is elected by the people, as well as the governor, and secretary of the State. Pennsylvania, though in an evil moment she forsook that course which had adorned her supreme bench with so many great judges, to adopt one which, even at the time it was suggested, was of too doubtful expediency, may at least be proud that she has not swerved at the dictates of popular sentimentality, and entrusted

the selection of the attorney-general to the unthinking mob which too often takes the place of the nominating conventions, theoretically so perfect. It is a fact difficult to be explained by those who favor the elective system throughout, that, in Pennsylvania, where both have been tried at the same time in the selection of judge of the supreme court and of attorney general, men have been *appointed* by the governor to fill the latter position fully equal, to say the least, both intellectually and morally, to those who have been *elected* to the position of judge by the suffrages of the unerring people.[1]

So well, indeed, has that State been satisfied with its appointed attorney-generals, that the convention now sitting will probably entertain no amendment looking in another direction. But all that has been said of the attorney-general might be urged with equal force as to the judiciary.

The present system, which provides in almost all cases for the election of the State treasurer by the people, is founded upon a false basis. That officer should be not merely the depositary of State funds, but the financial adviser of the governor. Now how can the fitness of a candidate, whose qualifications before their actual exercise can necessarily be known but to a few, be determined by the nominating conventions of a State like New York, Pennsylvania or Ohio? The system which places in power a Boutwell or a Richardson, unpalatable as they undoubtedly are to all but to the master mind which selected them, is preferable to one in which a less honest and more popular financier would be elected by universal suffrage. This officer, should, in our opinion, be nominated by the executive, with limitations if you will,

[1]Among the attorney-generals of Pennsylvania (all appointed by the governors) have been Jared Ingersoll, one of the leaders of the Philadelphia Bar, at the end of the last century; Richard Rush, Ellis Lewis (Chief Justice of the Supreme Court of the State, and one of the ablest lawyers ever on the Bench); John M Read, the present Chief Justice; George M. Dallas, Vice-president of the United States; William M. Meredith, for many years the leader of the Philadelphia Bar, one of the three counsel chosen by 'the President of the United States to advocate the cause of this country before the Geneva Tribunal, and president of the Constitutional Convention of Pennsylvania now in session at Philadelphia; Thomas Sergeant, Associate Judge of the Supreme Court; and Judges Kane and Brewster, as well as many others of considerable legal tation.

and should be with the attorney-general an *ex officio* member of the legislature, without a vote, but with a seat upon the floor of the House of Representatives, like the territorial delegates in Congress.

There is another officer whose selection should no longer continue in the hands of men who compose the nominating conventions of our large districts. The prosecuting officer of the county should be to the judiciary what the soldier who attacks the enemy is to him who guards the citadel. The necessary qualifications for the position are most inconsistent with the arts one must practice to gain either popularity or office. It is no longer rare to see men holding this position against the wishes of a majority of the community which they are supposed to represent, and their official power is often exercised in a way to shock every man whose sensitiveness of judgment has not been depraved by long practice in the illicit arts of pandering to those whose suffrages are important. All that has been said of the judge applies with redoubled force to the prosecuting attorney, for in the latter case equal independence is necessary with a more determined resolution. He who accuses requires more courage than he who holds the power of conviction.

We should suggest as a remedy, the appointment of the district attorney by the governor, with the unanimous approval of his council, giving to the former the power of summary removal. The term of office might be made to last during the governor's tenure.

We now come to the consideration of that body whose reckless acts have done more to necessitate reform, and to create abundant material for it, than those of both of the other branches of the government combined. And in this respect little good can be done by written laws allowed to sleep by a negligent community. If you will be honestly governed, you must elect honest men to govern you, and this is both the burden and refrain of the argument. Written restrictions are like walls reared by man against the aggression of the ocean; a single moment of repose, an instant's parleying with the enemy, will open the way to the evils which it has been the work of years to exclude, and the artificial fabric that has been erected with so much toil will crumble to its foundations in the twinkling of an eye.

