LOYALTY TO CONSTITUTIONAL GOVERNMENT.

Is his Thanksgiving Day Proclamation, issued in 1795, George Washington enumerated among the blessings of the American people, for which he recommended prayerful gratitude to God, the possession of Constitutions of government which unite and by their union establish liberty with order. Nearly a century and a quarter has passed since then, during which the stability of our institutions and the happiness of our inhabitants have been guaranteed and preserved by the organic laws of the States and the United States. On the whole there is no nation in the world which is more free from oppression by its rulers, or where the individual citizen is more secure in respect of his life and liberty and the enjoyment of the gains of his own industry. It is to protect these things against the autocratic and tyrannical acts of persons who have been entrusted with power, and to safeguard them against the will of temporary majorities, that Constitutions exist.

The world has been dealing with problems of government for thousands of years. There is generally to be found somewhere on the walls of every college a map which, beginning at the ceiling, ends at the wainscot, showing the succession of empires and other governments during historic times. If it is up to date the period of years from Washington to Wilson occupies two or three inches of space at the bottom. Such is relatively the place of popular government in the history of the world.

Experience has been practically against the survival of republics. Monarchies have been the rule. Government by the strong, enforced through military power, has been in the main the only practicable means of controlling large masses of people. But the founders of the government of the United States, whom we have praised and praised until we have forgotten why we praise, believed that popular government could live and last, if protected by Constitutions which should stand in the place of the hard hand of power and autocracy, at once defining and limiting the functions of rulers and restraining the intemperate zeal of the masses. Within these boundaries the experiment was worth trying. The question now is, have the people of the United States so far forgotten the dangers which attach to power in the hands of a few, and the risks which attend the will of

communities acting hastily in times of excitement, as to abandon this experiment? In other words, have we the patience and self-denial which living under Constitutions demands? Or must we, in our zeal for sociological change, in a heady and egotistical way throw aside our principles of government, to begin to again to lay the foundations of what we may guess to be something better?

A people which is incapable of self-restraint is incapable of self-government. This is as true of communities as it is of individuals. As every person of correct conduct finds that it is necessary to habitually subject himself to the restraints of principles which are deliberately adopted in his soberer times of thought, so communities need to lay down fundamental rules for their action which shall not be subject to passing phases of their wills; and in order that each citizen may pursue his ordinary course of life without fear of sudden and subversive change. Constitutions are the deliberate expression of that "consent of the governed" which the Declaration of Independence asserts is fundamental to the just powers of government. They are the consciences of the people.

In the young and progressive, filled with enthusiasm for reforms of social order which promise the correction of old wrongs, change in itself is attractive and carries its own sufficient argument. Their self-consciousness is intense, and the confidence in the maturity of their inexperienced and unmatured views tends to overpower all fundamental principle. Their own habitual exemption from the deepest and most disastrous consequences of bad government causes them to be blind to the dangers of subversive measures. In their impatient zeal for radical changes in our social conditions, they have become restive under the restraints which the framers of our fundamental law thought it wise to impose. Long enjoyment of the beneficial effects of constitutional government has dulled the edge of appreciation and gratitude.

The attacks upon our organic law have come chiefly from three classes of persons. The first of these includes persons and organizations having frankly selfish objects to attain. Their wishes are obstructed by the fundamental provisions of the law. In their essence the objections made by these people, among whom the most noticeable are labor agitators and trade unions, rest not so much upon opposition to constitutional government as to particular protective features of our Constitutions which stand in their way. They are constantly procuring legislation in the supposed interest of the working classes, which the Courts are obliged to hold unconstitutional.

It is then the practice to blame the Courts and to bring wholesale charges against the Constitutions and laws. A great deal of this legislation is so obviously improper and obnoxious that one is led to suspect that the legislatures intentionally shift the burden of responsibility (and perhaps of unpopularity) from themselves to the judges. The result is much unjustified abuse of the Courts by people, who, in the bulk of their lives, are protected by constitutional principles more than any other class of persons in the community. The danger of their activities is great, but it can be met by the solid common sense of the body of the community if the discussion is allowed to become definite and concrete. It may be that there are clauses in our Constitutions which need modification in order that they shall not serve as bulwarks of injustice. If so, they can be changed, and ought to be changed whenever the mind of the public has maturely considered and concluded the result.