Something, however, may be gained by adopting the well-tried experiments of other States and by introducing innovations where their absolute necessity has been demonstrated. Of the former class is a large number of members of the House of Representatives. Apart from the more obvious vices of the system which now generally prevails, there is one, we think, frequently lost sight of, and which might be materially diminished. This is the difficulty of making personal worth felt in a large constituency, and the existence of strict party discipline, which becomes necessary to manœuvre successfully the vast array of voters on either side, in consequence of which the identity and individuality of each one is almost wholly lost. In several of our large cities a State senator is obliged to address himself to a constituency of from 30,000 to 50,000 voters. All possibility of intelligent combination is of course lost in this incoherent mass, limited as it is not by any community of interest, but by curious mathematical figures, which have sprung fully armed for their defense from the ingenious brain of some master in the art of gerrymandering.

Now, if the number of the members of the legislature of a State were sufficiently large to render small constituencies possible, a lasting reform might be effected. The sure result would be that each voter would take more interest, because he would exercise more influence in the election, and the candidate for office could canvass his district far more easily and efficiently. A man's character as it is known among his neighbors is a far more accurate test of his moral worth than the scandalous inuendoes or the fulsome praises of a campaign newspaper. Such a character would be his principal recommendation to office. Hearsay would give way to personal observation, and to be unknown would no longer be the highest recommendation for office.

Another important result from such a system would be the much greater difficulty in packing conventions, and the greater facility with which party discipline might be broken. It is true that the dishonest man would, relatively, still have an equal share in the selection of the candidate, but, isolated, his power is gone, and his helplessness at once becomes apparent.

In Massachusetts, which has a population of 1,443,000, there are 240 members of the House of Representatives. Estimating one voter to every 6 inhabitants, we shall have about 240,000

voters in that State. In other words, there is one representative in the State Legislature to every 1,000 voters, and one senator (40 in all) to every 6,000 voters. In closely populated States, like New York, Pennsylvania and Ohio, the number 2,000 might be taken as the basis of one representative. This would give, in round numbers, 400 members of the house for New York, 300 for Pennsylvania and 250 for Ohio.

As to the Senate, that body should not be chosen in the same manner as the House. With two bodies we gain, it is true, more deliberation, but the upper house is of the same general character as the lower, contrary to the theory which suggested the French House of Peers, the French Senate, and the Senate of the United States, and to the result of those events which has given to England its hereditary House of Lords.

A suggestion has been advanced to make each county a unit, which should be represented in the State Senate, as the State is in Congress. The objections to such a project are, however, extremely forcible, for owing to the very slight prevalence of that country life which exists in England, France and Germany, and by means of which the representative of a country district is frequently a large proprietor, and in every way fitted for the position, in this country the intellect of the community centers in the large cities, and it would be most unjust to give to New York or Philadelphia no more representation even in the conservative branch of the legislature than the inhabitants of the thinly populated agricultural and mining counties.

The simplest and most efficient remedy for the evils mentioned would be to select the upper house from the whole State, making each senator a representative not of the east or of the west, but of the whole community. The nominations, if made by men from all parts of the State, would rescue the large cities from their present deputies, while a great advance would be reached by electing a body of men before whom all local laws must come for final approval, and who were restrained by no warped patriotism to protect the interests of a given spot. This would indeed be analogous to the United States Senate, for the State alone, and not the component parts, would be represented in the same way as she now is by her governor and by her supreme court. By the formation of such an upper house, special legislation would receive a

severe blow and a much more effective one than by attempting to restrain a torrent which must one day overleap all barriers.

Local heart-burnings would die out, the number of senators from a city would represent the intelligence of its politicians, and would be greater or less according to its deserts. Finally, the importance of such a council to the governor could hardly be overestimated, especially if his power of appointment were to be largely increased and subjected to the approval of the senate. The plan we believe has never been tried in this country; we should therefore feel more hesitation in advocating it, were its peculiar merits less apparent, or were there less objections to other propositions of a different nature.

No subject has of late years more fully attracted the attention of political thinkers than that which is variously known as Proportional or Minority Representation. The principles advocated by the adherents of this reform promise so much that we should be guilty of negligence in not subjecting all that has been suggested to a thorough examination and rigid criticism. Of the various schemes proposed (of the Hare system, owing to its complexity we shall not speak) there are three principal ones, each of which promises to accomplish more easily than its fellow the object sought for, viz. : that of championing successfully the rights of the unprotected minority. These are known as the cumulative vote, the limited vote [proposed by Prof. Craik] and the system of proportional representation, whose birth-place was Philadelphia, and whose author was Mr. Thomas Gilpin, of that city.

When we find that the system born in Philadelphia in 1844, has traversed the ocean, and has calmed the frequent political broils of the revolutionary inhabitants of Geneva, we may be inclined to examine it with the more attention, and to yield it our earnest though tardy commendation. Before discussing the advantages of this system, however, let us point out the defects of the other two, that by contrast the former may appear to still greater advantage.

The principles of cumulative voting are best explained by illustration. Suppose that there are in any district ten members of the legislature to be elected. The first mentioned system says, You may either give one vote to each candidate or two to any five, or all to one, or lastly, you may give as many to any one as you please,

and may scatter your remaining votes among the others. Now the obvious advantage of this system is, that you may, by cumulating all your vote upon the heads of one or two candidates, elect them, though you be in the minority, and thus gain a representation which by the old system would be denied you.

Thus if there be five Democratic and five Republican candidates for office, and but five places to fill, with a constituency consisting of 20,000 Democrats and 30,000 Republicans, by the old system the party in power could have apportioned the district into five smaller ones, consisting each of 6,000 Republicans and 4,000 Democrats, and thus have filled five-fifths (or all) of the offices while representing a party which polled but three-fifths of the votes. Now apply here the principle of cumulative voting, by giving each voter five votes, and allowing him to divide them as he pleases. In this case the Democrats can give an equal number of votes to their two most popular candidates, who will together have 100,000 (20,000 $\times$ 5) or 50,000 a piece, while the Republicans will give each of their three candidates 50,000 ($\frac{30,000 \times 5}{3}$) votes —the latter number,—that is, all the votes cast divided by the whole number of offices to fill, ($\frac{\text{50,000 voters x 5 votes to each person}}{\text{5, whole number of offices to fill}}$ = 50,000 votes), being that necessary to a choice.

Such is the principle of cumulative voting. But the great objection to the system is, that it overleaps its object in seeking to defend the rights of the minority, and frequently invades those of the majority. A minority should have representation, but not a majority of the representatives, and any system that can be so manipulated as to produce this result should be at least looked at with suspicion if not summarily rejected. Now the more popular any one candidate is, the more danger of the abuse of a system which enables a man to get five or ten times as many votes as his fellow-candidate on the same ticket. In the school board election in London, there were seven persons to elect, and twenty-five thousand voters; 11,600 voters gave Miss Garrett 47,800 votes. The Catholic candidate was supported by a small but well disciplined minority of 1,857, who cast 9,000 ballots (or nearly their solid vote) for him, and he was accordingly elected. Suppose, now, that each man had given all his seven votes to his candidate; the vote for Miss Garret would represent nearly seven thousand voters, ($\frac{48,000}{7}$ = nearly 7,000) while that for the Catholic

candidate would represent no more than 1,300 ($\frac{9,000}{7}$ = 1,300 nearly). In other words 1,300 voters received by the cumulative system as much representation with an unpopular candidate as 7,000 with a popular one. In Illinois, too, where the cumulative system of voting has been adopted by their constitution of 1869, a minority of voters succeeded at a recent election in securing a majority of offices.

The next plan to be discussed is that called the Limited vote. This was incorporated, in England, in the reform bill of 1867, in certain newly-made districts electing each three representatives. By it a large majority of the members of the present convention of Pennsylvania was chosen, it was also used in the election of the delegates at large to the last constitutional convention of New York, and in the choice of members of the Court of Appeals of that State.