The second class consists of sociological thinkers, who have had academic, but not legal, education, and who find existing institutions out of harmony with their theories. It includes many persons whose motives are altruistic. Their fault is mainly lack of perspective. And the art of smooth writing and persuasive statement which they have fully acquired serves to dim the importance of fundamental principles which are so habitual as to be unperceived. It is easy for somewhat emotional natures to become so obsessed with the consciousness of present evils as to neglect the possibility of greater ones. It thus happens that, moved by an intense desire for social justice, and impressed by the force of well-conducted surveys of institutional wrongs prevalent in the community, they find in the rigidity of our constitutional government what seems to them an insurmountable obstacle to the correction of evils. To these persons may be added others who, for the purpose of advancing their political ambitions, utilize the envious and discontented, the shiftless and lazy, the malicious and bad elements of society, encouraging them in their disloyalty to the government and malice toward the thrifty and industrious. They can not be reached by argument or any sentiment of patriotism. They can only be voted down.

All of these classes of persons have been much aided in their points of view by the regretable tendency of the people of the United States during the half-century since the close of the Civil War to over-legislation. Nothing brings law, and particularly fundamental law, more into contempt; and one of the strange facts to be observed in our recent history is the insistence by all sorts of reformers upon

placing in our Constitutions, as part of our organic law, matters which, neither upon expediency nor principle, belong there. There has been a constant tendency to enlarge the Constitutions of the State governments to an extent which inevitably invites later change. The Constitutions themselves have therefore been brought into disrepute by a deviation from their proper purposes.

It is an opportune time at which to remind ourselves of some of the fundamental ideas upon which our institutions are founded, that we may not inconsiderately lose the most valuable things which we have.

The functions of a Constitution are these:

(1) To prescribe a framework for society, designating the executive officers to whom the powers of government shall be committed, and fixing orderly and regular methods by which the will of the people may be translated into laws.

(2) To define the electorate.

(3) To establish courts of justice and to define their jurisdiction.

(4) To state in comprehensive terms those fundamental principles of government by which, in the light of history and experience, the people deliberately mean themselves to be bound.

(5) To provide means by which this organic law can be changed from time to time in an orderly and deliberate manner, without incurring the dangers of revolution.

Organic law ought to be limited to the accomplishment of these objects, leaving to the legislative power created by the Constitutions the expression of the popular will upon all the details and transitory needs of government.

An examination of the Constitution of the United States shows how carefully its framers kept it within the limits of these functions. The same may be said in substance of all of the original Constitutions of the States except those admitted to the Union in the last few decades. But by revision and amendment the Constitutions of many of the States have gone far beyond these functions and entered the domain of legislation proper. It is due to this fact that the advocacy of the initiative in Constitution-changing has been so strong. The real fault with our later State Constitutions is that they have gone far beyond the appropriate functions of Constitutions. Considered in the light of their proper field of operation as the expression of only fundamental ideas, it is difficult to see how any patriotic American can object to their preservation and maintenance.

The public forgets the essential principles of constitutional government, and the importance of these principles to the preservation of our liberties. Among them is the supremacy of the Constitutions themselves. Every officer in the Federal and State governments, from the highest to the lowest, takes an oath to support the Constitution of the United States and that of his own State. This does not mean that he may not seek to amend the Constitutions by appropriate and legal methods; but it means that he binds himself to obey the provisions of the Constitutions and to enforce the obedience of them by other people. The same obligation rests upon every native-born citizen. An oath is required of every naturalized citizen. It is a substitute for the oath of allegiance which in other countries is given to kings and czars. The courts are the guardians of this supremacy, and to them is entrusted the duty and power, as particular cases involving the questions come before them, but not otherwise, of determining the constitutionality of the actions of Congress or of the legislatures, and of the conduct of officers of government. In this manner the Constitutions are kept effective and serve to make our government one of laws and not of men. It is not too much to say that upon the principles of the supremacy of our Constitutions and the independence of the courts rests the perpetuity of our institutions.

It is just at these points that the severity of the attacks occurs. Conscious that the great body of the people believe in these ideas, and that if given time for full consideration and deliberate action they will not change our form of government in these respects, the selfish and radical elements in the community wish to subordinate the Constitutions to legislative action and popular elections. And they wish to nullify the decisions of the courts on constitutional questions by popular vote directed at the particular case and particular points in the decisions. They have learned by experience and observation that elections can at times be manipulated in such a manner as to appear to express the will of the people, without doing so in fact. The results are in reality obtained by partisan effort, and frequently by an actual minority of the whole body of voters. The effort is to attain their ends at the expense of good government; and so far from being an expression of confidence in the deliberate judgment of the people, are attempts to take advantage of transitory excitement or lapses of attention.

It is scarcely necessary to call the attention of lawyers, or of any soundly-educated persons, to the uncertainty and confusion in which

such changes in our fundamental principles would result. If the legislatures were to be the sole judges of the constitutionality of their acts, constitutional government as we know it would be gone; for, unrestrained by any settled convictions in that regard, the legislatures might enact laws not only subversive of those primary rights and duties upon which we all depend, but so inconsistent with each other that there would be no settlement of any fundamental propositions. What the legislature declared to be constitutional at one time, it might at a succeeding date declare to be unconstitutional. And similarly, the reversal by popular election of the decision of the Supreme Court of a State determining a law to be constitutional or unconstitutional, might and probably would throw the whole body of constitutional principles into confusion and disrepute.

The people who contend for more comprehensive powers in Congress and the legislatures, and their right to determine for themselves the constitutionality of laws, point to what they call the unrestricted powers of the English Parliament. They reason that if the English Government can survive without constitutional limitations, the American Government may also do so. But they have misread history, if they fail to see that the English have a Constitution. They are even partly in error if they think that Constitution is unwritten. For in Magna Charta, the Petition of Rights and the Bill of Rights, the Habeas Corpus Act, the Act of Settlement, there are nearly all the elements of a written Constitution. And in the conservative beliefs of the English people, the frame of the English Government and the settled methods of legislation, the jurisdiction and powers of the Courts and the functions of the executives, are so well grounded as to amount to organic law. Some of the framework of English society was rejected in the formation of the United States, while much was adopted. We had no history or settled conventions to lean back upon. There was, therefore, a necessity of expressing, in definite form, the principles of government which we approved. There is but one Parliament, while we have a national Congress and forty-eight State legislatures. To allow our fundamental law to be varied, repealed or added to at every successive session of Congress and the legislatures would unsettle the whole fabric of society.

And what would happen if a constitutional ruling of a court could be set aside by popular vote, with the effect to reverse the decision upon the private rights of the litigant and to alter the Constitution upon the point decided?

It is noticeably true that in times of popular exictement the public deals with concrete situations and not with abstractions. Such an issue as the correctness of the decision of a court would raise before the people, not the abstract question of law involved in the case, but the particular result upon the parties. It would be the immediate human interest which would affect the voter. Ought the plaintiff to have recovered judgment? Should the defendant have been convicted? Was the woman certainly guilty? Which party should win? Everything else would seem to the public merely technical, and the real, fundamental and important question of what the Constitution ought to be would be lost in the strife. Let us take a possible illustration.

The legislature passes an act which permits the prosecuting officers in a criminal case to take the depositions of a sick or absent witness for the government. In itself this does not seem unreasonable. But the Constitution provides that in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; *to meet the witnesses against him face to face;* to have process to compel the attendance of witnesses in his behalf; and a speedy trial by an impartial jury of the country.

We may suppose that a vicious and unpopular man is on trial for a murder of particularly heinous character, involving unrestrained passions and great moral obliquity. The Supreme Court discharges him because of the use of a deposition against his objection, holding the act of the legislature unconstitutional. This is in the interest of every citizen in the community who may be unjustly accused. But a popular vote, considering only the unjust and unfortunate result of the trial, which would be properly ascribable, not to the Court, but to the legislature, would be likely to reverse the case; with the result that the prisoner is convicted, but the Bill of Rights is nullified and secret trials made possible.

And of hardly less importance in our constitutional system of government is the separation of the functions of government into the three departments of executive, legislative and judicial, and the declaration of the independence of these departments and of the duty of those entrusted with administration not to encroach, one upon the others, in any respects except where the Constitutions themselves permit. It is this declaration which prevents the absorption of too great power by any of the officers of government, and it enters into the private rights and safety of every person in the community. If

the legislature of a State could control the constitutional powers of the executive officers, there would be an end to the proper performance of their duties. If the executive officers could control the action of the legislatures, government would soon develop into tyranny. If either the executive power or the legislative power could dictate to the courts their judicial decisions, individual citizens would be without protection for their rights. It is of the essence of our safety and happiness that the humblest individual in the community may resort to the courts for justice against the whole power of the community. It is the contract between the government and the citizen, the respect for which is the flower of English and American jurisprudence. It has been earned by a thousand years of liberty-loving conflicts, and should not be lightly set aside.