The principal objections to this system may be shown by the following illustrations: Suppose that in any district there are 4,000 Democrats and 6,300 Republicans, with three offices to fill. Here the Democrats having over one-third of the whole number of voters should have at least one representative, yet the Republicans by a skillful division of their forces can easily secure all three. Thus:

Republicans,	Democrats,	Total number of votes,
6,300.	4,000.	10,300.

A, B and C represent the three Republican candidates, the Democrats have but two, D and E, as they cannot possibly elect more than that number, and each voter is allowed to vote for two candidates. The Republicans divide their voters into three bodies of 2,100 each and both parties vote as follows:

REPUBLICAN CANDIDATES.				DEMOCRATIC CANDIDATES.		
A,	B,	C,		D,	E,	
2100	2100	....	2100	4000	4000	4000 whole No. of Dem. voters.
.....	2100	2100	2100			
2100	....	2100	2100			
4200	4200	4200	6300 whole number of Republican voters.			

Thus the total vote for A, B and C exceeds by 200 that given to D and E, and the Republicans elect all of their candidates, while the Democrats do not elect any. Again, suppose a district consisting of 12,100 voters, of whom 4,100 are Democrats and

8,000 Republicans, and that three offices are to be filled. In this case if one of the Republican candidates is very popular, while the other two are liked equally by the party, the Democratic minority may chance to get two out of the three offices, and thus gain twice as much representation for 4,100 voters as is given to 8,000. Suppose as before that A, B and C are the Republican candidates, and D and E those of their opponents. The Republicans, among whom A is popular with all, while D and E only represent the views of particular sections of the same party, give 4,000 votes to A and B and 4000 to A and C. The Democrats, however, only put two candidates forward and give 4,100 votes to each. Thus:

REPUBLICAN CANDIDATES.				DEMOCRATIC CANDIDATES.		
A,	B,	C,		D,	E,	4100 whole number of Democratic voters.
4000	4000	....	4000	4100	4100	
4000	....	4000	4000			
				4100	4100	
8000	4000	4000	8000 whole number of Republican voters.			

Thus A, the popular Republican, is elected with D and E the two Democrats, who have each received 100 more votes than B and C, the other two Republicans; in other words 2,050 Democratic receive as much representation as 8,000 Republican votes.*

*We have used in the above examples figures which could readily be comprehended by every reader. Those persons, however, who have received a mathematical training may desire to see the theory rather than the illustration. To them we suggest the following formula:

Let x = the number of voters belonging to the stronger party.
m = the number of voters belonging to the weaker party.
n = the number of candidates for whom each may vote.
o = the whole number of offices to be filled.

Then, the dominant party *can always* fill *all* the offices wherever the following formula holds good: $x = o + o.\ \frac{m}{n}$. In other words, the majority can always elect all of its candidates where the number of voters belonging to the majority (x) exceeds, by the whole number of offices to be filled (o), the number of voters belonging to the party in the minority (m), multiplied by the whole number of offices to be filled (o), and divided by the number of candidates for which each person may vote (n). The truth of this formula will be seen by applying any numbers to the known quantities.

Thus, suppose 1,973 votes represent the minority in any district, and there be 11 offices to fill, and each voter is allowed to vote for 7 candidates.

Here $o = 11$, $m = 1973$, $n = 7$

and x (the majority) $= o + m.\frac{o}{n}$

or $x = 11 + 1973 \times \frac{11}{7} = \frac{77 + 21703}{7} = \frac{21780}{7}$

or $x = 3111$

The Gilpin system is the only one which deals equal justice to all. By it each party gets a proportional representation commensurate to its share of the whole vote cast. All the votes are represented except the small surpluses not sufficient to elect a whole representative. The Gilpin plan, with the modifications which seem necessary, is as follows:

Suppose R and D represent the two great parties engaged in any political contest; that there are 6,000 of the former party and 4,000 of the latter, and that there are 5 offices to be filled. In such a case the D voters receive a blank ticket with D marked at the head of it and the R men a similar blank ticket with R marked at the head. The D and R could of course be written as well as printed n which case an entire blank would be sufficient. The 4,000 Ds then fill up their tickets with any names they please, the whole number not to exceed the whole number of offices to be filled, which in this case would be five. The 6,000 Rs do the same. The votes are then counted, reckoning, not by the names of the candidates, but by the parties whose names head the list, *i. e.*, the Ds and the Rs, of which there are respectively 4,000

Let the Republican candidates be represented by the first eleven letters of the alphabet. Now the Democrats cannot, by any possibility, give more votes to any one candidate than the whole number of their voters, which is 1,973. The Republicans, however, divide into 11 (0) bands, consisting each of $\frac{3111}{11} = 282$ voters, and vote as follows, each man voting for seven candidates.

	A	B	C	D	E	F		H	I	K	L
1	282	282	282	282	282	282	282				
2		282	282	282	282	282	282	282			
3			282	282	282	282	282	282	282		
4				282	282	282	282	282	282	282	
5					282	282	282	282	282	282	282
6	282					282	282	282	282	282	282
7	282	282					282	282	282	282	282
8	282	282	282					282	282	282	282
9	282	282	282	282					282	282	282
10	282	282	282	282	282					282	282
11	282	2 2	282	28_	282	282					282
	1974	1974	1974	1974	1974	1974	1974	1974	1974	1974	1974

Thus it will be seen that each Republican candidate has received one more vote than any Democrat. All the former are therefore elected, and 3,111 votes have received 11 representatives, while 1,973 votes, which amount to nearly two-thirds of the Republican vote, have received no representation whatever.

and 6,000. The number of votes necessary for a single representative is then calculated by dividing the whole number of votes by the whole number of candidates (in this case $\frac{10000}{5} = 2{,}000$ votes necessary to a choice), and exactly as many candidates are allowed each party as there are multiples of the number of votes necessary for one choice in the whole number cast by that party (in the present illustration $\frac{\text{4000 whole number of D's}}{\text{2000 necessary to a choice}} = 2$ Ds elected; and $\frac{\text{6000, whole number of R's}}{\text{2000 necessary to a choice}} = 3$ Rs elected). So far nothing can be simpler, but now the question arises how to tell which D and which R candidates are elected, as each elector has been at liberty to vote for any five persons he pleased. The answer is that the preference of each voter is indicated by the order in which they occur upon his ballot. Suppose the ballot to be

D.
P Q R S T } Candidates.

(Smith's ballot,)

here the D at the top shows that Smith desires a Democrat to be elected, and that P is his first choice, and so on to T, his last. The person whose name occurs oftener than that of any one else upon the ballots is the first choice of the Ds, the person whose name occurs oftenest in the second place on the D ballots is the second choice of the latter party, and so on. So with the other party. The only difficulty which has been suggested as counterbalancing the evident advantages of this plan, is the occurrence of mixed and scratched tickets, and third parties, and this we believe to be entirely imaginary. For, to continue our illustration, suppose the existence in the last case of a third party who call themselves Liberals, and whom we shall denote by L. All that is necessary for them in order to gain proportional representation is to adopt a ballot headed L, and vote for their candidates as do the Ds and Rs in the former example. As soon as there are 2,000 Ls, that party will have one representative; as soon as there are 4,000, two, etc. The difficulty of scratched tickets is wholly obviated by the suggestion of having blank ballots and compelling the person voting to fill them up himself, as is now the