The Constitutions all contain what is called the Bill of Rights. Among them are freedom of speech and of the press; the safeguarding of the writ of habeas corpus, through which the citizen may obtain his liberty against unlawful imprisonment; freedom of conscience and religion; exemption from imprisonment for debt; the subordination of the military to the civil power; relief from ex post facto laws; the guaranties of equal protection under the law and that the citizen will not be deprived of his life, liberty or property without due process of law. The courts are resorted to frequently for the protection of citizens under these guaranties. All of them are essential to the life of a free people, both of the rich and the poor. They are also part of the contract between the government and the citizen, which the independence of the courts will protect and enforce. To throw them aside is to fall back upon autocratic power as the only means of government.

Much of the criticism of our Constitutions rests upon a new and somewhat radical view of property rights. This view is that property morally belongs more to the community than to the individual; and there is sufficient of truth in the proposition to make it specious and attractive to those who see dangers in the accumulation of wealth and the power which goes with money. Politicians and socialists put this in the form of the aphorism that they are for men rather than for dollars. The clauses of the Constitutions which protect the citizen against the taking of private property for private use or for public use without just compensation, which give to each person the right to equal protection of the law and inhibit the deprivation of property without due process of law, stand in the way of the radical legislation which is desired by many to restrain the

accumulation of wealth and to curb the money power. But they forget that property is inseparable in its essence from the men who own it. There is no such distinction as that between men and dollars, for the dollar has no separate existence. It is a dead, useless piece of metal except in the hands of someone to own it and use it. The rights of property, therefore, are simply the rights of men in property, and to deprive property of value is to deprive men of the value of property. They forget also that the absence of constitutional guaranties of the ownership of property and the protection of it by the laws, would make as insecure the earnings of the workman and the modest home which he may have obtained, as the ownership of bank deposits and railroad shares. What these people would like would be a state of the organic law which would permit the selection of particular obnoxious persons who could be made to disgorge their wealth. In former times this was the function of Bills of Attainder or of Pains and Penalties, which have been abolished by our Constitutions. There are indeed dangers connected with the great accumulation of wealth and economic difficulties inherent in the present methods of corporation management. But there are ample means within the limits of constitutional powers to deal with these evils. And in any event the price of their correction by abandoning fundamental principles of our government is too high. Evils, greater than these, would follow. It is not progress to hark back to the Middle Ages; nor to create a condition of things which only Imperialism could correct.

Perhaps no fact with relation to these subjects is more alarming than the tendency, perceptible in some of our national administrations, to appeal to a supposed higher law of expediency, to justify departures from the terms of our national Constitution, in the name of national growth and progress. If changes are desirable there are legitimate means provided by the Constitution itself for this purpose.

Only eight years ago an able Judge of an United States Court said, in an address before the American Bar Association, that modifications of the Constitution by amendment according to its terms would never be likely to occur again; that experience had shown the futility of attempts to change the Constitution in that manner. Since that time two important amendments have been adopted. It is therefore safe to say that the people of the United States, while conservative in tendency, can be made to see the importance of amendments, if they are such as to appeal to their common sense. All forms of short-cut to constitutional changes ought to be looked

upon with distrust and suspicion. The right can afford to wait, rather than to open doors through which wrong may easily enter.

Another danger to the unity and harmonious character of our Constitutions exists in the adoption of amendments making amendments more easy. The application of the popular initiative to the amendment of the organic law, though regular and constitutional in itself, might gradually so impair its strength and efficiency as to render it less than protective. It is an unwise expedient. Time and deliberation are necessary to call forth the real conscience of the people. Fortunately, the sober sense of the American people does not readily yield to new ways. They have generally voted down such amendments, offered in this way, less on their merits, than because of a well-founded distrust of the method. The advocates of change, if they are right, should be content to take deliberate action through the initiative of the legislatures, of the personnel of which the people have ultimate control, followed by popular vote based on their recommendation.

Among the readers of this paper may be many young lawyers and students of law who have been affected or weakened in the love for and allegiance to our organic laws by the vehement attacks or sneers of people who are too progressive to be progressive at all. And they may feel the sharpness of the charge made against the Bar that it is out of date and too conservative. To them may it be said that the law is the balance wheel of the social machine. It ought to be conservative. There are many rendering lip-service to the law, who inwardly desire its destruction.

Loyalty to the Constitutions does not demand that intelligent alterations may not be advocated and effected; but it implies care and deliberation in making them, in order that greater evil may not result from amendment than is corrected by the act. It calls for a respectful attitude of mind toward the principles of organic law and constant battle against wholesale denunciations of our policies. And it requires a belief in constitutional government as the highest attribute of American patriotism.

St. Louis, Mo. EDWARD C. ELIOT.