case in England under the new ballot bill. The only possible objection is in the occurrence of a mixed ticket, that is to say where an R wishes to vote for two R and for one D candidates, or *vice versa*. In this case, if he head his ticket R, the D candidate upon it will have but little chance of election, because the votes which he has received from the R party instead of being counted with those he has received from the D party, will be reckoned separately, and will only entitle him to a place so low on the R list that he may not be elected on that ticket. It is perhaps a sufficient answer to this difficulty that in our large communities, with the vast array of voters, mixed tickets are rarely used, and of small weight, therefore, in the selection of any candidate, and that the introduction of a system by which perfect proportional representation was gained, would benefit the community far more than the removal of what is felt to be a possible safeguard in extreme peril rather than an effective weapon in the daily contests of life. But even this apparent difficulty might be greatly diminished by the constant use of a third party ticket in small communities, such as that designated above as the L ticket, a sufficient number of both Republicans and Democrats voting together to ensure representation to the new ticket. The candidate elected on that ticket would be chosen by the method heretofore indicated.

The Gilpin system, as has thus been shown, is the only one which has been hitherto proposed which insures a just proportional representation to the minority, while it avoids the possibility of being misused by either party, because it invades the rights of none. It might, however, be supposed from what has been said, that proportional representation could only occur where the parties possessed exactly the quota of votes sufficient to elect one candidate, or exact multiples of that number. This, in the illustration given, was 2,000. Now it is evident that as long as the Democrats poll exactly that number of votes or even multiples of it, as 4,000, 6,000 or 8,000, they will be entitled to one, two, three or four representatives respectively. But, says the objector, your Democratic party may poll 3,900 votes and your Republican party 6,100. In such a case, if there are five offices to fill, it would be most unjust to give four of them to the Republicans, who have but an extremely small excess over the number of votes necessary to elect three men, and but one to the Democrats,

whose whole vote only lacks by a small number that necessary to elect two representatives. In other words, would you not in such a case be giving one representative to one hundred Republican votes (the excess above the number necessary to return two members), while you allowed 1,900 Democratic votes no representation, they lacking by 100 the number necessary for a choice, viz.: 2,000? A practical solution for this difficulty would be found by making the constituencies extremely small and the districts proportionally large. Thus in the case above referred to, where there are 10,000 voters, suppose that the number necessary for a choice be diminished from 2,000 to 1,000, and suppose that the district be enlarged by adding to it another where the vote stood 8,100 Republicans to 1,900 Democrats. By the former mode of reckoning, the first Democratic district would have but one representative for its 3,900 votes, while in the second the party would not be sufficiently numerous to elect even one. 5,800 Democrats, therefore, in two districts would have but one representative, while 14,200 Republicans, or not quite three times the number of the Democrats, would elect nine times as many representatives as the former. Now apply our remedy. We shall have one district consisting of 20,000 voters, of whom 14,200 are Republicans and 5,800 are Democrats. Of the 20 members to be chosen 5 will belong to the latter party and 15 to the former, which will be an almost exactly proportional representation. But a rule can be laid down by which the system may be rendered almost absolutely proportional in every case, even where the district is small and there are but few offices to fill.

It is as follows: In every district the number of offices to be filled by one party shall bear the same ratio to the whole number of offices to be filled as the whole number of voters of that party does to the whole number of votes cast; and wherever, after observing this rule, there shall still be an office vacant, and neither party shall have enough votes beyond those already represented to make up the quota necessary for a choice, that party of which the number of such votes shall be the greatest shall receive the additional representative. Thus, in the former case, where there are 3,900 Democrats and 6,100 Republicans, with five offices to fill, and 2,000 votes necessary to a choice, we apply our rule by first assigning 2,000 Democrats one representative, and 6,000

Republicans three; there remains one office to fill, with 1,900 Democrats and 100 Republicans represented—and as the former number exceeds the latter it is allowed the additional representative. In other words, we apply the proportional system until, with one office to fill, we reach numbers on both sides, either of which is by itself less than the necessary quota, and here we apply the system of simple majorities now in use.

So much for the system—a few words for the *modus operandi* of the election. And here it would be well to apply, almost unchanged, the directions incorporated in the English ballot bill of 1872. Those applicable to ourselves are as follows:

There are three persons inside the voting-booth—the inspector of elections, who is appointed by the (State) government, and an agent of each of the opposite candidates. [Here where we shall frequently have a number of offices to fill at once, the principal one to be elected, as the mayor, when on the same ticket with members of councils, or some person designated by him might choose agents for the party. This is infinitely preferable to having them appointed by the majority of the board of aldermen as at present, or even by the court, which cannot be sufficiently acquainted with the characters of these men.] The ballots are in blank, with a counterfoil[1] attached to each, and upon the ballot and counterfoil is inscribed the same number, but so, that when folded, it cannot be seen. [Upon the ballots should be printed

[1] The English ballot in use since the summer of 1872 (See 35 and 36 Vic. ch. 33) is as follows:

FORM OF BALLOT.

COUNTERFOIL.		CANDIDATES.
No. 2329.	1	Brown, (residence.)
NOTE.—This counterfoil is to have a number to correspond with that on the back of the ballot paper.	2	Jones, "
	3	Merton, "
	4	Smith "
[A. R. FABER.]	5	Traverse, "

FORM OF BACK OF BALLOT.

No. 2329

Election for ——— county (or borough or ward.)

NOTE.—The number on the ballot is to correspond with that on the counterfoil.

The name in brackets on the counterfoil is the name of the voter (A. R. Faber), and is a desirable addition to the English plan, because while it serve to identify the voter, yet being on the counterfoil, entire secrecy is maintained even toward the election officers, except in case of a contested election.

the name of the office or offices to be filled.] All the ballots are kept by the inspector, and are given by him, one to each registered voter, provided no objection be made to his voting; in the latter case a differently colored ballot is used, and the case is afterward investigated and the vote rejected if improper. No more than one ballot is given to any voter, unless he prove to the satisfaction of the inspector that the former one has been destroyed. Each ballot thus given, together with its counterfoil, is stamped on its back by the inspector with an official seal. [Here it might show the precinct where the vote was cast.] The elector then writes on his ticket the names of those persons whom he desires to see elected. [If there be several offices of the same kind to fill, the order in which the names are written would indicate his preference.] He then, in the full view of the inspector and both agents, separates his ballot from the counterfoil attached to it, and showing the official stamp, without which it would not be admitted, deposits the counterfoil in a sealed box, arranged in in such a way that the counterfoils may be put in but cannot be withdrawn without breaking the seal, and deposits his ballot in another box. The box containing the counterfoils are deposited in some safe place, and unless the election be contested its contents are burned at the end of six months. If the election be disputed, however, the box is opened, and the ballots can readily be identified by those voting by recalling the number.

The ballots are regularly counted, including those of which the color indicates doubt as to the validity of the vote; this question is decided by the inspector, with a right of appeal from his decision.

The only additional suggestion to be made is that proposed by the committee on elections in the Pennsylvania convention, viz.: that the name of the voter be written by him, or in case of inability to write, by some one in his presence *on the counterfoil*, thus affording an additional security against fraudulent voting and at the same time ensuring the secrecy of the ballot.

A provision forbidding voting to be carried on in any tavern or house of public entertainment, and placing the public school houses at the disposition of voters, seems most desirable. Nothing tends more to lower the value of elections in popular estimation than the disgraceful associations linked with them, and the rising

generation is tempted to look upon the present local habitation and the name of the general election as upon things equally degraded and degrading.

A few words in conclusion about special legislation. In England, where the popular branch of the legislature acts almost without restriction, the prime minister, who is the king's representative, being a member of Parliament, and the House of Lords exercising more forcibly its moral influence than its legal power of veto upon the lower house—in England, where special legislation can neither be vetoed nor declared unconstitutional, we rarely hear complaints of the exercise of a power the misuse of which in this country fills the least apprehensive with alarm.

It has been proposed lately to forbid special legislation almost altogether, and thus to cure the mischief by preventing it. Now it is unquestionably true that legislatures daily pass bills which imperil more and more the life and property of the citizens. It is a fact in the recollection of many lawyers in Pennsylvania, that in one instance a husband and wife were divorced by act of assembly of that State without the knowledge or consent of either of them. Discovering soon afterward the illegal and immoral life which they had been leading since the passage of the act, for little had they thought that their matrimonial life had been severed unknown to both of them, they set out in great alarm to the house of a worthy priest, and by his kindly offices, were each married for the second time to the other, though neither of them had lost their first partner.

Marriage in some of the constitutions of our States has been left at the complete mercy of the legislature. In Massachusetts, Ohio, Illinois, New Jersey and some other States, it is wisely provided that the courts only, with the assistance of a jury when necessary, shall pronounce upon the necessity of a divorce. This is unquestionably the place where the power should be lodged.

There is, however, much that will always be necessary, and which can only be performed by the legislature. Railroad bills in England are first referred to a special committee of the House of Commons—their scope and purpose is explained by the counsel of the road, and those opposed to the scheme are heard in their turn. The committee deliberates upon it, and approves or disapproves—but in either case upon due consideration—if the latter,

the proposed bill dies; if the former, it is reported favorably to the House, and passes without debate.

If now a body of wealthy, practical and experienced men could be selected, whose knowledge of the world would enable them to reject improper schemes, while their pecuniary independence would render bribery ineffectual, a clause might be inserted in the Constitution requiring all special legislation to be referred to them, and forbidding the legislature to pass any private bill which had not received the assent of two-thirds of their number. The State Senate, we think, would be such a body, if our suggestion in regard to its selection were to be adopted.

But a proviso which now exists in the constitutions of New York and of Ohio, if inserted in that of Pennsylvania, might check to a small degree the evils from which we suffer. In those States a bill to become a law must receive the assent of a majority of the whole number of members of each house—in other words, a law must be approved by a quorum, and not by a majority only of a quorum, and all the yeas and nays should be entered upon the statute-book. There should also be a proviso requiring every bill to be read at full length three several times, on different days, before its passage.

In view of the troubles which the religious element has introduced in New York, it might be well to adopt a provision to the effect that no sectarian appropriations should ever be made to any school or other institution under the control or part control of the State.

We should also advocate the introduction of a provision repealing all present laws, and forbidding the enactment of any future ones, which place a pecuniary limit upon the damages which may be recovered from a corporation where death or serious injuries are the result of the negligence or carelessness of any of the employés of such corporation. Till we have such a constitutional proviso, one of the privileges most prized by freemen—that of personal security of life and limb—will be under the almost unlimited control of reckless and powerful corporations.

Such are a few of the ideas which the subject under discussion has suggested to the writer of this article, and in asking for them a fair hearing, it is rather in the capacity of one who has collected the contributions of others than of one who calls attention to that which he has himself fabricated. If much shall have appeared

uninteresting, much obscure, he begs that the fault may be ascribed to the deficiencies of him who treats the subject, rather than to the tameness of the latter. In his justification he may be permitted to plead the excuse which, perhaps, should have prefaced these pages.

Fungar vice cotis, acutum
Reddere quæ ferrum valet, exsors ipsa secandi.

The experiments of two thousand years in the art of government appear to have enabled man to have advanced so little that his progress, when measured by time, seems almost infinitesimal. Occasionally, however, he makes more rapid strides in short intervals than in the ages which precede and follow. Let us hope that we are living in one of those epochs, and that the deliberative bodies now sitting, and soon about to meet to revise the fundamental law of their respective States, may be gifted with a double portion of wisdom for their task. If the present convention of Pennsylvania shall have convinced the people of that State of the small efficiency of governmental machinery without skilled workmen to direct it, and shall have stamped with its approval an instrument, the elasticity of which shall render it enduring, while too great a complication in its parts shall not impair its efficiency, the people of that State will accept the new order of things with the same alacrity with which they decided to have a new Constitution, and will declare by their suffrages that the work of a Constitutional Convention has at length been properly performed.

A. Sydney Biddle.

Philadelphia Social Science Association.

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